

IN THE SUPREME COURT OF FLORIDA

HAROLD GENE LUCAS,

Petitioner,

Case No. SC02-314

MICHAEL W. MOORE,

Respondent.

_____ /

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, MICHAEL W. MOORE, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY

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 (R1. V4/549).¹ The offenses were alleged to have occurred on August 14, 1976 (R1. V4/549). Lucas pled not guilty and trial commenced on January 11, 1977, before the Honorable Thomas W. Shands, Circuit Judge (R1. V1-V3). After deliberations, the jury found Lucas guilty as charged (R1. V4/543-545). Following the penalty phase of the trial, a jury recommended that the court impose a sentence of death (R1. V4/664). On February 9, 1977, the judge

¹References to the record in the direct appeal of Lucas's convictions and sentences, Florida Supreme Court Case No. #51,135, will be designated as R1. followed by the appropriate volume and page number.

followed the recommendation and imposed a sentence of death on the murder conviction, and thirty years imprisonment on each of the attempted murder charges (R1. 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 (R1. V4/677-682).

On appeal, Lucas alleged the following errors:

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF A REBUTTAL WITNESS WHOSE NAME HAD NOT BEEN FURNISHED TO DEFENSE COUNSEL PURSUANT TO FLA. R. CRIM. P. 3.220, WITHOUT FIRST CONDUCTING AN INQUIRY INTO ALL SURROUNDING CIRCUMSTANCES; THUS DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION OF WITNESSES AGAINST HIM?

ISSUE II

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE SENTENCE OF DEATH?

Specifically as to point two, Lucas argued that (A) the trial court failed to fully weigh the mitigating evidence; (B) the capital felony was not "heinous, atrocious or cruel" and this factor was erroneously applied to the attempted murder convictions;

(C) the capital felony did not create a great risk of harm to many persons; and (D) the trial court erred in finding a nonstatutory aggravating circumstance, thereby depriving Lucas of due process. Lucas also filed a supplemental brief alleging that Florida's capital sentencing statute unconstitutionally restricted consideration of mitigating circumstances. 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, Lucas argued the following issues:

ISSUE I

THE TRIAL COURT AT RESENTENCING ABUSED ITS DISCRETION BY NOT PROPERLY REWEIGHING AND REEVALUATING THE VALID MITIGATING AND AGGRAVATING CIRCUMSTANCES, AND THUS FAILED TO COMPLY WITH THE MANDATE OF THE FLORIDA SUPREME COURT AND IMPOSED A DEATH SENTENCE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO GRANT THE APPELLANT'S MOTION TO PRESENT EVIDENCE OF A NON-STATUTORY MITIGATING

CIRCUMSTANCE -- HIS CHARACTER AND BACKGROUND -- AND THUS DENIED THE APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

ISSUE III

THE TRIAL JUDGE ERRED IN DENYING THE APPELLANT'S MOTION TO EMPANEL AN ADVISORY JURY TO CONSIDER THE PROFFERED MITIGATING EVIDENCE OF HIS CHARACTER AND BACKGROUND, THEREBY DEPRIVING HIM OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

ISSUE IV

THE TRIAL JUDGE ERRED IN DENYING THE APPELLANT'S MOTION TO PRECLUDE THE IMPOSITION OF THE DEATH PENALTY ON THE GROUNDS THAT SECTION 921.141, FLORIDA STATUTES (1979) IS UNCONSTITUTIONAL AS APPLIED IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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 raised the following issues in the appeal of this resentencing:

ISSUE I

THE TRIAL COURT ERRED IN NOT ALLOWING LUCAS TO PRESENT ADDITIONAL EVIDENCE TENDING TO PROVE THE EXISTENCE OF STATUTORY MITIGATING CIRCUMSTANCES.

ISSUE II

THE TRIAL COURT ERRED IN NOT ALLOWING LUCAS TO PRESENT EVIDENCE OF HIS CHARACTER AND BACKGROUND AS NONSTATUTORY MITIGATING FACTORS.

