IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-352

JONATHAN HUEY LAWRENCE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, STATE OF FLORIDA

Lower Tribunal Case No. 57-98-270-CFA-B

REPLY BRIEF OF APPELLANT

Michael P. Reiter
4543 Hedgewood Drive
Tallahassee, Florida 32309
Attorney for Appellant
(850) 893-4668

TABLE OF CONTENTS

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING LAWRENCE FAILED TO ESTABLISH THAT HIS PLEAS WERE NOT KNOWING AND VOLUNTARY IN VIOLATION OF LAWRENCE'S CONSTITUTIONAL RIGHTS?

At pages 29-30 and again at page 40 of appellee's answer brief, counsel inserted information regarding Dr. Larson's and Dr. Gilgun's evaluation of Lawrence to proceed in postconviction – perhaps to improperly persuade this court with irrelevant information. Lawrence's competency to proceed in postconviction is not an issue in this appeal; why the State would suggest this issue is puzzling. At the very least, Appellee's competency should be disregarded by this Court. In addition, the Court should be cognizant that in all probability Dr. Larson and Dr. Gilgun trained Lawrence to be competent.

Appellee argues, at page 38 of the answer brief, procedural bar on the voluntariness of Lawrence's plea because the facts were raised on direct appeal. Appellant begs to differ. The issue on direct appeal before this Court was whether the trial court erred by failing to conduct a competency evaluation, especially since trial counsel failed to request one. Although this Court found the trial court did not abuse its discretion by not

conducting a competency evaluation, it noted that the decision was also based upon counsel's actions.

> Lawrence's counsel never requested a competency hearing during the penalty phase and gave all indications that Lawrence was competent to stand trial. Lawrence, 846 So.2d at 447.

The issue in postconviction is whether Lawrence was, in fact, competent to enter a plea, and whether counsel had sufficient information, which would have led a reasonable person to believe that an evaluation was necessary.

At page 41 of Appellee's brief, it states that Mr. Killam (one of Lawrence's trial attorneys) testified he was aware that Lawrence's competency was determined in federal court. However, appellee found no support in the record of such testimony, nor could undersigned counsel find it either.

Appellee argues at page 41 in their brief that Jones v. State, 740 So.2d 520 (Fla. 1999) does not apply because Lawrence had a prior evaluation. Although Lawrence did have a prior evaluation, it occurred more than one and a half years prior to the plea. Moreover, in its order the postconviction court found that a prior determination is not considered controlling the circumstances when evidence is presented that contradicts the finding (Order p. 5, footnote 2).

At the evidentiary hearing, substantial evidence was presented to contradict any previous finding of competency, which, incidentally, went without discussion in Appellee's brief. Ms. Stitt (another one of Lawrence's trial attorneys) testified to the following relevant facts not mentioned in the PC trial court's order: (1) Lawrence suffered from long- and short-term memory loss (EH 261), (2) Lawrence had difficulty when providing details (EH 262, 273), (3) she had concerns about Lawrence's competency when he reported having hallucinations (EH 263), (4) she didn't request a competency evaluation after the reported hallucinations, because her co-counsel did not think it was necessary (EH 264), which she felt was in error (EH 265), (5) she asked Lawrence's mother to convince her son to plead guilty since both counsel were fearful that Lawrence did not understand what they were talking about (EH 277, 306, 310-311), (6) Lawrence was not always able to answer "yes" or "no" when answering their questions, (7) during trial, Stitt constantly worried that she had made the wrong decision about not asking for a competency hearing, which may have impaired her ability to fully represent Mr. Lawrence (EH 323), (8) often, words had to be defined over and over again to Lawrence (EH 330), and (9) the taped

practice plea was made, in part, so Lawrence would know how to answer the judge's questions (EH 330).

At the evidentiary hearing, Killam also testified to other relevant facts not mentioned in the PC trial court's order: (1) Lawrence's responses consisted mainly of "yes" or "no" (EH 157), (2) when conferring with their client, Lawrence had to be led in order to understand any details (EH 157), (3) Lawrence became visibly upset after seeing the crime scene photographs (EH 158), (4) Killam had not discussed Lawrence's competency evaluations with doctors Larson or Bingham (EH 181), (5) Stitt spent more time with Lawrence than he did (EH 205), (6) Killam was over by the jury box when Lawrence first reported having hallucinations to Stitt (EH 220), (7) Killam believed the best chance Lawrence had to receive a life sentence was to proceed with the penalty phase and forgo a competency hearing (EH 228).

