

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-314

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HAROLD GENE LUCAS,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent.

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REPLY TO STATE'S RESPONSE TO  
PETITION FOR WRIT OF HABEAS CORPUS

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ROBERT T. STRAIN  
ASSISTANT CCRC  
FLORIDA BAR NO. 325961

ELIZABETH A. WILLIAMS  
STAFF ATTORNEY  
FLORIDA BAR NO. 0967350

CAPITAL COLLATERAL REGIONAL  
COUNSEL - MIDDLE  
3801 CORPOREX PARK DRIVE  
SUITE 210  
TAMPA, FL 33619-1136  
(813) 740-3544

COUNSEL FOR PETITIONER

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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. THE JUDGMENTS AND SENTENCES OF DEATH IN THIS CASE MUST BE VACATED IN LIGHT OF *RING V. ARIZONA*.

The State of Florida served its response to this petition on May 14, 2002. Thereafter, the United States Supreme Court decided *Ring v. Arizona*, 122 S.Ct. 2428, ----, 2002 WL 1357257 on June 24, 2002. For the following reasons, the Respondent's analysis is incorrect and in error.

In *Ring*, the United States Supreme Court held that the Arizona statute violates the Sixth Amendment right to a jury trial in capital prosecutions because the trial judge, sitting

alone and following a jury adjudication of a defendant's guilt of first-degree murder, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty; receding from *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The court noted that the "right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished" if it encompassed the fact-finding necessary to increase a noncapital defendant's sentence by a term of years, as was the case in *Apprendi*, but not the fact-finding necessary to put him to death. *Ring v. Arizona*, 2002 WL 1357257 \*10.

Florida's death penalty statutory scheme facially violates the Federal Constitution. In Florida, death is not within the maximum penalty for a conviction of first degree murder:

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.

Fla. Stat. § 775.082 (1984). The statutory scheme does not permit a sentence greater than life predicated on the jury verdict alone. A penalty phase must then be conducted under § 921.141. While the jury gives a recommendation, it is the judge who makes the findings and imposes the sentence.

In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the United States Supreme Court recognized that for purposes of the Sixth Amendment, Florida's death penalty statute is indistinguishable from the statute invalidated in *Ring*:

We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (*per curiam*); *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In *Hildwin*, for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638, 109 S.Ct., at 2056, and we ultimately

concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 640-641, 109 S.Ct., at 2057.

The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

*Id.* 647-48. The Court reiterated this Sixth Amendment link between the Florida and Arizona capital sentencing schemes in Ring:

In *Walton v. Arizona*, 497 U.S. 639 (1990), we upheld Arizona's scheme against a charge that it violated the Sixth Amendment. The Court had previously denied a Sixth Amendment challenge to Florida's capital sentencing system, in which the jury recommends a sentence but makes no explicit findings on aggravating circumstances; we so ruled, *Walton* noted, on the ground that 'the Sixth Amendment does not require that specific findings authorizing the imposition of the sentence of death be made by the jury' *Id.* at 648 (quoting *Hildwin v. Florida*, 490 U.S. 638, 640-641 (1989)(*per curium*). *Walton* found unavailing attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to *Walton*, were the aggravating factors 'elements of the offense'; in both

States, they ranked as 'sentencing considerations' guiding the choice between life and death. 497 U.S. at 648 (internal quotation marks omitted).

*Ring v. Arizona*, 2002 WL 1357257 \*9 (U.S.). The parallelism between the Arizona statute and the Florida statute was the major *Walton* theme. *Walton, supra*, 497 U.S. at 640-641, 647.

In *Ring*, the State and its *amici* agreed that overruling *Walton* necessarily meant Florida's statute falls. See Brief of Respondent in *Ring* at 31, Tr. of Oral Arg. at 36, and Brief *Amicus Curiae* of Criminal Justice Legal Foundation at 21-22.

Notably, this Court has previously held that, "[b]ecause *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." *Mills v. Moore*, 786 So.2d 532, 537 (Fla. 2001). *Ring* overruled *Walton* and the basic principle of *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*), which had upheld the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" *Ring*, slip op. at 11 (quoting *Walton*, 497 U.S. at 648, in turn quoting *Hildwin*, 490 U.S. at 640-641)).

Additionally, *Ring* undermines the reasoning of this Court's decision in *Mills* by recognizing (a) that *Apprendi* applies to

capital sentencing schemes,<sup>1</sup> *Ring*, slip op. at 2 (“Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment”); *id.* at 23, (b) that States may not avoid the Sixth Amendment requirements of *Apprendi* by simply “specif[ying] ‘death or life imprisonment’ as the only sentencing options,”<sup>2</sup> *Ring*, slip op. at 17, and (c) that the relevant and dispositive question is whether under state law death is “authorized by a guilty verdict standing alone.” *Ring*, slip op. at 19.

