IN THE SUPREME COURT OF FLORIDA

HAROLD GENE LUCAS,

Appellant,

vs. CASE NO. SC01-1633

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

AMENDED ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

The facts of this case are recited in this Court's initial opinion, Lucas v. State, 376 So. 2d 1149, 1150 (Fla. 1979):

> The victim, Jill Piper, was appellant's girlfriend. A week before her death, she and appellant became embroiled in a heated argument which continued for several days. On the night of the murder, appellant arrived at Jill's house carrying a shotgun. Anticipating a visit by appellant, the victim and her friends, Terri Rice and Ricky Byrd, armed themselves. They were surprised, however, when appellant suddenly appeared from the side of the house, catching them in the yard, and began shooting. Jill Piper was struck immediately, but Terri and Ricky ran unharmed into the house to hide in a bedroom. The evidence is unclear as to what next occurred. According to Ricky's testimony, Jill came into the house, struggled with appellant, and was shot several more times. In any event, appellant soon burst into the bedroom where Ricky and Terri were hiding and shot them. Jill's body was found outside the house.

Defendant Lucas was charged with the first degree murder of Anthia Jill Piper and the attempted first degree murders of Terri L. Rice and Richard Byrd, Jr., in an Indictment returned on August 30, 1976 (DA. V4/549).[1] The offenses were alleged to

[1]References to the record in the direct appeal of Lucas's convictions and sentences, Florida Supreme Court Case No. #51,135, will be designated as DA. followed by the appropriate volume and page number; references to the direct appeal of Lucas's 1987 resentencing, Florida Supreme Court Case No. #70,653, will be designated as RS. followed by the appropriate volume and page number; references to the record in the instant postconviction proceedings, Florida Supreme Court Case No.

have occurred on August 14, 1976 (DA. V4/549). Lucas pled not guilty and trial commenced on January 11, 1977, before the Honorable Thomas W. Shands, Circuit Judge (DA. V1-V3). Lucas was represented by Assistant Public Defender Gene Taylor and the State was represented by State Attorney Joseph D'Alessandro (DA. V1/1).

At the trial, numerous witnesses testified to threats Lucas had made against Jill, and a prior incident where Lucas had been arrested for trespass on the Piper property (DA. V1/35-40, 150, 180-185; V2/210, 226-30, 274). There was also testimony about events earlier in the evening on the night of the shootings, including Lucas riding in a car that was stopped by police where one passenger was arrested for drug possession and a fight between Lucas and Eddie Kent at a Hess station (DA. V1/163-167; V2/188-90, 205-215, 230).

Ricky Byrd and Terri Rice both testified as witnesses to Lucas's shooting rampage. Jill, Terri, and Ricky were approaching Jill's house after moving the car, when Lucas stepped out from behind the side of the house and raised a rifle at Jill (DA. V2/237). Terri was walking behind Jill and testified that as Ricky entered the house, she saw Lucas come around the house and shot Jill; Jill fell to the ground (DA. V2/237). Terri and Ricky ran into the bedroom to call the

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#SC01-1633, will be designated as PC. followed by the appropriate volume and page number.

police (DA. V2/238). Terri heard Jill in the house, crying and screaming, asking Lucas why he had done this (DA. V2/238, 252). Then Lucas came through the bedroom door, shot Ricky, and followed Terri into the bathroom (DA. V2/238). Terri begged him to leave them alone, and Lucas said he would and turned to leave, but then he shot Terri through the door (DA. V2/238-39).

Ricky Byrd had better recall of the events. According to Ricky, he had just entered the house after they had been out to move the car, when he heard three firecrackers (DA. V2/280). He turned and saw Terri coming in behind him, frozen in fright (DA. V2/280). Several seconds later Jill ran in, collapsed in front of him on the floor, and said she had been shot (DA. V2/280). Byrd saw two wounds in her back which were bleeding (DA. V2/280). Byrd grabbed Terri and ran into the bedroom (DA. V2/281). Ricky heard screaming and slapping from the front of the house, and was aware of fighting and begging noises while he and Terri were on the phone to the police (DA. V2/281). Then he heard three more shots, then silence (DA. V2/281). He was trying to calm Terri down and, within a minute or two, the bedroom door crashed in and Lucas was there with a rifle and a shotgun (DA. V2/281). Lucas shot Ricky and Ricky was aware of more fighting over by where Terri hid in the bathroom area, then Lucas shot Terri through the door (DA. V2/282). Lucas came back

to Ricky and put a gun to his face; Ricky wasn't sure if he heard a click, but nothing happened (DA. V2/282). Then Lucas kicked Ricky and left the room (DA. V2/283). Ricky called for Terri and they were able to get back on the phone (DA. V2/283). He could hear noises from the house, as if someone were rummaging through drawers, looking for something (DA. V2/283). Finally he heard an officer yelling for anyone to come out of the house, and he made it out to the front yard (DA. V2/283-84).

