IN THE FLORIDA SUPREME COURT
CASE NO. SC06-1152

JONATHAN HUEY LAWRENCE, *Petitioner*

v.

JAMES R. MCDONOUGH, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Lawrence filed an initial petition for writ of habeas corpus. For the reasons discussed, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief. Lawrence had two different appellate counsel. Lawrence was first represented in the direct appeal by Assistant Public Defender Chet Kaufman, who wrote the initial brief and then by Assistant Public Defender David Davis, who wrote a supplemental initial brief and the reply brief. APD Davis did the oral argument.

First appellate counsel, Assistant Public Defender Chet Kaufman, who is now an Assistant Federal Public Defender and who

is now a board certified criminal appellate specialist, was admitted to the Florida Bar in 1989. He wrote a 98 page initial brief raising six issues. First appellate counsel devoted 32 pages of the initial brief to the facts.

Lawrence's second appellate counsel, Assistant Public Defender David Davis, has been a board certified criminal appellate specialist since 1987 and was admitted to the Florida Bar in 1979. Second appellate counsel wrote a supplemental initial brief raising the additional issue of whether Investigator Hand's testimony about Lawrence's alter ego was properly admitted. *Lawrence v. State*, 846 So.2d 440, 446, n.9 (Fla. 2003)(listing issues raised but not in the order raised in the initial brief).[1] Assistant Public Defender Davis then wrote a 29 page reply brief readdressing five of the six issues raised in the initial brief. (ISSUES I, II, III, V and VI).

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[1] The seven issues raised were: 1) the trial court erred by failing to order a competency hearing for Lawrence; 2) the trial court erred by refusing to admit into evidence facts in support of the substantial domination mitigator and then rejecting that mitigator; 3) the trial court erred by finding the cold, calculated, and premeditated aggravator; 4) the trial court erred by issuing a defective and unreliable sentencing order; 5) Florida's capital sentencing scheme is unconstitutional; 6) the trial court erred in allowing a lay witness to testify to an opinion reserved for experts (raised in supplemental briefing); and 7) Lawrence's death sentence is disproportionate.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Rutherford* Court explained that to show prejudice petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643. Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. This Court noted that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. *See also Freeman v. State*, 761 So.2d 1055 (Fla. 2000). Additionally, in the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. *United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000). Petitioner must show that he would have won a reversal from this Court had the issue been raised.

Here, Lawrence has the additional hurdle of the fact that he had not one, but two appellate lawyers. Both appellate

public defenders would have to be found to be ineffective for this Court to grant relief. Because his second appellate counsel filed a supplemental initial brief raising an additional issue on appeal, it is clear that second appellate counsel reread the trial record with an eye to raising any issue that he thought first appellate counsel had missed or omitted. The standard for ineffectiveness of appellate counsel is that no reasonable appellate attorney would have omitted the issue. *Cf. Marquard v. Sec'y for Dept. of Corr.*, 429 F.3d 1278, 1304 (11th Cir. 2005)(explaining to establish ineffective assistance of counsel, a petitioner must establish that no competent counsel would have taken the action that his counsel did take" quoting *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000)(en banc)). Almost, by definition, there can be no ineffective assistance of appellate counsel when two different, but experienced, criminal appellate lawyers independently handle the appeal.

ISSUE I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A PROPORTIONALITY ISSUE THAT WAS, IN FACT, RAISED? (RESTATED)

Lawrence contends that his two appellate attorneys were ineffective for failing to adequately brief the proportionality issue. This issue was raised in the direct appeal. This Court ruled that Lawrence's death sentence was proportionate. Indeed, this Court's direct appeal opinion had an extensive discussion of proportionality. Specifically, this Court held:

> The final issue we here consider is the issue of proportionality. In *Bates v. State*, 750 So.2d 6, 12 (Fla.1999), this Court stated:
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> > Our function in a proportionality review is not to reweigh the mitigating factors against the aggravating factors. As we recognized in our first opinion in this case, that is the function of the trial judge. Rather, the purpose of proportionality review is to consider the totality of the circumstances in a case and compare it with other capital cases. For purposes of proportionality review, we accept the jury's recommendation and the trial judge's weighing of the aggravating and mitigating evidence.
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> (Citations omitted.) We have likewise said that proportionality "is not a comparison between the number of aggravating and mitigating circumstances; rather, it is a 'thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases.'" *Beasley v. State*, 774 So.2d 649, 673 (Fla.2000)(quoting *Porter v. State,* 564 So.2d 1060, 1064 (Fla.1990)).
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> Additionally, we stated in *Dixon v. State*, 283

So.2d 1, 7 (Fla.1973):

> Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes. In so doing, the Legislature has also recognized the inability of man to predict the myriad tortuous paths which criminality can choose to follow. If such a prediction could be made, the Legislature could have merely programmed a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors included-with ranges of possible impact of each-and provided for the imposition of death under certain circumstances, and for the imposition of a life sentence under other circumstances. However, such a computer could never be fully programmed for every possible situation, and computer justice is, therefore, an impossibility. The Legislature has, instead, provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges.

We have followed *Dixon* by stating that the death penalty is "reserved for only the most aggravated and least mitigated of first-degree murders." *Urbin v. State*, 714 So.2d 411, 416 (Fla.1998).

