

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-314

HAROLD GENE LUCAS,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Lucas was deprived of the right to a fair, reliable trial and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to as "PC-R. ___" followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

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INTRODUCTION

Significant errors which occurred at Mr. Lucas' capital trial and re-sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Lucas. "[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on in direct appeal, but should now be revisited in light of subsequent case law or in order to correct error in the

appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Lucas is entitled to habeas relief.

**JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF**

This is an original action under Fla.R.App.P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. The Petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Lucas' sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Lucas' direct appeals. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Lucas to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla.

1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Lucas' claims.

GROUND FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Lucas asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

LUCAS I

Harold Gene Lucas was indicted August 30, 1976, and charged

with one count of first-degree murder and two counts of attempted first-degree murder for the August 14, 1976, shootings of Jill Piper, Richard Byrd, and Terri Rice in Bonita Springs, Florida. (R1. 549)¹ Ms. Piper died and Mr. Byrd and Ms. Rice recovered from their wounds. Mr. Lucas was, thereafter, convicted as charged. (R1. 683) After the jury recommended a sentence of death, the trial court sentenced Mr. Lucas to death February 9, 1977. (R1. 683) Additionally, Mr. Lucas was sentenced to thirty years imprisonment on each of the two convictions for attempted murder, those sentences to run consecutively. Id. To support its imposition of the death sentence, the trial court found two aggravating circumstances. (R1. 677-682) First, the court found a prior conviction for a felony involving use or threat of violence to persons (Mr. Lucas' contemporaneous attempted murder convictions.)² Id. Secondly, the court found that the offense was heinous, atrocious, and cruel. Id. As a mitigating circumstance, the court found that Mr. Lucas had no significant prior criminal history. Id. On direct appeal, the Florida Supreme Court

¹R1 refers to the Record on Appeal in Lucas v. State, 376 So. 2d 1149 (Fla. 1979).

²This aggravating circumstance was not specifically found by the trial court but was found by the Florida Supreme Court. Lucas v. State, 376 So. 2d 1149 (Fla. 1979)

remanded the case for re-sentencing on the ground that the trial court erroneously considered as two non-statutory aggravating circumstances, the heinous, atrocious nature of the attempted murders. Lucas v. State, 376 So. 2d 1149 (Fla. 1979).

LUCAS II

Upon remand, the trial court sentenced Mr. Lucas to death. Again, upon appeal, the Florida Supreme Court determined that the trial court failed to use reasoned judgment in re-weighing the aggravating and mitigating circumstances and remanded the case to the trial court. Lucas v. State, 417 So. 2d 250 (Fla. 1982).

LUCAS III

On the next remand, the trial court, now presided over by Judge Reese (the original trial judge having died), denied Mr. Lucas' request for a new jury trial and for permission to present additional evidence. (R2. 400-403) The trial court again sentenced Mr. Lucas to death without a jury trial, finding as aggravating circumstances: (1) a prior conviction of a felony involving the use or threat of violence to persons, (2) the great risk of death to many persons, and (3) a heinous, atrocious, or cruel act. (R2. 400-403)³ In mitigation, the trial

³R2 refers to the Record on appeal in Lucas v. State, 490 So.2d 943 (Fla. 1986).

court found a lack of significant prior criminal history. Id.

The Florida Supreme Court reversed, holding that a jury should have heard evidence in a new penalty phase. Lucas v. State, 490 So. 2d 943 (Fla. 1986).

The court also struck the aggravating circumstance of creating a great risk of death to many people. Id.

Thus, Mr. Lucas' case was remanded "for a complete new sentencing proceeding before a newly impaneled jury." Id. at 946.

LUCAS IV

On remand, the second penalty phase trial was held and the jury recommended a sentence of death. (R3. 888)⁴ The trial court followed the jury's recommendation, finding as aggravating circumstances: (1) the prior conviction of a felony involving the use or threat of violence to persons, and (2) that the crime was heinous, atrocious, or cruel.⁵

On direct appeal, the Florida Supreme Court found that the finding of a heinous, atrocious, or cruel act could also have been a finding that the offense had been committed in a cold, calculated, and premeditated fashion. Lucas v. State, 568 So.

⁴R3 refers to the Record on Appeal in Lucas v. State, 568 So. 2d 18 (Fla. 1990).

⁵This finding is somewhat difficult to distill from the Sentencing Order.

2d 18 (Fla. 1990). Therefore, because the trial court's order was unclear both as to its findings of aggravation and in mitigation, the Florida Supreme Court remanded the case to the trial court for reconsideration and rewriting of its findings of fact. Lucas v. State, 568 So. 2d 18 (Fla. 1990). Further, the Florida Supreme Court found, as a matter of law, that the aggravating circumstance of cold, calculated, and premeditated could not be supported by the evidence. Id.