ISSUE III

THE TRIAL COURT ERRED IN REFUSING TO APPOINT A TOXICOLOGIST AND A PSYCHOLOGIST FOR THE PURPOSE OF ASSISTING LUCAS IN THE PREPARATION AND PRESENTATION OF STATUTORY AND NONSTATUTORY MITIGATING EVIDENCE.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

ISSUE V

THE SENTENCING JUDGE ERRED IN NOT REQUIRING THE PRESENTATION OF LIVE TESTIMONY AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES BEFORE REIMPOSING A DEATH SENTENCE, SINCE HE WAS NOT THE ORIGINAL SENTENCING JUDGE AND NEVER HAD THE OPPORTUNITY TO WEIGH THE Demeanor AND CREDIBILITY OF THE WITNESSES.

ISSUE VI

THE TRIAL COURT ERRED IN REFUSING TO IMPANEL A NEW JURY FOR THE PURPOSE OF OBTAINING A NEW SENTENCING RECOMMENDATION, BECAUSE THE ORIGINAL JURY WAS ERRONEOUSLY NOT PRESENTED WITH VALID MITIGATING EVIDENCE, AND WAS ERRONEOUSLY PRESENTED NONSTATUTORY AGGRAVATING EVIDENCE.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING HAROLD LUCAS TO DEATH BECAUSE SUCH A SENTENCE IS DISPROPORTIONAL TO THE CRIME HE COMMITTED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court struck the aggravating factor of great risk to many persons, found 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).

Lucas' second jury also 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.

In this appeal, Lucas argued:

ISSUE I

THE JURY'S SENTENCING RECOMMENDATION HEREIN WAS TAINTED BY THE PROSECUTOR'S IMPROPER VOIR DIRE AND CLOSING ARGUMENT, WHICH MISLED THE JURY IN ITS CONSIDERATION OF MITIGATING EVIDENCE.

ISSUE II

THE COURT BELOW ERRED IN TAKING JUDICIAL NOTICE OF THE FACT THAT APPELLANT WAS FOUND GUILTY ON JANUARY 14, 1977 OF THE ATTEMPTED FIRST DEGREE MURDERS OF TERRI L. RICE AND RICHARD BYRD, JR., AND IN SO INFORMING THE JURY.

ISSUE III

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE AT APPELLANT'S PENALTY PHASE TRIAL EVIDENCE OF THE MENTAL ANGUISH AND PHYSICAL PAIN ENDURED BY TERRI RICE AND RICHARD BYRD, JR.

ISSUE IV

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE DAMAGING HEARSAY TESTIMONY AGAINST APPELLANT, WHILE

DENYING APPELLANT THE OPPORTUNITY TO PRESENT HEARSAY TESTIMONY THAT WAS CRITICAL TO HIS DEFENSE.

ISSUE V

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE PREJUDICIAL EVIDENCE OF A COLLATERAL CRIME (BURGLARY) WHEN THE STATE HAD FAILED TO GIVE APPELLANT THE STATUTORILY REQUIRED NOTICE THAT IT INTENDED TO INTRODUCE THIS EVIDENCE.

ISSUE VI

THE COURT BELOW ERRED IN PERMITTING THE JURORS TO TAKE NOTES DURING APPELLANT'S PENALTY TRIAL, AND TO USE THEIR NOTES DURING DELIBERATIONS, WITHOUT INSTRUCTING THE JURY ON THE PROPER WAY TO TAKE AND USE NOTES.

ISSUE VII

THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO SYSTEMATICALLY EXCLUDE ALL POTENTIAL JURORS WHO EXPRESSED RESERVATIONS ABOUT THE DEATH PENALTY PRODUCED A JURY THAT WAS UNCOMMONLY WILLING TO CONDEMN APPELLANT TO DIE AND THEREBY VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO BE TRIED BY AN IMPARTIAL JURY.