Lucas fled into the woods and was not apprehended for several days. He was arrested in Naples on August 21 (DA. V2/222-225). His defense at trial was lack of premeditation due to drug and alcohol use on the day and evening of the murder (DA. V1/17). Defense counsel elicited information from state witnesses regarding the identity and quantity of the drugs Lucas used, and the effect observed from the drugs, and presented defense witnesses to corroborate the information (DA. V1/151-160, 167-172; V2/288, 293-94, 311-318, 352-359; V3/378-390). Lucas also testified and related that he had no memory of having a gun, going to Jill's house, or shooting anyone (DA. V2/318). The testimony was consistent that Lucas had consumed beer, marijuana, and a drug in the form of white powder which was sold as, and was believed to be, THC (DA. V1/153-160, 174; V2/311-314, 353-356; V3/378-380). In rebuttal, a State forensic expert

testified about the composition and effects of marijuana, hash, and THC (DA. V3/425-426). He stated that THC did not come in a powder, but in oil, also noting on cross-examination that PCP could easily be reduced to powder form (DA. V3/426-427).

After deliberations, the jury found Lucas guilty as charged (DA. V4/543-545). Following the penalty phase of the trial, a jury recommended that the court impose a sentence of death (DA. V4/664). On February 9, 1977, the judge followed the recommendation and imposed a sentence of death on the murder conviction, and thirty years imprisonment on each of the attempted murder charges (DA. V4/683). The court found two aggravating circumstances, that there were prior violent felony convictions and that the murder was heinous, atrocious or cruel, and found in mitigation that Lucas had no significant criminal history (DA. V4/677-682).

On appeal, this Court affirmed the judgments, but remanded for resentencing due to the trial court's consideration of the heinous nature of the attempted murders in imposing the death sentence. Lucas v. State, 376 So. 2d 1149 (Fla. 1979). On remand, the court again imposed the death sentence, eliminating mention of the heinous, atrocious or cruel nature of the attempted murders. On appeal from the remand, this Court again vacated the death sentence, finding that the trial judge had failed to conduct a proper weighing of the aggravating and

mitigating circumstances. Lucas v. State, 417 So. 2d 250 (Fla. 1982). A new trial judge conducted the resentencing on remand, as the original trial judge had passed away. Following review of the trial and sentencing transcripts, the Honorable Thomas S. Reese, Circuit Judge, imposed a death sentence, finding an additional aggravating factor of great risk of death to many persons. Lucas appealed his resentencing, and this Court again remanded, striking the aggravating factor of great risk to many persons, and finding that the new trial judge should have permitted additional argument and testimony from the parties, and once again remanded for a new sentencing proceeding with a new jury. Lucas v. State, 490 So. 2d 943 (Fla. 1986).

A new jury was empaneled for the resentencing, which was conducted March 30 - April 3, 1987. Lucas was represented by Assistant Public Defender Robert Jacobs and the State was represented by Assistant State Attorney John Dommerich (RS. V1/1). The State presented much of the same evidence from the initial trial and the defense presented lay witnesses for mitigation as well as forensic psychiatrist Dr. Daniel Sprehe (RS. V4/613-636). Lucas also testified, consistent with his initial trial testimony, that he did not have any recollection of the shootings, or anything that happened at Jill's house that night (RS. V4/597, 605-06). However, he testified that the drug which he had purchased that day was PCP, not THC, and he

recalled the name of the woman from Miami that had sold him the drug (RS. V4/594).