The sentencing order in this case found extensive aggravating circumstances and substantial mitigating circumstances. The trial judge properly weighed these circumstances and determined that the jury's death recommendation should be followed. The trial judge's sentencing order offered the following summary of his findings:

> The Court has carefully considered and weighed the aggravating circumstances found to exist in this case. The State has proven

> beyond and to the exclusion of every reasonable doubt the existence of two serious aggravators. The prior violent felony aggravator was given great weight due to the fact that both prior offenses were committed prior to the murder of Jennifer Robinson, were committed with the co-defendant, Rodgers, and involved murder and attempted murder. Both of these prior crimes were senselessly violent and without any moral or legal justification. They are indicative of the same total disregard for human life evidenced in this case. In each case, Lawrence and Rodgers killed or attempted to kill another human being for the sheer excitement or depraved enjoyment of the act. In addition, the cold, calculated, and premeditated aggravator was given great weight due to [Lawrence's] significant involvement in the planning, preparation, and execution of the murder.
> In weighing the aggravating factors against the mitigating factors, this Court understands the process is not simply arithmetic. It is not enough to weigh the number of aggravators against the number of mitigators. The process is more qualitative than quantitative. The Court must and did look to the nature and quality of the aggravators and mitigators that it has found to exist.
> The Court finds, as did the jury, that these two aggravators greatly outweigh all of the statutory and non-statutory mitigating circumstances, inclusive of the significant mental mitigation.

Sentencing order at 19-20(citations omitted). In comparing the particular circumstances of the instant case with other cases which have had similar aggravation and mitigation, we determine that Lawrence's death sentence is proportionate.

This Court has upheld sentences of death in several cases involving aggravating and mitigating circumstances similar to those found in the instant case. In *Robinson v. State*, 761 So.2d 269, 272-73

(Fla.1999), this Court reviewed a trial court's imposition of a death sentence on a defendant who had been convicted of murdering an acquaintance in order to obtain money for drugs. The trial court found three aggravating factors: "(1) the murder was committed for pecuniary gain; (2) the murder was committed to avoid arrest; and (3) the murder was cold, calculated and premeditated." *Id.* The trial court found two statutory mitigating factors: "(1) Robinson suffered from extreme emotional distress (some weight); and (2) Robinson's ability to conform his conduct to the requirements of the law was substantially impaired due to history of excessive drug use (great weight)." Id. at 273. The trial court also found eighteen nonstatutory mitigators: (1) Robinson had suffered brain damage to his frontal lobe (given little weight because of insufficient evidence that brain damage caused Robinson's conduct); (2) Robinson was under the influence of cocaine at the time of murder (discounted as duplicative because cocaine abuse was considered in statutory mitigators); (3) Robinson felt remorse (little weight); (4) Robinson believed in God (given little weight); (5) Robinson's father was an alcoholic (given some weight); (6) Robinson's father verbally abused family members (given slight weight); (7) Robinson suffered from personality disorders (given between some and great weight); (8) Robinson was an emotionally disturbed child, who was diagnosed with ADD, placed on high doses of Ritalin, and placed in special education classes, changed schools five times in five years, and had difficulty making friends (given considerable weight); (9) Robinson's family had a history of mental health problems (given some weight); (10) Robinson obtained a G.E.D. while in a juvenile facility (given minuscule weight); (11) Robinson was a model inmate (given very little weight); (12) Robinson suffered extreme duress based on fear of returning to prison because where he was previously raped and beaten (given some weight); (13) Robinson confessed to the murder and assisted police (given little weight); (14) Robinson admitted several times to having a drug problem and sought counseling (given no additional weight to that already given for history of drug abuse); (15) the justice system failed to provide requisite intervention (given no additional weight to that already given for history of drug

abuse); (16) Robinson successfully completed a sentence and parole in Missouri (given minuscule weight); (17) Robinson had the ability to adjust to prison life (given very little weight); and (18) Robinson had people who loved him (given extremely little weight).

Id. This Court upheld Robinson's death sentence because the totality of the circumstances indicated that Robinson was capable of functioning in everyday society and that he "acted according to a deliberate plan and was fully cognizant of his actions." Id. at 278.

In *Smithers v. State*, 826 So.2d 916, 931 (Fla.2002), this Court reviewed a trial court's imposition of two death sentences on a defendant who had been convicted of murdering two women and then disposing of their bodies in a pond. The trial court found two aggravating factors for the murder of the first victim: (1) previous violent felony (contemporaneous murder); and (2) the murder was especially heinous, atrocious, or cruel (HAC). The trial court found three aggravating factors for the murder of the second victim: (1) previous violent felony (contemporaneous murder); (2) HAC; and (3) CCP. This Court detailed the mitigation found by the trial court which related to both murders:

The trial court found the following two statutory mitigators: (1) the murder was committed while Smithers was under the influence of extreme mental or emotional disturbance (moderate weight) and (2) Smithers' capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (moderate weight). The trial court also found the following nonstatutory mitigators: (1) Smithers was a good husband and father, (2) Smithers enjoyed a close relationship with his siblings, (3) Smithers was physically and emotionally abused by his mother as a child, (4) Smithers regularly attended church and was devoted religiously, (5) since being arrested, Smithers has been a model inmate and he would conduct himself appropriately in a prison setting, (6) Smithers has made several contributions to the community, and (7) Smithers confessed to the crime, but his trial testimony is in conflict with his

statements to the detectives. All of the nonstatutory mitigators were given moderate weight. Finally, the court considered the statements of John Cowan ([second victim's] father), who requested that Smithers be given a life sentence. This was given great weight by the trial court.