ISSUE VIII

THE SENTENCING ORDER BY THE COURT BELOW IS NOT SUFFICIENTLY CLEAR TO ESTABLISH THAT THE COURT ENGAGED IN A REASONED WEIGHING OF MITIGATING CIRCUMSTANCES, AND SO WILL NOT SUPPORT THE SENTENCE OF DEATH IMPOSED UPON APPELLANT.

ISSUE IX

THE TRIAL COURT ERRED IN SENTENCING HAROLD GENE LUCAS TO DIE IN THE ELECTRIC CHAIR, BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

ISSUE X

THE TRIAL COURT ERRED IN SENTENCING HAROLD GENE LUCAS TO DEATH BECAUSE SUCH A SENTENCE IS DISPROPORTIONAL TO THE CRIME HE COMMITTED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Lucas also filed a supplemental brief arguing that the instruction provided to his sentencing jury on the heinous, atrocious or cruel aggravating circumstance was unconstitutionally vague. Finding the trial court's sentencing order to be inadequate, this Court 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, Lucas claimed:

ISSUE I

APPELLANT'S CONSTITUTIONAL RIGHTS WERE DENIED BY THE REFUSAL OF THE SENTENCING COURT TO PERMIT APPELLANT TO PRESENT ADDITIONAL EVIDENCE TO ESTABLISH MITIGATING CIRCUMSTANCES.

ISSUE II

APPELLANT'S CONSTITUTIONAL RIGHTS WERE DENIED BY THE PROCEDURE FOLLOWED BY THE SENTENCING COURT. INSTEAD OF HOLDING A SINGLE HEARING AT WHICH THE COURT MERELY INFORMED APPELLANT OF HIS ALREADY-PREPARED SENTENCING DECISION, THE COURT SHOULD HAVE FIRST RECEIVED EVIDENCE AND ARGUMENT REGARDING THE APPROPRIATE SENTENCE, AND THEN IMPOSED SENTENCE AFTER DUE DELIBERATION.

ISSUE III

THE COURT MAY HAVE BEEN IMPROPERLY INFLUENCED BY IRRELEVANT VICTIM IMPACT STATEMENTS IN MAKING HIS DECISION TO SENTENCE APPELLANT TO DEATH.

ISSUE IV

THE COURT BELOW ERRED IN FINDING THAT THE HOMICIDE OF JILL PIPER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL, AS THE STATE DID NOT PROVE THIS AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

ISSUE V

APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS VAGUE, IS APPLIED ARBITRARILY AND CAPRICIOUSLY, AND DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

ISSUE VI

THE LOWER COURT'S SENTENCING FINDINGS DO NOT SHOW THAT HE GAVE PROPER CONSIDERATION TO ALL MITIGATING EVIDENCE IN THE RECORD, AND ARE NOT SUFFICIENTLY CLEAR TO SUPPORT THE SENTENCE OF DEATH IMPOSED UPON APPELLANT.

ISSUE VII

THE TRIAL COURT ERRED IN SENTENCING HAROLD GENE LUCAS TO DEATH BECAUSE SUCH A SENTENCE IS DISPROPORTIONATE TO THE CRIME HE COMMITTED.

This Court upheld the imposition of the death sentence. 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).

ARGUMENT

Lucas raises one issue in his habeas petition: whether Florida's death penalty statute was unconstitutionally applied in his case. According to Lucas, Florida's death penalty statute is only constitutional if the particular aggravating factors are charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt by a unanimous verdict. His claim is based on Apprendi v. New Jersey, 530 U.S. 466 (2000), which is a state court extension of due process principles announced in Jones v. United States, 526 U.S. 227 (1999). Lucas's argument must be rejected on a number of bases.

