

IN THE FLORIDA SUPREME COURT

HAROLD GENE LUCAS, :
Appellant, :
vs. : Case No. 67,094
STATE OF FLORIDA, :
Appellee. :

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APPEAL FROM THE CIRCUIT COURT
IN AND FOR LEE COUNTY
STATE OF FLORIDA
CLERK OF COURT
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INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the record on appeal in this case will be designated with the prefix "R." References to the prior record on appeal in this case (Case No. 51,135) will be designated with the prefix "PR." References to the first resentencing proceeding which was appealed under Case No. 51,135 will be designated with "PRS." The appendix to this brief will be designated with the prefix "A."

STATEMENT OF THE CASE

On August 30, 1976, a Lee County grand jury indicted Harold Gene Lucas for the first degree murder of Jill Piper and the attempted murders of Terri Rice and Richard Byrd. (R1) Lucas proceeded to a jury trial where he was convicted as charged. (R235-237) After hearing additional evidence, the jury recommended a death sentence for the murder. (R250) Circuit Judge Thomas Shands adjudged Lucas guilty on February 9, 1977, and sentenced him to death for the murder and thirty years on each attempted murder. (R255-257) In support of the death sentence, Judge Shands found three aggravating circumstances: (1) that the defendant had been previously convicted of attempted murders based on the contemporaneous convictions for the shooting of Terri Rice and Richard Byrd; (2) that the homicide and attempted murders were heinous, atrocious or cruel; and (3) that the shootings were done in such a fashion as to create a great risk of death to others. (R256-257) The court found one mitigating circumstance that the defendant did not have a significant history of prior criminal activity. (R256)

Lucas appealed his judgment and sentence to this Court. On June 14, 1979, this Court rendered an opinion affirming the convictions but reversing the death sentence for a new sentencing proceeding without a new jury. Lucas v. State, 376 So.2d 1149 (Fla.1979). This Court held that the trial judge had improperly considered as a nonstatutory aggravating circumstance that the attempted murders were heinous, atrocious or cruel. 376 So.2d at 1153.

At the resentencing proceeding, Judge Shands refused to impanel a new jury and refused to consider additional evidence of Lucas's background and character which had not been introduced in the original proceeding. (PRS30-31,39-42,55,73) The court again imposed the death sentence submitting the same sentencing findings with references to the attempted murders deleted. (R295-297)(PRS62-63,67-68) On appeal, this Court reversed the reimposition of death because Judge Shands had not followed this Court's mandate to reweigh and reevaluate the aggravating and mitigating circumstances with the nonstatutory factor deleted. Lucas v. State, 417 So.2d 250 (Fla.1982).

Since Judge Shands died before this case was remanded for the second resentencing, Circuit Judge Thomas S. Reese presided over the resentencing proceeding. (R400) Prior to the resentencing, Lucas filed several motions including the following: (1) Motion Requesting the Impaneling of a Jury to Make a New Sentencing Recommendation (R301-302); (2) Motion to Allow Introduction of Statutory Mitigation (R303); (3) Motion to Preclude Re-Imposition of the Death Sentence (R304-305); (4) Motion Requesting Court to Permit Defendant to Present Character and Background Testimony From Family Members Prior to Resentencing (R306-307); (5) Motion to Appoint Toxicologist and Psychologist to Assist in Preparation of Evidence of Statutory and Nonstatutory Mitigation (R308); and (6) Motion to Preclude Death Due to Lack of Jurisdiction (R358-359). All of the above motions were denied. (R353-357,409)

Judge Reese reviewed the transcripts in the case but did not allow any evidence to be presented. (R368-398) After

hearing arguments from counsel, Judge Reese reimposed a death sentence. (R368-398,400-408) He found three aggravating circumstances: (1) that Lucas had been previously convicted of two attempted murders, the offenses which were tried with the murder charge; (2) that the homicide created a great risk of death to many persons since the two attempted murders occurred within seconds of the homicide; and (3) that the homicide was especially heinous atrocious or cruel. (R402-403)(A3-4) The court found one statutory mitigating circumstance that Lucas had no significant history of prior criminal activity. (R401-402)(A2-3) In his order, the trial judge specifically considered and rejected the statutory circumstances concerning mental or emotional disturbance and impaired capacity. (R402)(A3) The order did not mention the consideration of any other mitigating factors.