Smithers, 826 So.2d at 931. This Court found both of Smithers' death sentences proportionate. Id.

Additionally, this Court has upheld death sentences in other analogous cases where extensive aggravating circumstances outweighed substantial mitigating circumstances. Cf. *Chavez v. State*, 832 So.2d 730 (Fla.2002); *Zakrzewski v. State*, 717 So.2d 488, 494 (Fla.1998); *Gudinas v. State*, 693 So.2d 953, 968 (Fla.1997); *Rolling v. State*, 695 So.2d 278, 297 (Fla.1997); *Pope v. State*, 679 So.2d 710, 716 (Fla.1996); *Henyard v. State*, 689 So.2d 239, 255 (Fla.1996); *Branch v. State*, 685 So.2d 1250, 1253 (Fla.1996); *Spencer v. State*, 691 So.2d 1062, 1065 (Fla.1996); *Provenzano v. State*, 497 So.2d 1177, 1183-84 (Fla.1986).

In the instant case, the trial court found that despite the existence of mental mitigation, Lawrence was capable of functioning in society, he could comprehend the consequences of his actions, and he acted with a deliberate plan to further his own gruesome personal interests. Moreover, the jury recommended death by a vote of eleven to one, and the trial court accorded great weight to the two extremely serious aggravating circumstances (prior violent felonies and CCP). The trial court only gave considerable weight to the statutory mental mitigators and explained the factual reasons for their diminished weight in the sentencing order. See sentencing order at 10-13. The other statutory and nonstatutory mitigators were accorded similar or less weight. We find that the death sentence in the instant case is proportionate to Robinson, given the trial court's findings that Lawrence's mental impairments did not deprive him of self-control and that Lawrence followed a deliberate plan to murder the victim. Cf. *Robinson*, 761 So.2d at 273.

The instant case is also proportionate to *Smithers*, which involved similar facts and similar aggravating and mitigating circumstances. In both the instant case and Smithers, either the HAC or CCP

aggravators were found, and both are considered extremely serious aggravators. See *Larkins v. State*, 739 So.2d 90, 95 (Fla.1999) ("[HAC and CCP] are two of the most serious aggravators set out in the statutory sentencing scheme...."). Although the instant case is distinguishable from Smithers, in that Lawrence did not actually commit the instant murder,[2] the prior violent felony aggravator in the instant case is arguably more serious than the same aggravator in Smithers, given Lawrence's multiple convictions of murder and principal to attempted first-degree murder, which occurred over a period of months. Therefore, the aggravating circumstances in the instant case are stronger than those found in *Smithers*. Additionally, the trial court in the instant case found that Lawrence's mental impairments were diminished by other evidence in this case. Thus, Lawrence's death sentence is proportionate.[3]

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[2] This Court has upheld the death penalty in numerous cases where the defendant did not actually commit the homicide. See, e.g., *DuBoise v. State*, 520 So.2d 260, 266 (Fla.1988).

[3] The instant case is distinguishable from the cases cited by Lawrence. Lawrence first cites *Huckaby v. State*, 343 So.2d 29, 34 (Fla.1977), in which this Court vacated a death sentence due to substantial mental mitigation. *Huckaby*, however, involved the imposition of the death penalty for a conviction of rape of a child under the age of eleven and is therefore clearly distinguishable. Lawrence also cites to *Hess v. State*, 794 So.2d 1249, 1265 (Fla.2001), where this Court found a death sentence to be disproportionate for a defendant who suffered from a mental illness. However, the aggravating circumstances in Hess were not as significant as the aggravating circumstances in the instant case. See id. at 1266 (finding aggravating circumstances of (1) the murder was committed during the course of a robbery; and (2) the defendant

Lawrence, 846 So.2d at 452-455 (footnotes included but renumbered).

If appellate counsel raises an issue, there is no deficient performance. Lawrence admits that the proportionality issue was raised on appeal but argues that it was inadequately briefed. This Court routinely rejects claims that appellate counsel inadequately briefed an issue. *Peterka v. State*, 890 So.2d 219, 246 (Fla. 2004)(declining to address a claim of ineffective assistance of appellate counsel where defendant admitted issue