Under Florida law, the court conducts a separate sentencing proceeding after which the jury renders an advisory verdict. Fla.Stat. § 921.141. The ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance. The jury recommends a sentence but makes no explicit findings on aggravating circumstances. The statute is explicit that, without these required findings of

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<sup>1</sup> In *Mills*, The Florida Supreme Court said that “the plain language of *Apprendi* indicates that the case is not intended to apply to capital [sentencing] schemes.” *Mills*, 786 So.2d at 537. Such statements appear at least four times in *Mills*.

<sup>2</sup> *Mills* reasoned that because first-degree murder is a “capital felony,” and the dictionary defines such a felony as “punishable by death,” the finding of an aggravating circumstance did not expose the petitioner to punishment in excess of the statutory maximum. *Mills*, 786 So.2d at 538.

fact by the trial judge, the defendant must be sentenced to life imprisonment: "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose [a] sentence of life imprisonment."

Because the Florida death penalty statutory scheme thus requires fact-finding by the trial judge before a death sentence may be imposed, it is unconstitutional under the holding and rationale of *Ring*.

This Court has previously rejected the idea that a defendant convicted of first degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." *Engle v. State*, 438 So.2d 803, 813 (Fla. 1983), explained in *Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The statute specifically requires the judge to "set forth . . . findings upon which the sentence of death is based as to the *facts*," but asks the jury generally to "render an advisory sentence . . . based upon the following *matters*" referring to the sufficiency of the aggravating and mitigating circumstances. Fla. Stat. § § 921.141(2) & (3) (emphasis added). Because Florida law does not require that any number of jurors agree that the State has proven the existence of a given aggravating circumstance before it may be deemed

"found," it is impossible to say that "the jury" found proof beyond a reasonable doubt of a particular aggravating circumstance. Thus, "the sentencing order is 'a statutorily required personal evaluation by the trial judge of the aggravating and mitigating factors' that forms the basis of a sentence of life or death." *Morton v. State*, 789 So.2d 324, 333 (Fla. 2001) [quoting *Patton v. State*, 784 So.2d 380 (Fla. 2000)].

As the Supreme Court said in *Walton*, "[a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton*, 497 U.S. at 648. This Court has made the point even more strongly by repeatedly emphasizing that the trial judge's findings must be made independently of the jury's recommendation. See *Grossman v. State*, 525 So.2d 833, 840 (Fla. 1988) (collecting cases). Because the judge must find that "sufficient aggravating circumstances exist" "notwithstanding the recommendation of a majority of the jury," Fla. Stat. § 921.141(3), she may consider and rely upon evidence not submitted to the jury. *Porter v. State*, 400 So.2d 5 (Fla. 1981); *Davis v. State*, 703 So.2d 1055, 1061 (Fla. 1997). The judge is also permitted to consider and rely upon aggravating circumstances that were not submitted to the jury. *Davis*, 703

So.2d at 1061, citing *Hoffman v. State*, 474 So.2d 1178 (Fla. 1985) (court's finding of "heinous, atrocious, or cruel" aggravating circumstance proper though jury was not instructed on it); *Fitzpatrick v. State*, 437 So.2d 1072, 1078 (Fla. 1983) (finding of previous conviction of violent felony was proper even though jury was not instructed on it); *Engle, supra*, 438 So.2d at 813.

Although "[Florida's] enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury like any other element of an offense, *Ring*, slip op. at 23 (quoting *Apprendi*, 530 U.S. at 494), Florida law does not require the jury to reach a verdict on any of the factual determinations required before a death sentence could be imposed. Section 921.141(2) does not call for a jury verdict, but rather an "advisory sentence." This Court has made it clear that "the jury's sentencing recommendation in a capital case is *only advisory*. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances . . . ." *Combs*, 525 So.2d at 858 (quoting *Spaziano v. Florida*, 468 U.S. 447, 451) (emphasis original in *Combs*). "The trial judge . . . is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence." *Engle*, 438 So.2d at 813.

Because Florida law does not require any two, much less twelve, jurors to agree that the government has proved an aggravating circumstance beyond a reasonable doubt, or to agree on the same aggravating circumstances when advising that "sufficient aggravating circumstances exist" to recommend a death sentence, there is no way to say that "the jury" rendered a verdict as to an aggravating circumstance or the sufficiency of them. As Justice Shaw observed in *Combs*, Florida law leaves these matters to speculation. *Combs*, 525 So.2d at 859 (Shaw, J., concurring).