Dr. Sprehe testified that he examined Lucas on February 25, 1987, and had reviewed depositions and other documents and materials about the case (RS. V4/616). He opined that Lucas had ingested a lot of alcohol, and drugs, mainly PCP, on the day of the shootings (RS. V4/617). Lucas told Sprehe that he consumed two or three dime bags of PCP in the course of the evening, and that he did not remember anything about being at Jill’s house that night (RS. V4/618-619). According to Sprehe, Lucas was depressed and remorseful, and committed this murder while under the influence of an extreme mental or emotional disturbance due to the drugs he had ingested, and the consumption of drugs substantially impaired Lucas’s ability to conform his conduct to the requirements of law (RS. V4/619-620). Sprehe stated that, in his opinion, Lucas was intoxicated by the combination of drugs and alcohol, and could not premeditate a murder (RS. V4/621). He described the effects of PCP, including violent, impulsive behavior and sudden, extreme anger (RS. V4/621). On cross examination, Sprehe admitted that Lucas did not suffer from any serious mental illness, but most likely had an antisocial personality disorder (RS. V4/631).

The jury recommended the imposition of a death sentence for Jill Piper’s murder, by a vote of 11 - 1, and the trial court

again sentenced Lucas to death. On appeal, this Court found the trial court's sentencing order to be inadequate, and again vacated the death sentence and remanded the case. Lucas v. State, 568 So. 2d 18 (Fla. 1990). Upon remand, the court again imposed a death sentence, finding the prior violent felony convictions and heinous, atrocious or cruel aggravating circumstances, and enumerating several mitigation factors, including lack of significant criminal history, good prison conduct, good employment history, and history of drug abuse. On appeal from this resentencing, the imposition of the death sentence was upheld. Lucas v. State, 613 So. 2d 408 (Fla. 1992). Lucas thereafter sought certiorari review in the United States Supreme Court, but review was denied on October 4, 1993. Lucas v. Florida, 510 U.S. 845 (1993).

Lucas filed several motions for postconviction relief, the last of which was filed in January, 1999 (PC. V1/1-32). The state filed a response and a Huff hearing was held on July 6, 2000 (PC. V1/85-108). Following the Huff hearing, the court conducted an evidentiary hearing on Lucas' claims of ineffective assistance of counsel. The hearing commenced on August 29-30, 2000, and continued on October 24, 2000, before the Honorable William Nelson, Circuit Judge (PC. V3-V5).

At the hearing, Lucas' trial attorneys testified. Gene Taylor had graduated from law school and began working in the

Lee County Public Defender's Office in spring of 1974; Lucas's trial was in January, 1977 (PC. V3/160, 195). The Twentieth Circuit was relatively new, and had not had a public defender system until after Gideon was decided in the late 1960s (PC. V3/165-66). There were only a handful of attorneys in the office, and no one had experience with capital cases; there was no special training for capital litigation available (PC. V3/161, 164-65). Prior to Lucas's trial, Taylor had tried dozens of county court cases and a substantial number of felonies (PC. V3/196). Since 1977, he has tried about 18 capital cases, and noted that the Lucas case was not particularly complex in comparison (PC. V3/197).

Taylor worked this case with an investigator, Earl Perkins, and began the process of gathering information about the case by discussing it with Lucas (PC. V3/166, 197). He and Perkins both had extensive interviews with Lucas; the public defender's file, including transcripts of some of the interviews, was admitted into evidence at the hearing as State's Composite Exhibit 1 (PC. V3/198, 205). Taylor determined early in the case that any attempt to convince the jury that Lucas had not shot the victims would not be successful, and he focused on the intoxication defense (PC. V3/167-69). The primary goal, even at guilt phase, was to avoid the death penalty (PC. V3/169-70). However, Taylor believed that he had sufficient evidence of intoxication and

drug influence to overcome premeditation, and thought he had a good chance of convincing the jury this was not first degree murder (PC. V3/170).

Taylor acknowledged that there was some confusion as to the type of drug Lucas had purchased, it was either THC or PCP but they had difficulty determining which (PC. V3/167, 206-16, 261-63). He did not recall if he had consulted an expert in toxicology for more information, but he felt generally that most people would be familiar with the effects of the alcohol and marijuana described, and had the benefit of testimony from several witnesses about how the drugs were affecting Lucas prior to the shootings (PC. V3/167-68, 170-71, 264). The alcohol and marijuana use was clearly established, and the other drug was more exotic, less prevalent at that time (PC. V3/170-71). Taylor's testimony that the more esoteric drugs were not as well known back then, and there was not the emphasis on experts that there is today, was unrebutted (PC. V3/171). Even in hindsight, Taylor does not believe there would have been any way for him to have determined exactly what Lucas had consumed that night (PC. V3/261).