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was previously convicted of a violent felony (sexual activity with a child and lewd and lascivious assault)). The other cases cited by Lawrence are similarly distinguishable. Cf. *Almeida v. State*, 748 So.2d 922 (Fla.1999)(holding death sentence disproportionate for twenty-year-old defendant who murdered a bar manager where extensive mitigation outweighed single prior violent felony aggravator and jury vote in favor of death was seven to five); *Cooper v. State*, 739 So.2d 82, 86 (Fla.1999)(holding death sentence disproportionate for eighteen-year-old defendant with no prior criminal activity when mitigating circumstances of brain damage, mental retardation, and mental illness outweighed three aggravating circumstances, including CCP, and the jury's vote in favor of death was eight to four); *Fitzpatrick v. State*, 527 So.2d 809, 812 (Fla.1988)(holding death sentence disproportionate where defendant had emotional age between nine and twelve years, and neither CCP nor HAC was found); *Miller v. State*, 373 So.2d 882, 886 (Fla.1979)(vacating death sentence because trial judge improperly considered defendant's mental illness as an aggravating

was raised on direct appeal because "if an issue was actually raised on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to raise additional arguments in support of the claim on appeal" quoting *Rutherford v. Moore*, 774 So.2d 637, 645 (Fla. 2000)); *Jones v. Moore*, 794 So.2d 579, 586 (Fla. 2001)("This Court previously has made clear that habeas is not proper to argue a variant to an already decided issue."). A contention that the issue was inadequately argued merely expresses dissatisfaction with the outcome of the appeal. *Routly v. Wainwright*, 502 So.2d 901, 903 (Fla. 1987)(observing petitioner's contention that [the point] was inadequately argued merely expresses dissatisfaction with the outcome of the argument in that it did not achieve a favorable result for petitioner" quoting *Steinhorst v. Wainwright*, 477 So.2d 537, 540 (Fla. 1985)).

There was no deficient performance. Proportionality was the very first issue raised in the initial brief. Normally, proportionality is raised as the last issue because it is a penalty phase concern that is more logically raised last. Indeed, this Court's direct appeal opinion in this case addressed proportionality as the last issue as it normally does. Appellate counsel obvious took to heart the standard

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factor).

appellate practice advice to put your strongest issue first. John J. Bursch, *Ten Tips from the Other Side of the Appellate Bench Appellate*, Practice Section Newsletter Fall 2002 (stating: "do not save the 'good stuff' for the end of the brief" and recommending that your "strongest and best points should appear first and be given the most space."). Lawrence's first appellate counsel had an extensive factual discussion of Lawrence's mental condition entitled "[t]he development and deterioration of Jonathan Huey Lawrence" in the statement of the facts section and devoted 6 pages of his 98 page initial brief to the proportionality issue. The facts highlighted in the initial brief included Lawrence being held back in the first grade; his low IQ scores; his family's poverty; his treatment by a psychologist as a teenager; suicide attempts while in prison; diagnosis of mental illness by DOC; his commitment to Chattahoochee where he was diagnosed as "schizotypal personality disorder"; his refusal to take his medication; his tentative diagnosis of schizoaffective disorder for social security income benefits. (DA IB at 5-13.)[4] Appellate counsel argued that "even an aggravated murder does not warrant the death penalty if it is among the least mitigated of murders" citing *Cooper v. State*,

[4] DA refers to the direct appeal. IB refers to the initial brief and RB refers to the reply brief.

739 So.2d 82, 85 (Fla. 1999) and *Almeida v. State*, 748 So.2d 922, 933 (Fla.1999) (DA IB at 35-41). Appellate counsel discussed the *Cooper* case in a paragraph. (DA IB at 36). Appellate counsel had pages of case cites each with a parenthetical. (DA IB at 36-39). Appellate counsel argued that "this Court has reversed death sentences where the bizarre of horrendous nature of a crime are linked to the defendant's mental illnesses" which included a paragraph discussion of *Huckaby v. State*, 343 So.2d 29, 33-34 (Fla. 1977), and *Miller v. State*, 373 So.2d 882, 886 (Fla. 1979), as well as citing to *Hess v. State*, 794 So.2d 1249, 1265 (Fla. 2001). (DA IB at 39-40)[5] Appellate counsel pointed out that the defendant in *Miller* was also a former Chattahoochee inmate. (DA IB at 40). Appellate counsel asserted that "Jonathan's history establishes a lengthy, well-documented, and unrefuted record of profound mental mitigation which he had no ability to control, affecting his behavior throughout his life and contributing to the tragedy." (DA IB at 40). Appellate counsel also pointed out that Lawrence was not the actual killer. Appellate counsel concluded by noting that a case must be both one of the most aggravated and

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[5] This Court distinguished these cases in a footnote but obviously considered them close enough to warrant being distinguished. *Lawrence*, 846 So.2d at 455, n.12 (Fla. 2003)

one of the least mitigated capital crimes, and that "it may qualify as the former, but it certainly does not qualify as the latter." (DA IB at 41).

His second appellate counsel devoted 12 pages of his 29 page reply brief to the proportionality issue. (DA RB at 1-12). Second appellate counsel focused on unrebutted testimony of the three mental health experts at penalty phase that Lawrence suffered from some type of schizophrenia. (DA RB at 3-5). He asserted that such a diagnosis was "almost unique among the death penalty defendants." (DA RB at 5). Appellate counsel correctly asserted that no casual connection between the mitigation and the murder is required for the mental health of a defendant to be mitigating. (DA RB at 1-12).[6] Appellate counsel attempted to distinguish the cases the State cited in its answer

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[6] Second appellate counsel mistakenly argued that the trial court "dismissed" the mental mitigation. This is not accurate. The trial court found both statutory mental mitigators. The trial court found that Lawrence's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and gave it "considerable weight." The State agrees with appellate counsel's argument that no casual connection is required between the crime and the mitigator. *Brown v. Payton,* 544 U.S. 133, 142-143, 125 S.Ct. 1432, 1439, 161 L.Ed.2d 334 (2005)(explaining that any circumstance including postcrime behavior, such as a religious conversion or remorse, can lessen or excuse a crime, and therefore be mitigating). However, while a sentencer may not reject mitigation because it did not cause the murder, it may lessen the weight of that mitigator if it does not relate to the murder. This is a more accurate description of the trial

brief by noting that many of those cases involved moral failings, such as drinking and drugs, but Lawrence's mental condition was not due to any moral failing in his part. (DA RB at 9-12).