The sentence was rendered on May 8, 1985. (R400-408) Lucas timely filed his notice of appeal, but inadvertantly submitted it to the Second District Court of Appeal. (R411) He filed an amended notice of appeal to this Court on May 22, 1985 (R415), and the appeal was transferred to this Court from the Second District Court on June 7, 1985. (R417-419)

STATEMENT OF THE FACTS

Harold Gene Lucas was Jill Piper's friend. (PR306) They had known each other about four years at the time of her death. (PR306) They had dated some when they first met and for the 3 months preceding her death. (PR306,339) In fact, they were to be married. (PR193) Lucas also worked for Jill's father. (PR323) A dispute between Lucas and Jill arose, and apparently a quarrel ensued at the Piper's residence. (PR38-42) Deputy Craig Humble was called to the home and ultimately arrested Lucas for trespassing. (PR38-42) Lucas did not report for work at the Piper's business the following day. (PR232) This incident occurred one week before the homicide. (PR42-43)

On the day of the homicide, Lucas was drinking beer and smoking marijuana with friends. (PR155-161,378-380) Lucas and some friends went to Bonita Springs Park (PR146-148) where they saw Jill Piper with some of her friends. (PR146-148) Lucas did not talk to Jill (PR161,180-181) but allegedly made threatening remarks about her. (PR161,180-181) The testimony from those present was contradictory about the existence of the threats. (PR149,166,181,183,243,274) Those who heard the remarks did not take them seriously. (PR161,183) By 3:00 or 4:00 p.m., Lucas had consumed enough beer and marijuana to be high. (PR311-313) He bought THC around 6:00 p.m. at his home, and then the group returned to the park. (PR313-316) At 8:30 p.m., the car in which Lucas was a passenger was stopped by Deputy Boyette. (PR405) Another passenger, Danny Dowdal, was arrested for possession of drugs. (PR371,408) Boyette searched and

talked with each of the passengers in the car including Lucas. (PR408) Boyette said Lucas appeared rational at that time, and he did not arrest him. (PR410)

Lucas and his friends remained at Bonita Springs Park until 10:00 or 10:30 p.m. (PR189) After leaving the park, they stopped at a Hess service station to buy a soft drink. (PR189, 232) Jill Piper was seated in her car at the station and Terri Rice was a passenger. (PR194,207) Eddie Kent was standing outside Jill's car talking to her. (PR207) When Lucas exited the car, Kent, with whom Lucas had had confrontations in the past, made a derogatory remark to Lucas. (PR189,232) A fight ensued. (PR189-194,207) Lucas stopped fighting, reentered the car with his friends and they drove away. (PR189,195) Kent threw a beer bottle at the car as it left. (PR189,195) The bottle struck the passenger's side of the car where Lucas was riding. It broke and cut Lucas's ear. (PR195-197) During the fight, Jill Piper had walked across the street to a pay telephone to call the sheriff's department to report Lucas. (PR244-245) As Lucas and his friends drove away, Jill cursed him and threw rocks at the car. (PR165,195) Eddie Kent and Terri Rice said they heard Lucas threaten to kill Eddie and Jill. (PR233)

After the fight, Lucas and several of his friends returned to Lucas's house. (PR167) They continued to drink beer, smoke marijuana and hash as well as consume THC. (PR167-179, 355-360) Lucas used more drugs than anyone else. (PR158) Friends with whom he had used drugs before said they had never seen him that affected. (PR170,385) His condition became worse as the evening progressed. (PR357) Lucas "started going crazy";

his eyes were big and glassy; and he was irrational. (PR167-170,387-388) He was left alone at his house around 11:15 p.m. (PR162,175,197)

Jill Piper and Terri Rice drove away from the Hess station after the fight. At 11:00 p.m., they met another friend, Ricky Byrd, at a store. (PR233-234,276-277) They asked him to spend the night at the Piper residence with them for protection and he agreed. (PR234,276-277) The three drove to the Piper's residence and parked the car in a wooded area across the street. (PR235,278)