In Florida, additionally, the advisory verdict is not based on proof beyond a reasonable doubt. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." *Ring*, slip op. at 16. One of the elements that had to be established for Lucas to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. Fla.Stat. § 921.141(3).<sup>3</sup> The jury was not instructed

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<sup>3</sup> It is important to note that although Florida law requires the judge to find that sufficient aggravating circumstances exist to form the basis for a death sentence, Fla. Stat. § 921.141(3), it only asks the jury to say whether sufficient aggravating circumstances exist to "recommend" a death sentence. Fla. Stat. § 921.141(2).

that it had to find this element proved beyond a reasonable doubt. In fact, it was not instructed on any standard by which to make this essential determination.

Furthermore, a unanimous twelve member jury verdict is required in capital cases under United States Constitutional Common Law.<sup>4</sup> Florida's capital sentencing statute is, therefore, unconstitutional on its face and as applied.<sup>5</sup>

"[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and

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<sup>4</sup> In *Cabberiza v. Moore*, 217 F.3d 1329 (C.A.11 Fla., 2000) the court noted that the United States Supreme Court "has not had occasion to decide how many jurors, and what degree of unanimity, the Sixth and Fourteenth Amendments require in capital cases." *Id.* n.15. *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Apodaca v. Oregon*, 406 U.S. 404 (1972) were noncapital cases. Both cases cite in their first footnotes the applicable state constitutional provisions, which require twelve person unanimous juries in capital cases. The Florida constitution likewise requires twelve person unanimous juries in capital cases.

<sup>5</sup> The sentencing recommendations in this case were not unanimous.

neighbours...." 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769) (cited in *Apprendi* (by its terms a noncapital case)).

It would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the fact-findings required for a death sentence, because the statute requires only a majority vote of the jury in support of that advisory sentence. In *Harris v. United States*, 2002 WL 1357277, No. 00-10666 (U.S. June 24, 2002), rendered on the same day as *Ring*, the United States Supreme Court held that under the *Apprendi* test "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." *Id.* at \*14. And in *Ring*, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. In other words, pursuant to the reasoning set forth in *Apprendi*, *Jones*, and *Ring*, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

In *Williams v. Florida*, 399 U.S. 78, at 103 (1970), the United States Supreme Court noted that: "In capital cases, for example, it appears that no state provides for less than 12

jurors—a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society’s decision to impose the death penalty.” Each of the thirty-eight states that use the death penalty require unanimous twelve person jury convictions.<sup>6</sup> In its 1979 decision reversing a non-unanimous six person jury verdict in a non-capital case, the United States Supreme Court held that “We think this near-uniform judgement of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.” *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The federal government requires unanimous twelve person jury verdicts. “[T]he jury’s decision upon both guilt and whether the punishment of death should be imposed must

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<sup>6</sup> Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. §16-32-202; Cal. Const. Art. 1, §16; Colo. Const. Art 2, §23; Conn. St. 54-82(c), Conn.R.Super.Ct.C.R. §42-29; Del. Const. Art. 1, §4; Fla. Stat. Ann. § 913.10(1); Ga. Const. Art. 1, §1, P XI; Idaho. Const. Art. 1, §7; Ill. Const. Art. 1, §13; Ind. Const. Art. 1, §13; Kan. Const. Bill of Rights §5; Ky. Const. §7, Admin.Pro.Ct.Jus. A.P. 11 §27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5 ; Miss. Const. Art. 3, §31; Mo. Const. Art. 1, §22a; Mont. Const. Art. 2, §26; Neb. Rev. St. Const. Art. 1, §6; Nev. Rev. Stat. Const. Art. 1, §3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 §12; N.Y. Const. Art. 1, §2; N.C. Gen. Stat. Ann. §15A-1201; Ohio Const. Art. 1, §5; Okla. Const. Art. 2, §19; Or. Const. Art. 1, §11, Or. Rev. Stat. §136.210; Pa. Stat. Ann. 42 Pa.C.S.A. §5104; S.C. Const. Art. V, §22; S.D. ST §23A-267; Tenn. Const. Art.1, §6; Tex. Const. Art.1, §5; Utah Const. Art. 1 §10; Va. Const. Art. 1, §8; Wash. Const. Art. 1, §21; Wyo. Const. Art. 1, §9.

be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system." *Andres v. United States*, 333 U.S. 740, 749 (1948). See generally Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of The Unanimity Rule For Criminal Juries*, 18 Cardozo L. Rev. 1417 (1997).