Not only was the proportionality issue extensively briefed by both appellate counsels, second appellate counsel made proportionality the focus of his argument at the oral argument in this Court on April 4, 2002. His position was that, while this was a very aggravated murder, Lawrence was one of the most mitigated of defendants due to his mental illness and therefore, a death sentence was not appropriate.

Furthermore, second appellate counsel filed a motion for rehearing arguing the proportionality issue yet again. Three pages of his six page motion for rehearing was devoted to that issue. In the motion for rehearing, appellate counsel argued that "our law reserves the death penalty only for the most aggravated and least mitigated murders." While conceding that this was one of the most aggravated of murders, he argued that the Court erred in its analysis because it did not focus on whether this was also "one of the least mitigated" of murders. He asserted that "there can be no doubt this Court has seen few capital defendants as pathetic as Lawrence." He also asserted:

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court's reasoning.

"[t]his Court has <u>never</u> had a capital defendant diagnosed as schizophrenic, extensively damaged in parts of his poorly functioning brain, prone to psychotic episodes with hallucinations, and low intelligence." Motion for rehearing at 3 (emphasis in original). He noted that the trial court had found substantial mitigation and given considerable weight to the statutory mental mitigators. Appellate counsel pointed out that this Court rejected his proportionality claim because Lawrence was competent and followed a deliberate plan, which, he argued was improper because that reasoning applied to all first degree premeditated murders. Motion for rehearing at 4. Neither appellate counsels' performance was deficient.

Habeas counsel faults appellate counsel for not arguing that the trial court's analysis was an abuse of discretion and not supported by competent, substantial evidence. (Pet. at 7). First appellate counsel stated twice in the initial brief that the standard of review for proportionality was *de novo*. (DA IB at 35, 41). Habeas counsel seems to mistakenly believe that "abuse of discretion" and "competent, substantial evidence" are better standards of review than the *de novo* standard. They are not. 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. Under either standard of review relied on by habeas counsel, the appellate counsel must defer to some extent to the trial court’s ruling. First appellate counsel’s standard of review is more favorable to Lawrence than habeas counsel’s standard of review.

Habeas counsel also faults appellate counsel for the manner in which he handled the trial court’s rejection of the “substantial domination” mitigator. Pet. at 9-12. Appellate counsel raised the issue of the admissibility of co-defendant’s criminal record in the penalty phase to support this mitigator in ISSUE IIIA of his initial brief. (DA IB at 54-59). Appellate counsel devoted five pages of his 98 page initial brief to this issue. Appellate counsel also raised the issue of the trial court’s rejection of “substantial domination” mitigator in ISSUE IIIB of his initial brief. (DA IB at 59-64). Appellate counsel devoted five pages, with extensive footnotes, of his initial brief to this issue. Second appellate counsel devoted five pages of his reply brief to this issue. (DA RB at 18-23). This Court ruled that the trial court did not err in rejecting this mitigator. Specifically, this Court held:

> 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. There is evidence that Lawrence wrote the notes planning the murder, that he purchased or acquired the items used during the murder, and that he directly assisted in concealing Robinson's body. The trial court noted that Lawrence was a major participant rather than a minor accomplice. Thus, we deny Lawrence's claim. Cf. *San Martin v. State*, 705 So.2d 1337, 1348 (Fla.1997); *Valdes v. State*, 626 So.2d 1316, 1324 (Fla.1993).

Lawrence, 846 So.2d at 449-450.

Habeas counsel's argument is substantially the same as appellate counsel's argument. (Compare DA IB at 59-64 with habeas petition at 9-11). Both appellate counsel and habeas counsel argue that Lawrence was not violent until he met the coperptrator Rodgers. (DA IB at 63; Pet. at 9). Indeed, appellate counsel's argument was more detailed and extensive than habeas counsel's.

The case that habeas counsel cites and extensively discusses, *Crook v. State*, 908 So.2d 350, 358-59 (Fla. 2005), was not available to either appellate counsel when they wrote their briefs in 2001 and 2002. (Pet. at 8, 16-18, 20,22 citing *Crook v. State*, 908 So.2d 350, 358-59 (Fla. 2005)(noting that mental health testimony related the rage and brutal conduct of the murder to the defendant's brain damage and mental deficiencies)). Appellate counsel cannot be ineffective for failing to cite a case that does not exist at the time he is

writing the brief.

While claiming ineffectiveness for inadequately arguing the issue, habeas counsel is basically making the exact same substantive argument that second appellate counsel made in his reply brief. (Compare DA RB at 6 with habeas petition at 8-9). The differences between the arguments is merely a matter of semantics.