Initially, it should be noted that this claim is procedurally barred, as any challenge to the constitutionality of the death penalty statute as applied in this case must have been presented prior to trial and asserted on appeal. Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1982) (challenge to constitutionality of statute as applied must be raised at the trial level and presented on appeal). This Court has repeatedly recognized that habeas petitions are not to be used as successive appeals, and that

issues which could and should have been presented earlier will not be considered. See Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000)(while habeas petitions are proper vehicle to advance claims of ineffective assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion); Thompson v. State, 759 So. 2d 650 (Fla. 2000); Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Hardwick v. Dugger, 648 So. 2d 100, 105 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). Although Apprendi was not decided until after Lucas's appeals, the basic argument that the Sixth Amendment required jury sentencing in capital cases was available and, in fact, routinely advanced around the time of Lucas's trial and resentencing. See Hildwin v. Florida, 390 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447, 472 (1984); Chandler v. State, 442 So. 2d 171, 173, n. 1 (Fla. 1983). Lucas's failure to allege this claim in an earlier direct appeal procedurally bars this Court from consideration of this issue in his petition.

Lucas's assertion that he is entitled to any benefit from the Apprendi decision retroactively under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980), is not persuasive. Lucas does not even attempt to offer any reasoning to support this assertion. Pursuant to Witt, Apprendi is only entitled to retroactive application if it is a decision of fundamental significance, which so drastically alters the underpinnings

of Lucas's death sentence that "obvious injustice" exists. New v. State, 26 Fla. L. Weekly S798 (Fla. 2001). In determining whether this standard has been met, this Court must consider three factors: the purpose served by the new case; the extent of reliance on the old law; and the effect on the administration of justice from retroactive application. Ferguson v. State, 789 So. 2d 306, 311 (Fla. 2001). Application of these factors to Apprendi offers no basis to provide any alleged benefit from the Apprendi decision to Lucas in this habeas action. Federal courts have also held that Apprendi is not retroactive. See In re Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000).

"Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel." Rutherford, 774 So. 2d at 643. However, Lucas makes no claim that appellate counsel was ineffective. Moreover, a claim of appellate ineffectiveness would be meritless. The claim that under "principles of common law," aggravating circumstances must be charged in indictment has been rejected by this Court many times. See Chandler, 442 So. 2d at 173, n. 1; Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981), cert. denied, 455 U.S. 983 (1982). Similarly, the suggestion that jury unanimity in recommending a death sentence is constitutionally required would have failed even if presented earlier; this Court has consistently held that a jury may recommend a death sentence on simple majority vote. See Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994)(constitutional for a jury to recommend death based on a

simple majority); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990); Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). Appellate counsel “is not ineffective for failing to raise a claim that would have been rejected on appeal.” Downs v. State, 740 So. 2d 506, 517 n. 18 (Fla. 1999).

Even if Lucas’s substantive claim is considered, habeas relief is not warranted; Lucas’s claim that Florida’s death penalty statute is unconstitutional under Apprendi is without merit. As Lucas acknowledges, this claim has already been repeatedly rejected by this Court. See Brown v. Moore, 800 So. 2d 223 (Fla. 2001); Mann v. Moore, 794 So. 2d 595 (Fla. 2001); Mills v. Moore, 786 So. 2d 532 (Fla.), cert. denied, 121 S. Ct. 1752 (2001). In Mills, this Court expressly held that Apprendi did not apply to Florida’s capital sentencing scheme. 786 So. 2d at 536-38.

In Apprendi, the Supreme Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt.” Apprendi, 530 U.S. at 490. However, the Court noted that its holding did not apply to capital cases because the statutory maximum in a capital case is death. The Court explained that once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought

to be imposed. Apprendi, 530 U.S. at 496. Thus, the majority held, its decision does not overrule Walton v. Arizona, 497 U.S. 639 (1990), which upheld Arizona's death penalty statute providing for judge-only death sentencing.