Lucas provided his defense team with several statements about the night of the offense, the first of which included a number of specific details relating directly to Jill's murder, such as his recall that the gun he was carrying used ten shells,

and was fully loaded, with long rifle hollow point bullets (PC. V3/222). According to that statement, Lucas shot Jill one time, when she approached him with a shotgun, and then he ran into the house, shot when he saw a pistol and shot at some noise behind the door, and ran out into the woods (PC. V3/220-224; V5/6440659). In another statement, Lucas denied having been to the Piper house at all that night; but he later retracted that statement (PC. V3/238-239; V5/670-680).

Public Defender Robert Jacobs represented Lucas at the 1987 resentencing proceeding (PC. V3/267). Jacobs had actually been an assistant in the public defender's office at the time of Lucas's initial trial, and has handled 16 - 20 capital trials before this one (PC. V3/268, 298). Jacobs received a recommendation from now-Judge Darryl Casanueva to hire Dr. Sprehe, a forensic psychiatrist that specialized in toxicology and had been successful in a similar case (PC. V3/271-72). Sprehe was highly credentialed and had been accepted as an expert over 3000 times in Florida (PC. V3/277). Jacobs also accepted strategy advice from the assistant public defender that had worked on Lucas's appeals, W.C. McClain (PC. V3/300-301). Even with the thirteen years of experience he has had since the resentencing, he could not think of anything that could have made a difference in the penalty phase other than the judge ruling in his favor and providing a jury instruction and

permitting testimony suggesting life imprisonment meant Lucas would not have a chance at parole (PC. V3/275-76).

Jacobs recalled arguing to the jury that Jill was only outside the house, thinking the testimony about her being inside was questionable (PC. V3/280-81). He also recalled arguing that the heinous, atrocious or cruel aggravating factor did not apply because one of the shots would have killed Jill instantaneously, and no one could identify the order in which the shots were fired (PC. V3/281). His main goal was to negate the aggravating factors; he was able to successfully negate the State's theory of a cold, calculated and premeditated murder by arguing that Lucas's use of PCP precluded heightened premeditation (PC. V3/283-284). In addition to Sprehe's testimony that Lucas's ability to premeditate was impaired and that both statutory mental mitigating factors were applicable, Jacob's efforts at mitigation focused on Lucas's disadvantaged childhood and drug and alcohol use (PC. V3/285-286). Jacobs did not think that any further crime scene investigation on his part, ten years after the murder, would have been meaningful (PC. V3/290-291).

When Jacobs reviewed the postconviction motion that had been filed alleging his ineffectiveness, he did not find any information that he had not known at the time of the resentencing (PC. V3/304). Jacobs did not believe Dr. Graves' testimony about the lack of physical evidence of blunt trauma to

Jill's head to indicate a beating had occurred would have been significant, given the fact that the injury to Jill's head from the gunshot could have obscured any otherwise observable head trauma (PC. V3/305). Jacobs felt that the evidence of Byrd having heard Jill screaming and the testimony of the defensive wounds she suffered diminished any meaning the lack of head trauma may have held (PC. V3/305-306).

Dr. Wallace Graves testified via deposition about his findings from Jill's autopsy (PC. V3/315-341). He stated that he did not see any evidence of a "dragging" from Jill's body or clothes, and he saw no physical evidence of Jill having been beaten, although he noted that she had a number of defensive wounds and abrasions on her fingers, hands, and arm (PC. V3/329-332, 336, 340, 351, 354). Graves reviewed some of the photos from the autopsy and could not detect any head injuries other than those caused directly by the gunshot wounds (PC. V3/328-332).

Lucas also presented the testimony of Dr. Jonathan Lipman, a neuropharmacologist from Chicago (PC. V4/384-385). Dr. Lipman testified extensively about the composition and effects of PCP (PC. V4/390-398). It is a disassociate anesthetic which, depending on the dose, can cause a drunken, euphoric feeling or cause hallucinations and delusions (PC. V4/390-393). Dr. Lipman explained that Lucas had ingested PCP rather than THC, and that

his appearance and behavior on the night of the murder was consistent with someone under the influence of PCP (PC. V4/399-400). Lipman put great emphasis on Lucas's inability to remember any of the details about the events at the Piper house in finding the PCP influence; he also noted that Lucas had a feeling of drunkenness and euphoria, glazed eyes, and was sweating and flushed (PC. V4/400, 413, 439, 445).