LUCAS V

On remand, the trial court refused to allow the presentation of additional testimony and prepared its findings of fact in advance of the sentencing hearing. (R4. 93-116)⁶ Finding two aggravating circumstances, (1) the prior conviction for a felony involving use or threat of violence to persons and (2) the heinous, atrocious, or cruel quality of the crime, the trial court sentenced Mr. Lucas to death for a fifth time. (R4. 965-982) The court also found several mitigating circumstances: (1) that Mr. Lucas had no significant prior criminal history, (2) that Mr. Lucas acted under an extreme mental or emotional disturbance at the time of the offense (very little weight), that Lucas acted under extreme duress at the time of the offense

⁶R4 refers to the Record on Appeal in Lucas v. State, 613 So. 2d 408 (Fla. 1992).

(no meaningful weight), (4) that Mr. Lucas' ability to conform his conduct to the requirements of law was substantially impaired at the time of the offense (supported by some evidence but not enough to counterbalance either aggravating factor), (5) that Mr. Lucas committed the offense as the result of emotion and passion (incapable of mitigating the defendant's punishment because no CCP), (6) that Mr. Lucas' conduct while in prison was good, (7) that Mr. Lucas had been rehabilitated while in prison (little weight), (8) that Mr. Lucas was the victim of alcohol and drug abuse (reflection of lifestyle and character but does not reduce moral culpability), and (9) that prior to the offense Mr. Lucas had maintained gainful employment. (R4. 965-982)⁷

In 1992, the Florida Supreme Court upheld the death sentence. Lucas v. State, 613 So. 2d 408 (Fla. 1992). The United States Supreme Court subsequently denied a timely filed petition for writ of certiorari on October 4, 1993. 510 U.S. 845 (1993).

POSTCONVICTION

Mr. Lucas filed motions under Fla.R.Crim.P. 3.850 on October 3, 1994, August 22, 1995, October 3, 1995, and January 19, 1999,

⁷The Sentencing Order is arguably ambiguous as to whether 3, 4, and 5 were found by the trial court.

the last of which amended and supplanted the earlier motions. (PC-R. Vol. I - 001-032). The State of Florida's response to the last amended motion was filed on June 25, 1999. On July 6, 2000, the trial court conducted a hearing under Huff v. State, 622 So.2d 982 (Fla. 1993). (PC-R. Vol. I - 085-108).

The trial court conducted an Evidentiary Hearing on ineffective assistance of counsel claims presented in Claims I and II of the amended Rule 3.850 motion. Testimony and evidence were presented on August 29, August 30 and October 24, 2000.

On June 22, 2001, the trial court entered its Order Denying Amended Motion to Vacate Judgments of Conviction and Sentences. (PC-R. Vol. VII - 862-906). A timely appeal was filed with the trial court on July 19, 2001, which appeal is now properly before this Court. This petition is being filed simultaneously with the Rule 3.850 appeal pursuant to Fla.R.App.P. 9.140(b)(6)(E).

CLAIM I

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In Jones v. United States, the United States Supreme Court held "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi, 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi, 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the

Florida death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury during guilt phase, and proven beyond a reasonable doubt by a unanimous verdict.

At the time of Harold Gene Lucas' re-sentencing, Florida statute 775.082 provided:

A person who has been convicted of a capital felony **shall be punished by life imprisonment** and shall be required to serve no less than 25 years before becoming eligible for parole **unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.**

§775.082 Fla. Stat. (1987) (emphasis added). Under this statute, the state must prove at least one aggravating factor in the separate penalty phase proceeding before a person convicted of first degree murder is eligible for the death penalty. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat., §775.082 (1994); §921.141(2)(a), (3)(a) Fla. Stat. (1994). Thus, Florida capital defendants are not eligible for the death sentence simply upon conviction of first degree murder. If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. §775.082 Fla. Stat. (1994). Therefore, under Florida law, the death sentence is not within

the statutory maximum sentence, as analyzed in Apprendi, because it increased the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

Under the Florida death penalty scheme there are essentially two levels of first degree murder. The first, conviction for first degree premeditated murder or felony murder permits a life sentence. The second, if aggravating circumstances are proved beyond a reasonable doubt, the person so convicted can be sentenced to death. Thus, the Florida death penalty system divides murders into two categories, analogous to felony battery and aggravated battery. Felony battery, which is punished as a third degree felony, becomes aggravated battery, punished as a second degree battery, upon proof of certain aggravating circumstances. §§784.041, 784.045 Fla. Stat. (1999). These circumstances which increase felony battery from a third degree felony to a second degree felony of aggravated battery are elements of the crime which must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt by a unanimous verdict.

Likewise, the Florida death penalty aggravating circumstances, which elevate a murder punishable by a life

sentence to a murder punishable by death, must be charged in the indictment, submitted to the jury, and must be proved beyond a reasonable doubt. No other crimes in Florida allow increased punishments based on additional findings (other than prior conviction) made by a judge; Apprendi disallows this practice.