The above facts demonstrate substantial contradictory evidence that Lawrence's counsel had sufficient information to establish that Lawrence was not competent to enter a plea. Yet, neither the court's order, nor Appellee's brief analyzes these facts.

Further, Appellee's brief at page 30 describes the video tape of Lawrence's practice plea with counsel as: "…extensive discussions between Lawrence and his attorneys

about entering the plea." Obviously, appellant and appellee have a discrepancy about the meaning of "discussions." Lawrence contends that a discussion involves dialogue that contains more words than "yes" and "no."

In addition, appellee's brief makes no mention about Lawrence's ability to understand the proceedings, the law, or the language used during the practice plea or the actual plea. Yet, the mental health experts testified that Lawrence was unable to understand the proceedings, the law, or the meaning of many of the words used. Boykin v. Alabama, 395 U.S. 238, 90 S.Ct. 1709, 23 L.Ed.2d 274 (1969)(It cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts).

In addition, neither the postconviction court's order nor Appellee's brief discusses the experts' conclusions that the plea colloquy, which consisted primarily of "yes" and "no" answers, was insufficient to indicate whether Lawrence understood the proceedings. All the experts, however, testified that they didn't believe Lawrence understood.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT LAWRENCE'S COUNSEL WAS NOT INEFFECTIVE DURING PRE-TRIAL AND THE GUILT PHASE IN VIOLATION OF LAWRENCE'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS CAUSING LAWRENCE'S CONVICTIONS AND DEATH SENTENCE TO BE CONSTITUTIONALLY UNRELIABLE?

Failure to Inform Defendant of a Defense.

Lawrence continually denied the elements described in 3.01 of the Florida Standard Jury Instructions in Criminal Cases in his statements to law enforcement and to his attorneys, as described in Lawrence's initial brief pages 44-50.

The postconviction court and appellee's brief focused on: (1) Williams rule evidence, (2) trial counsel's belief of Lawrence's guilt, and (3) appellee's assessment of the evidence.

First, Williams rule evidence may not have been presented in the guilt phase. At the time of the plea, a jury had already been selected and no notice of intent to utilize Williams rule evidence had been filed. Further, no additional prejudice would have occurred by going to trial because Williams rule evidence was presented at the penalty phase.

Second, trial counsels' belief in the defendant's guilt is not relevant to this issue. However, if trial

counsel were as correct in their belief as purported in appellee's brief, they should have explained those facts to the defendant before duping him into a plea.

Finally, neither the postconviction court's order nor appellee's brief discusses the legal criteria the court is required to apply. Grosvenor v. State, 874 So.2d 1176 (Fla. 2004); Gilbert v. State, 913 So.2d 84 (Fla. 2nd DCA 2005) These cases were discussed in Lawrence's initial brief, but weren't even cited in appellee's answer brief.

Whether the jury would have believed Lawrence's denials did not relieve counsel of their responsibility to inform Lawrence about his option; the option was: if the jury believed him, he had a defense. Appellee suggests at pages 48-49 of their brief: "This is not a dispute about whether a defense existed, it is a dispute about credibility." Appellee ignores the elements of "principle." Lawrence denied all of those elements. Certainly, credibility is an issue, but it should be determined by a jury—not by trial counsel, not by appellate counsel, nor, by the trial court.

MISREPRESENTATION

Photographs. Appellee contends at page 51 of the answer brief that "counsel properly informed Lawrence that if he pled guilty the State's evidence would not be as

extensive in the penalty phase." Ms. Stitt never mentioned anything about "extensive." Perhaps the Appellee's interpretation of "not be[ing] as extensive in the penalty phase" is the result of an over-active imagination. Although Appellee correctly states at page 48 of the answer brief what Ms. Stitt told Lawrence: "Counsel explained that if he entered a plea, the jury would not see 'gory photograph after gory photograph.'" However, in reality, the jury was shown gory photograph after gory photograph. Exhibits 17A-H were presented to the jury through a larger-than-life projected image. The following gory photos were introduced into evidence despite Ms. Stitt's assurance to Mr. Lawrence that they would not be shown to the jury: (1) Ex. 6A—Polaroid of victim with head wound, admitted at vol. III, p. 372; (2) Ex. 11A-G—Polaroids of victim, admitted at vol. III, p. 396; (3) 13A-K—crime-scene photos, admitted at vol. IV, p. 407; (4) Ex. 14—crime-scene photo, admitted at vol. IV, p. 405; (5) Ex. 17A-H—crime-scene photos with victim present, admitted at vol. IV, p. 416.