According to Dr. Lipman, there is no way to determine today how much PCP Lucas consumed on the day of the murder, although he stated that there were tests developed at the time that could have provided this information (PC. V4/407). Although the quantification would only be an estimate, Lipman believed it could have been helpful (PC. V4/408). Lipman had no doubt that Lucas's ability to form specific intent was profoundly affected, just based on the alcohol alone that Lucas had consumed (PC. V4/422).

Paul Kish, a forensic consultant from New York, was accepted as an expert in crime scene reconstruction (PC. V4/494-495). Kish reviewed photos and materials about the crime scene in this case, and reached three conclusions: that Jill's shooting took place outside; that there was no physical evidence that Jill had been dragged from the house into the yard; and that there was no evidence to indicate that Jill suffered a savage beating (PC. V4/498-501). Kish acknowledged that the physical evidence was

consistent with the description of the crime provided by Ricky Byrd's testimony (PC. V4/504-507).

The evidentiary hearing continued on October 24, 2000, and concluded with the testimony of Dr. Henry Dee, a clinical neuropsychologist (PC. V5/556, 571). Dr. Dee examined Lucas for purposes of this postconviction proceeding and administered a standard battery of psychological tests (PC. V5/572-573). He discussed Lucas's deprived childhood, history of drug use, and a head injury suffered in a car accident when Lucas was about eighteen years old (PC. V5/574-575). According to Dee, Lucas had low average intelligence and suffered memory deficits probably caused by brain damage from the car accident or drug use (PC. V5/577).

The trial court entered an extensive order denying the motion for postconviction relief on June 22, 2001 (PC. V7/862-906). The court made numerous factual findings from the testimony presented at the evidentiary hearing, and concluded that Lucas had failed to demonstrate either deficiency or prejudice with regard to his attorneys' performances during his initial trial and his 1987 resentencing (PC. V7/876-898). The court also explained its reasons for denying the legal claims presented in the postconviction motion which had not been subject to the evidentiary hearing (PC. V7/898-905). This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court properly denied Lucas' postconviction claims of ineffective assistance of counsel following the evidentiary hearing below. The court made factual findings which are supported by competent, substantial evidence, and entered legal conclusions consistent with applicable law. Since Lucas failed to demonstrate any deficiency or prejudice in the representation at his 1977 trial or his 1987 resentencing, he is not entitled to any relief.

The court below properly summarily denied Lucas' claim that the length of time he has spent on death row entitles him to a life sentence. This claim has been routinely rejected by state and federal courts as meritless.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING LUCAS'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOLLOWING THE EVIDENTIARY HEARING BELOW.

Lucas's first claim asserts that the court below erred in rejecting Lucas's argument that his trial attorneys provided ineffective assistance at his initial trial and his 1987 resentencing. This claim was denied following an evidentiary hearing. The denial of this claim involved the application of legal principles to the factual findings made below; this Court must review the factual findings for competent, substantial evidence, paying great deference to the trial court's findings, and review of the legal conclusions is de novo. Huff v. State, 762 So. 2d 476, 480 (Fla. 2000), cert. denied, 121 S. Ct. 785 (2001); Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

Of course, as the court below noted, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the

outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569.

The Eleventh Circuit sets out the basic law for assessing a lawyer's performance in Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000) (en banc) cert. denied, 121 S. Ct. 1217 (2001). Courts must indulge in a strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment. Id. at 1314 (internal marks omitted). A reviewing court's role in considering an ineffective assistance claim is not to "grade" a lawyer's performance, but only to determine

whether a lawyer's performance was within "the wide range of professionally competent assistance." See Strickland, 466 U.S. at 687.

The inquiry into whether a lawyer has provided effective assistance is an objective one: a defendant must establish that no objectively competent lawyer would have taken the action that his lawyer did take. See Chandler, 218 F.3d at 1315. Because the standard is objective, a defendant's argument that his counsel could have done more is not determinative. See id. at 1313 (stating that "lawyers, in every case, could have done something more"). The burden of establishing prejudice is also high; a defendant must establish that a reasonable probability exists that the outcome of the case would have been different if his lawyer had given adequate assistance. See Strickland, 466 U.S. at 687.

