

IN THE SUPREME COURT OF FLORIDA

NO. SC09-1788

ANDREW RICHARD LUKEHART,

Petitioner,

v.

WALTER McNEIL,

Secretary, Florida Department of Corrections,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S
RESPONSE FOR WRIT OF HABEAS CORPUS

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COUNSEL FOR PETITIONER

ISSUE I

THIS COURT SHOULD REVISIT PETITIONER'S PROPORTIONALITY REVIEW IN LIGHT OF THE TESTIMONY OF BRENDA PAGE AT THE EVIDENTIARY HEARING.

Respondent contends that Petitioner is relitigating the validity of the underlying conviction used as an aggravator and Habeas petitions are vehicles to raise ineffective assistance of appellate counsel claims. Petitioner contends Respondent is wrong.

Petitioner's Habeas does not seek to undo the conviction of the prior violent felony aggravator, but to ask this court to revisit the proportionality of the sentence of death in light of Brenda page's testimony.

Respondent contends that only ineffective assistance of appellate counsel claims are ripe for a Habeas Petition. Although the ineffective assistance claim is utilized most of the time, it is not the only avenue to obtain a review by this Court. In this Petition, Petitioner has not claimed that appellate counsel was ineffective; appellate counsel had no knowledge about Brenda Page.

Respondent also contends that Petitioner is actually raising a Johnson v. Mississippi, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), claim. Not correct. As stated

above, Petitioner's Petition does not attempt to set aside his prior conviction, only to mitigate it.

Respondent claims that to set aside his prior violent felony, Respondent must file an appeal with the First District Court of Appeals, which would be untimely. Respondent is correct.

Respondent also claims that to be properly before this Court, a postconviction motion for newly discovered evidence must be filed and denied, and newly discovered evidence would fail because Brenda Page is not new. Again, Respondent is correct.

However, proportionality is vested in this Court and no other. Because trial counsel knew about Brenda Page but failed to present her testimony at trial, no direct appeal issue could be raised, and no newly discovered evidence can be raised. Hence, this Petition.

This Court of law is also a court of equity. Fraser v. State, 602 So.2d 1299 (Fla. 1992). As such, this court should do what ought to be done. "All courts of appeal are required to do equity." Sterling v. Brevard County, 776 So.2d 281 (Fla. 5th DCA 2001). No other area of our justice system applies the principle of "required to do equity" with more weight than death cases. Death cases are unique; the outcome is irrevocable.

This Court is unable to rely upon the trial court's finding of credibility of the testimony of Brenda Page because the trial court failed to acknowledge same in its order. Moreover, the State presented no rebuttal or impeachment evidence to discredit the testimony of Brenda Page. Petitioner contends that this Court should not only consider Brenda Page's testimony, but must accept it as true.

ISSUE II AND III

Petitioner will rely upon his Initial Petition.

CONCLUSION AND RELIEF SOUGHT

Appellant prays for the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

That his convictions and sentences, including his sentence of death, be vacated and a new trial provided.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Charlemagne Milsap, Assistant Attorney General, Office of the Attorney General, The Capitol PL-01, Tallahassee, FL 32399-1050 on February 22, 2010.

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CERTIFICATE OF COMPLIANCE

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

/s/ Michael Reiter
Michael Reiter