Furthermore, Lucas's arguments that aggravating factors are "elements" of an offense and require a unanimous jury finding are not supported by the Apprendi decision. Apprendi involved the application of a New Jersey hate crime statute which doubled the maximum sentence if the defendant committed the underlying crime with a biased purpose. The statute allowed the trial court to find biased purpose based on a preponderance of the evidence standard. Apprendi argued that due process required that the jury rather than a judge make the determination of biased purpose and that the State must prove biased purpose beyond a reasonable doubt rather than by a preponderance of the evidence. In other words, Apprendi asserted that biased purpose was an element of the crime rather than a "sentencing factor." The Apprendi Court agreed and noted that the distinction between an element of the offense and a "sentencing factor" was not made at common law. The Apprendi Court noted and relied on their recent case of Jones v. United States, 526 U.S. 227 (1999), which construed a federal statute. In Jones, the United States Supreme Court held that "serious bodily injury" was an element of the crime rather than a sentencing factor which, consistent with due process and the right to a jury trial, must be determined by

a jury beyond a reasonable doubt. Both Apprendi and Jones concerned factors which placed the sentence outside of the statutory maximum for the offense charged.

However, the majority specifically rejects any argument that the holding in Apprendi effects the Court's prior precedent upholding capital sentencing schemes that require the judge to determine aggravating factors rather than the jury prior to imposing the death penalty. Apprendi, 530 U.S. at 496, *citing*, Walton v. Arizona, 497 U.S. 639 (1990). In Walton, the United States Supreme Court held that Arizona's death penalty scheme did not violate the Sixth Amendment right to a jury trial. Walton asserted that all the factual findings necessary for a death sentence must be made by a jury, not by a judge. The Walton Court rejected this claim, noting that any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions. Walton noted that constitutional challenges to Florida's death sentencing scheme, which also provides for sentencing by the judge, not the jury, have been repeatedly rejected. As Apprendi acknowledged, Walton did not involve a judge determining the existence of a fact which enhanced the crime to a capital offense; rather, in death penalty cases, the jury determined whether a capital crime had been committed. The Apprendi Court noted that it is constitutional to have the judge decide whether the maximum penalty of death or a lesser one should be imposed. Basically,

because death is within the statutory maximum for first degree murder, a judge may determine the facts relating to a sentence of death just as the judge may do with any other fact within the statutory maximum.

Apprendi is simply inapposite to the issues of whether aggravating factors must be charged in an indictment or whether a jury recommendation should be unanimous. Apprendi requires that a fact that is used to increase the statutory maximum be treated as an element of the crime; it did not change the jurisprudence of unanimity. Moreover, Apprendi concerns what the State must prove to obtain a conviction, *not* the penalty imposed. Additionally, the Apprendi Court, specifically addressing capital sentencing schemes such as Florida's, stated that the holding did not effect their prior precedent in this area. Even if Apprendi were construed to have some application to judge-only capital sentencing schemes, it would have no application to Florida's capital sentencing, in which the jury is the co-sentencer.

Finally, any possible Apprendi error in the instant case would clearly be harmless beyond any reasonable doubt. One of Lucas's aggravating factors was based on his contemporaneous felony convictions, the attempted murder charges which were alleged in the indictment and proven to the satisfaction of a unanimous jury. Apprendi itself states that prior convictions used to enhance a sentence need not be alleged or proven for the charge being enhanced, although in this case they were.

This aggravating factor made Lucas death eligible under the reasoning of Apprendi, and rendered any possible Sixth Amendment concern harmless.

CONCLUSION

Lucas's Apprendi issue is barred. Further, it is meritless because Apprendi does not apply to capital sentencing, and even if it did, it would not apply to a capital sentencing scheme like Florida's, in which the jury is the co-sentencer. Apprendi requires only that a jury find beyond a reasonable doubt a fact which would increase the defendant's sentence beyond the statutory maximum. Of necessity under the facts of this case, the jury did just that. Further, the prior violent felony aggravator finding could properly have been made by the judge even if this were a non-capital case to which Apprendi applies, and this finding would be sufficient under Apprendi to allow the judge to impose a more severe sentence. Thus, even if Apprendi is extended to capital cases, Lucas's penalty phase meets the requirements of Apprendi. His petition for writ of habeas corpus must be denied.

WHEREFORE, Respondent respectfully requests that this Honorable Court DENY Lucas's Petition for Writ of Habeas Corpus.

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 Strain, CCRC, Office of the Capital Collateral Regional Counsel, 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 response is

12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

COUNSEL FOR RESPONDENT