*Ring* also held that the existence of at least one statutory aggravating circumstance must be proven to a jury beyond a reasonable doubt. In essence, the aggravating circumstance is an essential element of a new crime that might be called "aggravated" or "death-eligible" first degree murder. The death recommendation in this case was not unanimous.

Florida requires that verdicts be unanimous.<sup>7</sup> Although Florida's constitutional guarantee of a jury trial [Art. I, §§ 16, 22, Fla. Const.] has never been interpreted to require a unanimous jury verdict, it has long been the legal practice of this state to require such unanimity in all criminal jury trials; Fla.R.Crim.P. 3.440 memorializes this long-standing practice: "[n]o [jury] verdict may be rendered unless all of the trial jurors concur in it." It is therefore settled that "[i]n

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<sup>7</sup> At least absent a waiver initiated by the defendant. *Flanning v. State*, 597 So.2d 864 (Fla. 3d DCA 1992). See *Nobles v. State*, 786 So.2d 56, (Fla. 4<sup>th</sup> DCA 2001) certifying question. *Flanning* is flatly inconsistent with *Jones*.

this state, the verdict of the jury must be unanimous" and that any interference with this right denies the defendant a fair trial. *Jones v. State*, 92 So.2d 261 (Fla.1956).

Another point from *Ring* is that the harmless error doctrine cannot be applied to deny relief. As Justice Scalia explained in *Sullivan v. Louisiana*, 508 U.S. 275 (1993): "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan*, 508 U.S. at 278. Where the jury has not been instructed on the reasonable doubt standard,

[t]here has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of *Chapman*<sup>8</sup> review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would be rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate.

*Sullivan*, 508 U.S. at 280. The same reasoning applies to lack of unanimity, failure to instruct the jury properly, and importantly, the lack of an actual verdict.

The Petitioner's death sentence also violates the State and Federal Constitutions because the elements of the offense

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<sup>8</sup> *Chapman v. California*, 386 U.S. 18 (1967).

necessary to establish capital murder were not charged in the indictment. *Jones v. United States*, 526 U.S. 227 (1999), held that "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*, at 243, n.6. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. *Apprendi*, 530 U.S. at 475-476.<sup>9</sup> *Ring* held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" *Ring*, quoting *Apprendi* at 494, n. 19. In *Jones*, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," because "elements must be charged in the indictment." *Jones*, 526 U.S. at 232.

Like the Fifth Amendment to the United States Constitution, Article I, section 15 of the Florida Constitution provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury." Florida law clearly

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<sup>9</sup> The grand jury clause of the Fifth Amendment has not been held to apply to the States. *Apprendi*, 530 U.S. at 477, n.3.

requires every "element of the offense" to be alleged in the information or indictment. In *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977), this Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." In *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983), this Court said "[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus." *Gray*, 435 So.2d at 818. Finally, in *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996), this Court said "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." A conviction on a charge not made by the indictment is a denial of due process of law. *State v. Gray, supra, citing Thornhill v. Alabama*, 310 U.S. 88 (1940), and *De Jonge v. Oregon*, 299 U.S. 353 (1937).

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the

aggravated crime of capital murder, Lucas' right under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were violated. By wholly omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Lucas "in the preparation of a defense" to a sentence of death. Fla.R.Crim.P. 3.140(o).

Lastly, the Petitioner, Mr. Lucas, is entitled to the benefit of *Apprendi* and *Ring* 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.

Respectfully submitted,

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Robert T. Strain  
Florida Bar No. 325961  
Assistant CCRC

---

Elizabeth A. Williams  
Florida Bar No. 0967350  
Staff Attorney

CAPITAL COLLATERAL REGIONAL  
COUNSEL-MIDDLE  
3801 Corporex Park Drive  
Suite 210

Tampa, Florida 33619  
telephone 813-740-3544

Counsel for Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Reply to State's Response to 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, 7819 NW 228<sup>th</sup> Street, Raiford, Florida 32026 on this \_\_\_\_\_ day of July, 2002.

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Robert T. Strain  
Florida Bar No. 325961  
Assistant CCRC  
CAPITAL COLLATERAL REGIONAL  
COUNSEL-MIDDLE  
3801 Corporex Park Drive  
Suite 210  
Tampa, Florida 33619  
telephone 813-740-3544

Counsel for Appellant

**CERTIFICATE OF COMPLIANCE**

I 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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Robert T. Strain  
Florida Bar No. 325961  
Assistant CCRC

CAPITAL COLLATERAL REGIONAL  
COUNSEL-MIDDLE  
3801 Corporex Park Drive  
Suite 210  
Tampa, Florida 33619  
telephone 813-740-3544

Counsel for Appellant