Furthermore, while claiming ineffectiveness for inadequately arguing the issue, habeas counsel is actually attacking this Court's analysis of proportionality more than appellate counsel's performance. (Pet. at 13-16). Given the length of this Court's discussion of the issue, this is a particularly inappropriate case for habeas counsel to urge this Court to reconsider the issue. (Pet. at 22). This Court should decline to reconsider its proportionality review.

Habeas counsel makes an extensive argument that this Court's proportionality review is inconsistent. (Pet. 12-22). This is an argument to abolish proportionality review altogether, whether habeas counsel recognizes it or not. Habeas counsel refuses to acknowledge that true, objective, uniformity in proportionality review is impossible and discrepancies will always occur. Both opponents and supporters of proportionality review agree that complete consistency is not possible. Barry

Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons From New Jersey)*, 64 ALB. L. REV. 1161 (2001)(concluding that proportionality review is "constitutionally unwarranted, methodologically unsound, and theoretically incoherent, and, therefore, should be abolished" and noting that the New Jersey Supreme Court has established the most quantitative proportionality review in the United States with an "elaborate, time-consuming, and costly methodology" which suffers from the "illusion that a mathematical formula will ensure equal treatment" and that is "hopelessly unrealistic" and concluding that "[c]omparison of capital cases drains judicial resources, diverts the focus of the courts, distends the post-conviction process, and denies the imposition of justice upon the guilty--all in pursuit of a chimera without basis in the Constitution."); Evan J. Mandery, *In Defense of Specific Proportionality Review*, 65 Alb. L. Rev. 883, 912 (2002)(admitting that if a state undertakes comparative proportionality review, "failure is inevitable" and explaining "it is not possible to make meaningful empirical comparisons of defendants' degrees of wrongdoing."); *In re Proportionality Review Project (II)*, 757 A.2d 168, 170 (N.J. 2000)(noting that "the development of a sound methodology for the purpose of systemic proportionality review has proved an elusive goal.");

Judge David S. Baime, *Comparative Proportionality Review: The New Jersey Experience*, Criminal Law Bulletin April 2005 (acknowledging that "[c]omplete consistency in capital sentencing can never be fully achieved.").[7] (Pet. at 21-22).

Appellate counsel's performance cannot be deficient for failing to brief two issues that they, in fact, briefed. Moreover, there can be no prejudice under this scenario because it is clear that petitioner would not have been granted relief on appeal because appellate counsel did raise both issues and lost, which establishes that there is no prejudice. Appellate counsel was not ineffective.

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[7] Judge Baime was the Special Master appointed by the New Jersey Supreme Court to examine the proportionality review methodology used by that Court.

ISSUE II

WHETHER FLORIDA'S LETHAL INJECTION THREE DRUG PROTOCOL VIOLATES THE EIGHTH AMENDMENT PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT?

Lawrence argues that Florida's lethal injection three drug protocol constitutes cruel and unusual punishment in violation of the Eighth Amendment. Relying upon a recently published study, Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 *The Lancet* 1412 (2005), Lawrence argues that he will be subjected to "unnecessary pain" during his execution.

The Lancet article involved the autopsy reports of 49 executed inmates from four states: Arizona, Georgia, North Carolina, and South Carolina. L.G. Koniaris, M.D., et.al., *Inadequate anaesthesia in lethal injection for execution*, 365 THE LANCET 1412 (April 16, 2005). Using toxicology reports from the autopsies, the article revealed that post-mortem concentrations of thiopental in the blood of 43 of the 49 inmates (88%) were below typical surgery levels, and in 21 of the 49 inmates (43%) the concentrations of thiopental in the blood was consistent with awareness. The blood samples were taken from the subclavian artery. The article noted that anaesthesia is assumed because of the "relatively large quantity of thiopental", usually 2 grams compared to the typical surgical dose of 3-5 milligrams.

The article stated that this finding suggests substantial variations in either the autopsy or the anaesthesia methods but concluded that the variation was probably due to difference in drug administration in individual executions based on the expertise of the state medical examiners compared with the unskilled executioners. The article stated that they could not conclude that these inmates were unconscious and insensate. The article admitted that "[e]xtrapolation of antemortem depth of anaesthesia from post-mortem blood thiopental concentrations is admittedly problematic." The article "postulated that anaesthesia methods in lethal injection might be inadequate." The article concluded that cessation and public review of lethal injection was warranted.[8]

Lawrence's lethal injection claim is not a proper habeas claim. Lawrence seems to be raising a straight constitutional

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[8] This seems like an odd conclusion for a true scientific article. The more natural conclusion would seem to be a recommendation to increase the amount of thiopental used in lethal injections as a means of addressing these concerns, not the cessation of all lethal injections. See *Ex parte Aguilar*, 2006 WL 1412666, *2 (Tex. Cr. App. May 22, 2006)(unpublished)(Cochran, J., concurring)(noting that there are serious problems with the study including that (1) it is a research letter, which is "akin to a letter to the editor", not a peer-reviewed scientific study; (2) the study was conceived by and based upon data supplied by an attorney who represents death row inmates which "is hardly a mark of scientific objectivity" and (3) the "suggested conclusion is so extraordinary that it challenges simple logic.").

challenge rather than an ineffective assistance of appellate counsel claim. Habeas petitions should be limited to claims of ineffective assistance of appellate counsel. A habeas petition should not be a second direct appeal. *Breedlove v. Singletary*, 595 So.2d 8, 10 (Fla. 1992)(noting that "[h]abeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been . . . or were raised on direct appeal"). Moreover, Lawrence relies on affidavits to support his assertions. Affidavits are not proper in a state habeas petition. This claim is not properly brought in a habeas petition.