In this case, Lucas has offered allegations pertaining to two areas of disagreement with the trial and resentencing performances by counsel. First, he asserts that counsel could have precluded application of the heinous, atrocious, or cruel aggravating factor by challenging the evidence of Jill's beating during the murder. Second, he asserts that guilt phase counsel's presentation of the intoxication defense was ineffective, because counsel allegedly failed to determine the

particular drug which Lucas had consumed and failed to present expert testimony regarding the consequences of ingesting PCP. As will be seen, neither of these allegations provides any basis for disturbing the trial court's rejection of Lucas's ineffective counsel claims.

Lucas's conclusion that the evidentiary hearing testimony established that Jill had not been beaten is not supported by the totality of the evidence. Testimony at the evidentiary hearing focused on the lack of physical evidence of a beating noted at Jill's autopsy, and the alleged lack of evidence that Jill had been "dragged" outside the house after she retreated there following the initial shooting. Lucas presented the testimony of Paul Kish, a crime scene expert, and the deposition of Dr. Wallace Graves, the medical examiner, to provide this testimony. According to Kish, Jill was shot outside the house and there was no physical evidence to support any suggestion that Jill had been dragged outside, although she may have been pulled or carried out against her will (PC. V4/498-501, 527, 529). Kish agreed with Graves that Jill's autopsy did not reveal evidence of any injuries suffered in a "beating," although Graves acknowledged that Jill had defensive wounds on her hands and arm (PC. V3/328-334, 351; V4/507).

Although much of the focus in the testimony was to refute

any suggestion that Jill had been dragged outside the house, Lucas does not offer any significance for this testimony. The trial transcript does not reflect any testimony that Jill had, in fact, been "dragged" outside. In the State's closing argument, the prosecutor outlined Byrd's testimony about hearing Jill begging for her life, and then three more shots, and stated, "What happened? She either ran out of the house or she was drug out of the house. But we know that she was fighting in that house and she was begging for her life." (DA. V3/456). In this Court's description of the facts of the case, the opinion states that, after Terri and Ricky ran into the house, "The evidence is unclear as to what next occurred." 376 So. 2d at 1152. In light of the fact that the State has never suggested that Jill had been drug out of the house before the final shots were fired, it is curious that so much of the testimony at the evidentiary hearing focused on refuting this detail.

In fact, Lucas's expert testified that the crime scene he studied in this case was not inconsistent with any of the testimony from trial (PC. V4/504-07). That testimony supports the State's theory of how this murder occurred: Lucas, after lying in wait behind a wall at Jill's house, stepped out and shot her. After she ran into the house behind Terri and Ricky, Lucas followed her in and fought with her. Jill ran or was

taken back outside, and Lucas shot at her again, including a fatal shot to her head.

Similarly, the postconviction testimony noting the lack of any injuries from a beating is inconsequential. Clearly, Jill and Lucas were fighting, as evidenced by the sounds of the scuffle and the acknowledged defensive wounds. That no one can pinpoint exactly how severe or savage Jill's beating may have been would not have precluded the application of the heinous, atrocious or cruel factor, and does not offer any basis for a finding of deficient performance on this issue.

Byrd testified at trial that Jill was bleeding from the bullet wounds to her back when she ran in the house, yelling that she had been shot (DA. V2/280). He heard screaming, fighting, slapping, and begging before the final three shots (DA. V2/281). These facts, coupled with Dr. Graves' testimony about Jill's defensive wounds, provide more than ample support for the application of the heinous, atrocious, or cruel aggravating factor. See Hannon v. State, 638 So. 2d 39, 43 (Fla. 1994) (HAC upheld where victim suffered great fear and terror and was begging for life prior to being repeatedly shot).

At the resentencing, counsel argued that the heinous, atrocious or cruel factor should not be applied. He aggressively challenged this aggravator to the jury as well as

the judge. Presenting further testimony attempting to diminish the strength of the State’s evidence on this point would not have made any difference. The factor applied because Jill’s murder meets the definition of heinous, atrocious and cruel. On these facts, neither deficiency nor prejudice has been demonstrated with regard to this claim.

Lucas’s contention that guilt phase counsel was ineffective in his presentation of the defense that Lucas could not form the premeditation for first degree murder due to his consumption of drugs and alcohol is also unpersuasive. Lucas apparently has no quarrel with the actual defense selected and presented, he simply believes that more should have been done. Again, the focus of the evidentiary hearing was on a detail which again had little to do with the actual result obtained by the jury’s verdict.