The court's order and appellee's characterization of photos not being "extensive[ly]" gory is inaccurate. Ms. Stitt and Mr. Killam knew that Mr. Lawrence would get upset if he saw these photographs, and they used that knowledge

to coerce Lawrence's guilty plea by telling him they would not be shown to the jury.

Intimidation. Appellee argues that Lawrence was not pressured into giving a plea based upon Judge Bell's plea colloquy and that counsel only "advised" Lawrence. Appellee ignores facts showing otherwise: counsel repeatedly badgered Lawerence's mother, Ms. Thompson, to get her son to plead guilty, because they couldn't; Dr. Crown testified that in his opinion, Mr. Killam "promised" Ms. Thompson that Lawrence would get a life sentence if he pled guilty; Stitt told Lawrence that the gory photographs would not be introduced into evidence, and that witness after witness would not be called to testify in court; and Stitt told Lawrence that if he did not plead guilty, he would get the death penalty. Clearly, this is not advice; it amounts to intimidating Mr. Lawrence to comply with counsels' wishes.

Motion to Suppress. Not much more than previous argument contained in appellant's initial brief on this issue needs to be argued here.

However, concerning the appellant's May 5, 1998, statement about the Robinson killing, neither Mr. Lawrence nor Detective Hand understood what a waiver was. Therefore, it could not be determined if Lawrence was fully informed

of his rights, and the statement should have been suppressed.

As for appellant's May 14, 1998, statement, also concerning the Robinson case. After perusal of the statement, it is clear that Detective Hand asked numerous questions without Lawrence's attorney present. Although Lawrence may have initiated the conversation to offer an explanation, it quickly became obvious that Det. Hand took over the conversation by asking an enormous number of questions without Lawrence's attorney being present, or even notified.

Motion to Disqualify Judge. Appellant will rely upon his argument in the initial brief.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT LAWRENCE'S COUNSEL WERE NOT INEFFECTIVE DUE TO INADEQUATE ADVERSARIAL TESTING OF THE STATE'S CASE DURING THE PENALTY PHASE IN VIOLATION OF LAWRENCE'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS?

CONCESSION OF AGGRAVATOR

Appellee misconstrues appellant's application of Nixon v. State, 857 So.2d 172 (Fla. 2003) and Florida v. Nixon 125 S.Ct. 551 (2005) at page 67 of the answer brief. Appellant conceded in his initial brief that Nixon was

overruled and didn't specifically apply to concession of aggravators.

However, the concept of counsel discussing strategy with his client and adversarial testing still apply under Strickland, which was announced by the United States Supreme Court in Nixon, 125 S.Ct. 551.

> A presumption of prejudice is not in order based solely on a defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with the defendant. Id. at page 558. (Emphasis added)

Further, this Court has reversed a case where counsel conceded an aggravator to the jury, Holmes v. State, 429 So.2d 297 (Fla. 1983).

> Instead of arguing that the crime was not heinous, atrocious, or cruel, defense counsel conceded the existence of this questionable aggravating circumstance. Furthermore he made no reference to the reports of the two court-appointed psychiatrists who suggested that Holmes may have been in some kind of disturbed psychological state at the time of the murder. Although these reports were delivered after the sentencing hearing was held, counsel made no attempt to reopen the proceeding for the purpose of presenting the reports or testimony of the psychiatrists.

Appellant acknowledges that the concession in Holmes was in conjunction with a failure to also mention mitigation expressed by experts. However, the concession in this case diminished the mitigation that was presented. In addition counsel argued against CCP in his memorandum to

the court. The zealous advocacy announced in Nixon should also apply in a penalty phase no different than in the guilt phase, as pointed out by Justice Quince in her concurring opinion in Coday v. State, SC02-1920 (Fla. 10/26/2006):

> Trial counsel's obligation to zealously advocate for their clients is just as important in the penalty phase of a capital proceeding as it is in the guilt phase. There is no more serious consideration in the sentencing arena than the decision concerning whether a person will live or die.