The claim is time-barred. The statute making lethal injection Florida's default method execution was enacted in 2000. See ch. 2000-2, § 1, Laws of Fla. (eff. Jan. 14, 2000). Lawrence does not explain his six years delay in bringing this challenge Florida's lethal injection statute. It is not proper to use a habeas petition as a means around time limitations.

In *Hill v. State*, 921 So.2d 579, 582-583 (Fla. 2006), this Court concluded that this study did not require the Court to reconsider its holding in *Sims v. State*, 754 So.2d 657, 668 (Fla. 2000), that "the procedures for administering the lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment." See also

Rutherford v. State, 926 So.2d 1100, 1113-1114 (Fla. 2006)(rejecting a claim that the Lancet article required the Court to reconsider its holding in *Sims,* citing *Hill*, 921 So.2d 579 at 582-583).

Here, as in *Hill* and *Rutherford*, the Lancet article does not require this Court to reconsider its holding in *Sims*. There is controlling precedent from this Court that Florida's lethal injection protocols do not violate the Eighth Amendment.

The United States Supreme Court's decision in *Hill v. McDonough*, - U.S. -, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006), does not impact this Court's holdings in *Hill* or *Rutherford.* The *Hill* Court held that a challenge to a lethal injection protocol may properly be brought as a § 1983 complaint. This is not a §1983 action. All that *Hill* holds is that, if Lawrence wishes to bring his lethal injection challenge via § 1983, he may do so. *Hill* does not affect this Court's lethal injection jurisprudence. As one federal district court observed, "Hill involved a narrow procedural question and has a correspondingly limited holding. The opinion does not comment in any way on lethal injection challenges in substantive terms." *Lenz v. Johnson*, 2006 WL 2079379, *6 (E.D.Va. July 25, 2006)(quoting *Hill*, 126 S.Ct. at 2104 (stating: "[t]he equities and the merits of Hill's underlying action are … not before us."). Indeed,

federal district courts are not reaching the merits of § 1983 actions raising lethal injection challenges; rather, they are dismissing such § 1983 actions as untimely. *Hill v. McDonough*, Case. No. 4:06-cv-032-SPM (N.D.Fla. September 1, 2006)(dismissing a § 1983 action challenging Florida's lethal injection protocol, finding that Hill had delayed unnecessarily in bringing his § 1983 challenge); *Lenz v. Johnson*, 2006 WL 2079379, *6 (E.D.Va. July 25, 2006)(dismissing a § 1983 action challenging Virginia's lethal injection protocol as dilatory where it was brought one month prior to the scheduled execution); *Reese v. Livingston*, 453 F.3d 289, 291 (5th Cir. 2006)(denying a stay of execution in a § 1983 action challenging Texas' lethal injection protocol and noting that "we are not persuaded that *Hill* has undermined the decisions of this Court insisting upon a timely filing" quoting *Hill*, 126 S.Ct. at 2104 (stating: "[t]he federal courts can and should protect States from dilatory or speculative suits . . .").[9] The claim should be

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[9] Section 1983, unlike federal habeas, does not require exhaustion in state courts. Indeed, if Lawrence had brought the claim in the state court and the state court reached the merits, Lawrence would be barred by the doctrine of *res judicata* from bringing his lethal injection claim as a § 1983 action in federal court. Lawrence, rather than bringing this improper habeas petition, should file a § 1983 in state or federal court.

However, § 1983 does require the exhaustion of administrative remedies. *Woodford v. Ngo*, 126 S.Ct. 2378 (2006)(holding that a prisoner must properly exhaust his

denied.

administrative remedies); *Walton v. Johnson*, 2006 WL 2076717, *4 (E.D.Va.)(dismissing a § 1983 challenge to Virginia's lethal injection protocol for failing to exhaust administrative remedies, relying on *Ngo*). Lawrence should not be in this Court raising a habeas claim; rather, he should be at the Department of Corrections raising the matter in their grievance procedures prior to filing a § 1983.

ISSUE III

WHETHER FLORIDA'S LETHAL INJECTION PROTOCOL VIOLATES THE FIRST AMENDMENT RIGHT OF FREE SPEECH?

Lawrence also argues that Florida's lethal injection drug protocol violates his free speech rights under the First Amendment. Lawrence asserts that the second drug in the series, pancuronium bromide, will render him unable to speak, violating his right to free speech. This claim is procedurally barred. This claim should have been raised in the direct appeal. Moreover, Florida's lethal injection drug protocols do not violate the First Amendment.

This is not a proper habeas claim. Lawrence seems to be raising a straight constitutional challenge rather than an ineffective assistance of appellate counsel claim. Habeas petitions should be limited to claims of ineffective assistance of appellate counsel. A habeas petition should not be a second direct appeal initial brief. *Breedlove v. Singletary*, 595 So.2d 8, 10 (Fla. 1992)(noting that "[h]abeas corpus is not a second appeal and cannot be used to litigate or relitigate issues which could have been … or were raised on direct appeal").