Lucas criticizes his counsel’s failure to discover that the drug he had purchased from an unidentified woman from Miami was PCP, not THC as it was repeatedly identified as at trial. He offered testimony to establish that it may have been possible to determine exactly what drug Lucas may have ingested on the day of the murder from testing samples of Lucas’s hair. Defense counsel, however, had a clear strategy to appeal to the jury through the use of lay testimony about Lucas’s behavior that

night. Gene Taylor testified at the evidentiary hearing that he felt the jury could appreciate the affects of alcohol and marijuana. He had the benefit of abundant eyewitness testimony establishing that Lucas had been consuming drugs and alcohol all day, along with another illicit drug, and presented testimony describing Lucas as high as a kite, messed up, acting crazy, wasted, toasted (DA. V1/157, 167; V2/384). Danny Dowdal described an incident where Lucas kept putting his boot on and off, "too stoned" to do anything (DA. V2/357).

Whether Lucas was so messed up because he had taken PCP as opposed to THC is a difference without distinction. Although there is certainly a great deal of difference in medical terms between the two drugs and their effect on people, there is no difference in the way they relate to Lucas's defense. Based on the information available to him, Taylor determined that a complete intoxication defense suggesting that Lucas did not know what he was doing would not be successful due to the nature of the crime, and opted for a defense limited to negating the element of premeditation (PC. V3/180-182).

In addition, as Taylor testified at the evidentiary hearing, his investigation into trying to determine the exact drug Lucas had consumed was well within the bounds of reasonableness. Lucas and his friends were questioned about the purchase of the

drug they all identified as THC; all they could tell defense investigators was that a woman from Miami had come to Lucas's house and sold him a dime of a powder drug in tin foil packets, and that she came back later and sold him another dime (PC. V5/644-646, 668-670, 670-671, 681-682). The girl's name was Patty, but she was now in California and no one knew how to contact her (PC. V5/644, 671). In fact, it appears that Taylor may have recognized that Lucas took PCP rather than THC, since he asked the forensic chemist which the State presented in rebuttal about PCP being in a powder form, after the expert stated that THC was an oil (DA. V3/426-427).

Thus, it is clear that the testimony presented at the evidentiary hearing could not have added materially to Lucas's defense, either in guilt phase as to the additional information on PCP or in the penalty phase in an attempt to negate the heinous, atrocious, or cruel aggravating factor. No ineffectiveness of counsel is evident on these facts. Lucas's claim and the testimony from the postconviction hearing establish only that his current counsel disagree with trial counsel's strategic decision on this issue. This is not the standard to be considered. Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have

been considered and rejected"); Rose, 675 So. 2d at 570; Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result"); Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994), cert. denied, 525 U.S. 1159 (1999); State v. Bolender, 503 So. 2d 1247, 1250 (Fla.), cert. denied, 484 U.S. 873 (1987). In reviewing Lucas's claims, this Court must be highly deferential to counsel:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689; see also Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were

inadequate or prejudicial"); Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); Stano v. State, 520 So. 2d 278, 281, n. 5 (Fla. 1988) (noting fact that current counsel, through hindsight, would now do things differently is not the test for ineffectiveness).

Furthermore, even if this case had been tried as collateral counsel insists it should have been, the result would not have been any different. Lucas committed a senseless murder of a sixteen year old girl, and shot the two friends that had stayed with her to try to protect her. His actions fully supported both aggravating factors, and nothing has been offered in mitigation during postconviction that was not known at the time of Lucas's resentencing.

In order to establish prejudice to demonstrate a Sixth Amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty. Strickland, 466 U.S. at 694. The aggravating factors found in this case were: prior violent felony convictions, and heinous, atrocious, or cruel. Lucas has not and cannot meet the standard required to prove that his attorneys were ineffective when the facts to support these aggravating factors are considered.

Thus, the investigation and presentation of the guilt phase

defense and mitigating evidence in this case were well within the realm of constitutionally adequate assistance of counsel. Trial counsel conducted a reasonable investigation, presented appropriate evidence, and forcefully argued for the jury to convict Lucas of a lesser offense and to recommend sparing his life. There has been no deficient performance or prejudice established in the way Lucas was represented at any stage of his trial. On these facts, Lucas has failed to demonstrate any error in the denial of his claims that his attorneys rendered ineffective assistance of counsel. This Court must affirm the denial of relief.

<u>ISSUE II</u>

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING LUCAS'S CLAIM THAT THE LENGTH OF TIME HE HAS SPENT ON DEATH ROW COMPELS THAT HIS SENTENCE BE REDUCED TO LIFE.