At page 69, Appellee's argument that inconsistent defenses are permitted does not apply in this case. First, However, the cited cases for their position apply only "so long as the poof of one does not necessarily disprove the other." Phillips v. State, 874 So.2d 705 (Fla. 1st DCA 2004), and Keyes v. State, 804 So.2d 373 (Fla. 4th DCA 2001). Conceding proof of CCP aggravators to the jury is fundamentally in opposition of denying proof of CCP to the judge.

Second, Appellee argues at pages 68-70 that counsel was not ineffective by maintaining his credibility with the jury in conceding the CCP aggravators; however, Appellee makes no mention about how this tactic affected his credibility with the court, who ultimately pronounces

sentence. Mr. Killam acknowledged that this inconsistent position probably affected his credibility (EH 188).

Appellee argues that taking inconsistent positions between the jury and the court is perfectly fine, even though “trial counsel’s argument against the CCP aggravator in his sentencing memo was not supported by the law” (AB page 70). If appellee’s statement is true, which appellant contends is not true, then trial counsel’s argument to the court must have been unethical, because counsel is not permitted to make arguments to the court he knows is inaccurate. Notwithstanding appellee’s contention, the memo that Killam wrote clearly argued that the evidence presented at the penalty phase showed that Appellant’s participation was merely a “fantasy of an organically damaged schizophrenic brain bathed in ethanol” (R. Vol. II, p. 318).

If trial counsel believed that the State failed to prove CCP in his memorandum to the court, there can be no rational strategy to concede the aggravator to one trier of fact, while taking an inapposite position with the other trier of fact. This is especially true when the alleged strategy was to maintain credibility, which counsel agreed was damaged by this tactic.

DEGROATORY AND PREJUDICAL COMMENTS

Appellant relies upon his initial brief.

VOLUNTARINESS OF STATEMENTS

Appellant relies upon his initial brief.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THAT LAWRENCE'S RIGHT TO EQUAL PROTECTION WAS NOT VIOLATED PURSUANT TO ATKINS BECAUSE ATKINS DOES NOT APPLY TO THE MENTALLY ILL?

Appellant concedes that Atkins v. Virginia, 536 U.S. 304 (2002), limits its holding to the mentally retarded. However, the rationale for their holding cannot be ignored.

> Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.

As explained in Appellant's initial brief, that rationale applies equally as well to the mentally ill.

Appellee argues at page 78 of their brief that Ford v. Wainwright, 477 U.S. 399 (1986) prohibits the execution of those with serious mental illness. Appellee's understanding of the holding in Ford is misguided. Justice Powell states clearly in his opinion in Ford, "Rather, the only question raised is not *whether,* but *when,* his execution may take place." Id at 420.

The decision in Atkins excludes the mentally retarded from the eligibility column for the death penalty, while the Ford decision only postpones the execution until the condemned is mentally capable to be executed.

Appellee states at page 78 of their brief, “Lawrence, unlike a mentally retarded person, could have controlled his mental illness by taking his medication.” Perhaps this statement has some validity, but Lawrence suffers from brain damage, in addition to mental illness. The testimony of the mental experts was clear that appellant’s brain damage had, and continues to have, just as much of an effect on his abilities as his mental illness. Just as there is no pill to cure mental retardation, there is no pill to cure brain damage.

Nowhere within appellee’s brief do they argue that Lawrence’s disabilities in areas of reasoning, judgment, and control of his impulses, are not affected by his brain damage and mental illness, as suggested in Atkins.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING NO MERIT TO LAWRENCE'S CLAIM THAT HE WAS DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING LAWRENCE'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT?

Appellant relies upon his initial brief on this issue.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING LAWRENCE'S CLAIM THAT HE WAS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION AND LETHAL INJECTION ARE CRUEL AND/OR UNUSUAL PUNISHMENTS?

Appellant relies upon his initial brief on this issue.