This claim, as a straight challenge, is procedurally barred in postconviction litigation. Lawrence should have raised his First Amendment challenge in his direct appeal. The basis of this claim does not depend on the Lancet article. Lawrence knew

about the three drugs at the time of the direct appeal. The Florida Supreme Court, in *Bryan,* described the three drug protocol, literally syringe by syringe, in 2000. *Bryan v. State*, 753 So.2d 1244, 1252 (Fla. 2000)(describing Florida's lethal injection protocol and explaining that syringes one and two contain a lethal dosage of Sodium Pentathol, which is used in surgical settings as an anaesthetic and takes effect in a matter of seconds; syringes four and five contain a lethal dosage of Pancuronium Bromide which causes paralysis and syringes seven and eight contain a lethal dosage of Potassium Chloride which will stop the heart from beating). Lawrence's initial brief in the direct appeal was filed in 2001, a year after the opinion in *Bryan*. Lawrence knew that Florida's lethal injection protocol contained a drug that would render him unconscious and therefore unable to speak. Lawrence had all the information he needed to raise this issue in the direct appeal but he failed to do so. Lawrence's First Amendment claim is procedurally barred. *Jones v. State*, 928 So.2d 1178, 1182, n.5 (Fla. 2006)(denying without discussion a claim that lethal injection is unconstitutional because it should have been raised in the direct appeal and therefore, was procedurally barred in postconviction); *Suggs v. State*, 923 So. 2d 419, 441 (Fla. 2005)(rejecting a claim that execution by electrocution or lethal injection constituted cruel

and unusual punishment and finding it to be procedurally barred since this claim was not raised on direct appeal and noting that the claim was "also without merit because this Court has consistently rejected arguments that these methods of execution are unconstitutional.").

The claim is also time-barred. The statute making lethal injection Florida's default method execution was enacted in 2000. See ch. 2000-2, § 1, Laws of Fla. (eff. Jan. 14, 2000). Lawrence does not explain his six years delay in bringing this challenge Florida's lethal injection statute. It is not proper to use a habeas petition as a means around time limitations.

Furthermore, the claim is meritless. Even if the second drug was not administered, Lawrence will be unconscious from the first drug and therefore, unable to speak. It is the first drug, sodium pentothal, not the second drug, pancuronium bromide, that renders the inmate unconscious and therefore unable to speak. There is a legitimate penological interest in having an inmate unconscious and immobile during the execution. *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989)(holding that prison regulations impacting First Amendment rights are valid if they are reasonably related to legitimate penological interests rather than the normal "strict" or "heightened" scrutiny).

This Court has rejected a First Amendment challenge to Florida’s lethal injection drug protocols. In *Rutherford v. State*, 926 So.2d 1100, 1114-1115 (Fla. 2006), this Court held that lethal injection does not violate the First Amendment. Rutherford asserted that the administration of pancuronium bromide violated his free speech rights because the administration of pancuronium bromide, which paralyzes the muscles, would render him unable to communicate any feeling of pain that may result if the execution procedure is carried out improperly. The trial court did not conduct an evidentiary hearing. This Court found the claim to be “without merit” relying on their prior case of *Sims v. State*, 754 So.2d 657 (Fla. 2000). In *Sims*, the Court observed that “two grams of sodium pentothal ... is a lethal dose and certain to cause rapid loss of consciousness (i.e., within 30 seconds of injection).” *Sims*, 754 So.2d at 666 n. 17. However, this Court noted that aside from the 2005 study, Rutherford presented no evidence that the sodium pentothal would be administered improperly. This Court noted that Rutherford conceded that if the sodium pentothal is administered properly, he will be unconscious and therefore unable to feel the effects of the administration of the remaining two chemicals and therefore, he will have nothing to communicate concerning the execution procedures. Based on

the fact that the amount of sodium pentothal is sufficient to result in a loss of consciousness, and because Rutherford failed to demonstrate that the sodium pentothal will be administered improperly or that he will be conscious when the pancuronium bromide and potassium chloride are administered, this Court concluded that the motion, files, and record conclusively show that Rutherford was not entitled to relief. See also *Beardslee v. Woodford*, 395 F.3d 1064, 1076 (9th Cir. 2005), *cert. denied*, - U.S. -, 125 S.Ct. 982, 160 L.Ed.2d 910 (2005)(rejecting a free speech challenge to California's lethal injection drug protocols which includes pancuronium bromide because Beardslee would not be conscious when the final two drugs are administered).

Here, as in *Rutherford*, Lawrence will be unconscious and therefore, unable to speak. This is not a violation of the First Amendment. Here, as in *Rutherford*, no evidentiary hearing is required to deny this claim. Here, as in *Rutherford*, Lawrence has failed to demonstrate that the sodium pentothal will be administered improperly or that he will be conscious when the pancuronium bromide and potassium chloride are administered.

The United States Supreme Court's decision in *Hill* does not affect this Court's holding regarding free speech in *Rutherford*. The First Amendment right to free speech was not at issue in

Hill. Hill did not raise a free speech claim.

There is controlling precedent against Lawrence's free speech challenge to Florida's lethal injection protocols. This claim should be denied.

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by U.S. Mail to Michael P. Reiter, 4543 Wedgewood Drive, Tallahassee, FL 32309 this ____ day of September, 2006.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

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