In Apprendi, the hate crime sentencing enhancement was applied after the defendant was found guilty and increased the statutory maximum penalty by up to ten years. Apprendi, 120 S.Ct. at 2351. The Apprendi court clearly dispensed with the fiction that such an enhancement was not an element which received Sixth Amendment protections. The Court wrote "[b]ut it can hardly be said that the potential doubling of one's sentence from 10 years to 20-has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the severe stigma attached, the differential here is unquestionably of constitutional significance." Apprendi, 120 S.Ct. at 2365. As in Apprendi, in Harold Gene Lucas' case, the aggravators were applied only after he was found guilty. The aggravators increased the statutory maximum penalty based on the guilty verdict from life imprisonment to death. Certainly, the difference between life and death has more than nominal effect and is of constitutional significance. "[T]he penalty of death is qualitatively different from a sentence of imprisonment,

however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1975). See Gardner v. Florida, 430 U.S. 349, 357 (1976).

Though Apprendi involved two separate statutes and the Florida death penalty involves only one, the issue is substance over form. Apprendi 120 S.Ct. at 2350, 2365; §921.141 Fla. Stat. (1999). The effect of the Florida death penalty statute is similar to the effect of the federal car jacking statute the United States Supreme Court addressed in Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Three subsections of the Jones statute appeared, superficially, to be sentencing factors. However, the superficial impression lost clarity when the Court examined the effects of the sentencing factors.

But the superficial impression loses clarity when one looks at the penalty subsections (2) and (3). These not only provide for steeply higher penalties, but they condition them on further acts (injury, death) that seem quite as important as the elements in the principle paragraph (e.g. force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range from 15 years to life, was meant to carry none of the process safeguards that elements of the offense bring with them for a defendant's benefit.

Jones, 526 U.S. at 233. Because the car jacking sentencing factors increased the maximum penalty for the crime from 15

years to 25 years or life imprisonment, the Court interpreted them as elements of the crime which receive Sixth Amendment protection. Jones, 526 U.S. at 230, 242-43.

Although the majority of the Court stated in dicta that Apprendi did not overrule Walton v. Arizona, 497 U.S. 639 (1990), the Apprendi court was not addressing a death case in which constitutional protections are more rigorously applied, and Apprendi did not specifically address the Florida sentencing scheme. Apprendi, 120 S.Ct. at 2366. Moreover, the majority dicta did not carry the force of an opinion of the full court. See Apprendi, 120 S.Ct. at 2380 (Thomas J., concurring) ("Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day."); Apprendi, 120 S.Ct. at 2387-88 (O'Connor, J., dissenting) ("If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.") Apprendi, 120 S.Ct. 2388.

Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, at 2365. This did not occur in Harold Gene

Lucas' case. Thus, the Florida death penalty scheme is unconstitutional as applied.

Mr. Lucas argues that Apprendi overruled Walton and relies upon the five-to-four split in the Court. Four justices stated in dissent that Apprendi effectively overruled Walton and another justice, in his concurring opinion, stated that reconsideration of Walton was left for another day. However, with the majority of the justices refusing to disturb the rule of law announced in Walton, Mr. Lucas recognizes that this Court has consistently rejected similar claims within the past year. See King v. State, 27 Fla.L.Weekly S65 (Fla. Jan. 16, 2002), stay granted, No. 01-7804 (U.S. Jan. 23, 2002); Mills v. Moore, 786 So.2d 532, 536-537 (Fla. 2001), cert. denied 121 S.Ct. 1752 (2001); Brown v. Moore, 26 Fla.L.Weekly S742 (Fla. Nov. 1, 2001); and Mann v. State, 794 So.2d 596, 599 (Fla. 2001).

On January 31, 2002, this Court denied the petitioner Apprendi relief in Bottoson v. Moore, ___ So.2d ___ (Fla. Jan. 31, 2002), in accordance with the ruling in King. At the same time, this Court recognized that the United States Supreme Court has granted certiorari review in State v. Ring, 25 P.3d 1139 (Ariz. 2001), cert. granted, 122 S.Ct. 865 (2002) on the Apprendi issue involving similar state laws. The United States Supreme Court has now issued a stay of execution in Bottoson

pending its disposition of a petition for writ of certiorari in which the Apprendi issue was raised and which referred to the Ring grant of certiorari. Bottoson v. Moore, ___ So.2d ___ (Fla. Jan. 31, 2002), stay granted, No. 01-8099 (U.S. Feb. 5, 2002).

Even if prior presentation of the issue is required in order to receive the benefit of Apprendi, see James v. State, 615 So.2d 668 (Fla. 1993), Mr. Lucas is still entitled to the benefit of Apprendi under Witt v. State, 387 So.2d 922, 929-930 (Fla. 1980).

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Harold Gene Lucas respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by U.S. Mail, first class postage prepaid, to Carol M. Dittmar, Assistant Attorney General, Office of the Attorney General, Westwood Building, Seventh Floor, 2002 North Lois Avenue, Tampa, Florida 33607 and Harold Lucas, DOC# 058279; P5110S, Union Correctional Institution, Post Office Box 221, Raiford, Florida 32083 on this _____ day of February, 2002.

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CERTIFICATE OF COMPLIANCE

We hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Courier New 12-point font pursuant to Fla.R.App.P. 9.210.

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