ISSUE VII

WHETHER LAWRENCE'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED BECAUSE LAWRENCE MAY BE INCOMPETENT AT THE TIME OF EXECUTION?

Appellant relies upon his initial brief on this issue.

ISSUE VIII

WHETHER LAWRENCE'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS?

Appellant relies upon his initial brief on this issue.

ISSUE IX

WHETHER THE TRIAL COURT ERRED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST THAT THE DEFENDANT BE EXAMINED FOR COMPETENCY DURING THE PENALTY PHASE OF THE TRIAL IN VIOLATION OF LAWRENCE'S RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

Appellee contends in their brief that this issue is procedurally barred because this Court found on direct appeal that the trial court did not abuse its discretion in failing to conduct a competency evaluation. If appellant were relying solely on the facts before the trial court at the time of its ruling, appellant would agree with appellee that the issue is barred.

However, neither the postconviction court, nor appellee discusses the fact that this Court pointed out twice in its opinion that counsel did not request an evaluation, or that Justice Bell testified at the evidentiary hearing that if counsel had requested an evaluation, he would have investigated the need for it.

In addition, neither the postconviction court, nor appellee speaks to the facts showing Lawrence's lack of capacity, which were known to counsel prior to the plea and testified to such at the evidentiary hearing, but failed to inform the trial court. These facts were expressed in appellant's initial brief, but are reiterated here for emphasis: (1) Stitt filed an Amended Motion for Competency on December 9, 1999 (R. Vol. I, p. 13), (2) Stitt testified Lawrence reported experiencing hallucinations during some of her visits with him at the jail (EH 339), (3) Lawrence reported having hallucinations and flashbacks to Stitt on two occasions during the penalty phase (R. Vol. IV, p. 419, 464), (4) Stitt had concerns about Lawrence's competency when he reported having hallucinations (EH 263), Stitt didn't request a competency evaluation because her co-counsel convinced her not to request one (EH 264), which she felt was in error (EH 265), (6) Counsel and the court knew Lawrence had a problem with judgment and ability to reason and think (R. Vol. I, p. 3-4), (7) Stitt testified that Lawrence had difficulty understanding counsel (EH 277), (8) Lawrence had difficulty giving "yes" and "no" answers (EH 308), (9) Stitt spent more time with Lawrence than Killam did (EH 205), (10) Killam didn't hear Lawrence complain to Stitt that he, Lawrence, had experienced

hallucinations (EH 220), (11) Stitt told Dr. Wood that Lawrence reported hallucinations (EH 17), (12) Dr. Wood told Stitt that Lawrence needed an evaluation, however, Stitt responded, “We may lose more than we would gain by trying to interrupt the proceedings” (EH 36), (13) Killam testified that Lawrence’s competency had “already been litigated and decided at that point” (EH 209). (14) Rather than taking a safe-than-sorry approach by asking for an evaluation, Killam stated that in his opinion, the best chance for getting a life sentence was to proceed with what they were doing (EH 228), (15) at the evidentiary hearing, all three doctors testified that when Lawrence reported having hallucinations, an evaluation should have been requested.

In their brief, appellee merely reiterates the facts that were on the record and before this Court on direct appeal. Appellant does not contest those facts. Appellant contends that counsel was ineffective for failing to bring to the trial court’s attention certain events which occurred privately with counsel; the trial court could not be aware of these private events unless counsel informed the court, which they did not

Appellant contends that Mr. Killam and Ms. Stitt were aware of the facts described above. Because they did not

want to stop the proceeding, they chose to ignore appellant's lack of capacity to proceed, rather than to request an evaluation. Therefore, counsel provided deficient performance and appellant was prejudiced.

CONCLUSION AND RELIEF SOUGHT

Jonathan Huey Lawrence prays for the following relief: That his judgment and sentence be vacated, and he be provided a new trial and/or a new penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by hand delivery to Charmaine Millsaps, Office of the Attorney General, Department of Legal Affairs, The Capitol, PL01, Tallahassee, FL 32399, on November ___, 2006.

MICHAEL P. REITER
Attorney for Appellant
4543 Hedgewood Drive
Tallahassee, FL 32309
(850) 893-4668

MICHAEL P. REITER
Florida Bar #320234

CERTIFICATE OF COMPLIANCE

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

MICHAEL P. REITER