Lucas next asserts that he is entitled to have his death sentence vacated due to the amount of time that he has spent on death row since his 1977 conviction. He claims that executing him after 24 years on death row would constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution. The trial court determined that this was a legal issue, not subject to an evidentiary hearing, and denied the claim as contrary to Florida law (PC. V7/898-901). This is a purely legal claim which must be reviewed de novo.

The trial court's ruling on this issue was correct. This claim has been repeatedly denied as meritless, and Lucas offers no basis for disregarding the clear precedent against him. <u>See</u> <u>Rose v. State</u>, 787 So. 2d 786, 805 (Fla. 2001); <u>Booker v. State</u>, 773 So. 2d 1079, 1096 (Fla. 2000); <u>Knight v. State</u>, 746 So. 2d 423, 437 (Fla. 1998), <u>cert. denied</u>, 528 U.S. 990 (1999). In <u>Booker</u>, this Court rejected an identical argument for a defendant that had spent over two decades on death row. In denying Booker's claim, the Court relied on its previous opinion in <u>Knight</u>:

> Although Knight makes an interesting

> argument, we find it lacks merit. As the State points out, no federal or state courts have accepted Knight's argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay. See, e.g., White v. Johnson, 79 F.3d 432 (5th Cir. 1996); State v. Smith, 280 Mont. 158, 931 P.2d 1272 (Mont. 1996). We also note that the Arizona Supreme Court recently rejected this precise claim. See State v. Schackart, 190 Ariz. 238, 947 P.2d 315, 336 (Ariz. 1997) (finding "no evidence that Arizona has set up a scheme prolonging incarceration in order to torture inmates prior to their execution"), cert. denied, ___ U.S. ___, 119 S.Ct. 149, ___ L.Ed.2d ___ (1998).

Booker, 773 So. 2d at 1096 (quoting Knight, 746 So. 2d at 437). Although recognizing a denial of certiorari is not an adjudication on the merits, Justice Thomas's concurrence in Knight is enlightening. As opined:

> I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.
>
> . . . .
>
> It is worth noting, in addition, that, in most cases raising this novel claim, the delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence. . . . Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence. See Coleman v. Balkcom, 451 U.S. 949, 952, 101 S. Ct. 2031,

> 68 L. Ed. 2d 334 (1981) (STEVENS, J., concurring in denial of certiorari) ("However critical one may be of . . . protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution"). It is incongruous to arm capital defendants with an arsenal of "constitutional" claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed.

Knight, 528 U.S. 990-91 (Thomas, J., concurring). If this Court were to vacate a death sentence merely because of a delay caused by a defendant exercising his constitutional rights, it would be the convicted felon controlling the judicial process, not the courts. Through no fault of its own, the State could be deprived of a lawful sentence.

Lucas asserts that the court below should have held an evidentiary hearing on this claim. However, there are no disputed facts relevant to the issue. The court below properly took judicial notice of the record in this case, and the procedural history since Lucas's 1977 convictions is well documented. Lucas suggests that, if given a hearing, he would offer evidence that the crime occurred in 1976 and that Lucas has been on death row since 1977, while his conviction did not become final until 1993. He also would proffer testimony about his suffering on death row and the differences between a death sentence and a life sentence in general population. None of

these facts would affect the denial of relief. The court below was well aware of the time that Lucas has spent on death row, and no one has suggested that Lucas's life has not been impacted by this time. Notwithstanding these facts, this claim is facially invalid because it is premised on an argument which has been repeatedly rejected in state and federal court.

Lucas's assertion that the court below failed to offer any rationale for summarily rejecting this issue is clearly refuted by the order denying his postconviction motion, which plainly states that this claim is contrary to Florida law (PC. V7/899). Since the claim is facially invalid and the court below explained its reason for denying the claim, it was not necessary for the court to conduct an evidentiary hearing or to attach portions of the record which refute the claim in order to properly summarily deny the issue. Asay v. State, 769 So. 2d 989 (Fla. 2000); Diaz v. Dugger, 719 So. 2d 865, 867 (Fla. 1998). Accordingly, this Court must find that Lucas's constitutional rights have not been violated and affirm the summary denial of this issue.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's denial of postconviction relief must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Robert T. Strain, Assistant Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida, 33619, this _____ day of May, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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COUNSEL FOR APPELLEE