Once inside the house, Piper produced a loaded .20 gauge shotgun and a loaded .38 caliber pistol. (PR235,278) She kept the shotgun and gave Byrd the pistol. (PR235,279) Piper became braver and decided that they should not hide the fact that they were there by hiding the car. (PR279) She had been drinking and was intoxicated to a degree. (PR144) She persuaded the others to move the car from the woods to the driveway. (PR279-280) Carrying the firearms, the three moved the car. (PR279-280)

Upon returning to the house, Ricky Byrd entered first to insure no one had slipped inside. (PR280) Terri Rice saw someone beside the house with a gun but initially assumed it was Byrd. (PR237-238) As she came closer to the house, she recognized Lucas as the man with the gun. (PR247) He raised the gun. (PR247) Rice heard one shot which hit Piper who was walking in front of her. (PR247,248) Terri ran inside, told Byrd what she saw, and they ran to the back bedroom. (PR249-

250) Terri never saw Jill come inside the house. (PR250) Ricky Byrd's version differed somewhat. He heard three shots outside (PR280) and remembered Jill coming inside wounded, falling down on the livingroom carpet.^{1/} (PR281) Terri heard Jill screaming. (PR292) Byrd heard begging, slapping and cursing, then three more shots. (PR281) The bedroom door was shot open with a shotgun. (PR281) Lucas entered carrying a shotgun and a rifle. (PR281) He shot Byrd in the stomach, struggled with Rice in the bathroom area and left. (PR238-240) As he left, he shot through the bathroom door wounding Terri Rice in the hip. (PR238-240) Byrd and Rice described Lucas as having wild, glassy eyes. (PR250,281)

Deputy Craig Humble was the first law enforcement officer on the scene. (PR43) Terri Rice had telephoned the sheriff's department as soon as the shooting began. (PR238) Humble found Jill Piper in the front yard dead. (PR48) Ricky Byrd walked out of the house holding his side. (PR49) Investigator McDougall drove Byrd to the hospital. (PR65-68) Terri Rice was found in the master bathroom area of the house. (PR238) She had been shot in the hip. (PR239-240)

The medical examiner, Dr. Wallace M. Graves, Jr., performed the autopsy on Jill Piper. (PR120) He found seven gunshot wounds. (PR133) Three wounds were caused by the same

^{1/} Physical evidence tended to corroborate Terri Rice's testimony that Jill did not come inside the house. No blood was found on the livingroom carpet. (PR99) Moreover, the first deputy on the scene found Jill's body on the front yard of the residence. (PR48)

bullet which grazed the skull and glanced through the soft tissue of the left shoulder. (PR135-136) One wound to the back traveled through the chest cavity, penetrated the spleen and a portion of the intestines. (PR136) A fifth wound to the lower back penetrated the chest cavity. (PR134,136) Another grazing wound to the lower leg was the sixth. (PR135,137) Finally, the fatal wound was to the left forehead just above the hairline. (PR134) That wound caused immediate unconsciousness and death within minutes. (PR141)

Lucas testified at trial. (PR305) He described his day of drinking beer, smoking marijuana and taking THC. (PR308-319) He first consumed THC at 6:00 p.m. and again several more times during the evening. (PR317-318) Shortly after the fight with Eddie Kent at the Hess Station, Lucas blacked out and had no recall of other events during the night. (PR308,319) His next memory was waking up in the woods. (PR318-320) He said that he had suffered blackouts from drug and alcohol use in the past. (PR309) A friend found Lucas walking, stopped and told him about the shooting at the Piper residence. (PR320) Lucas said that was the first time he became aware of the shooting. (PR320)

Dr. Thomas Hoagland, a psychiatrist, testified during the penalty phase. (PR626) Hoagland said Lucas suffered from sociopathic personality with acute chronic alcoholism. (PR627) His judgment was defective, his motivation poor, and he was unstable. (PR630) The influence of drugs or alcohol would aggravate his mental or emotional disturbance. (PR630) Furthermore, alcohol and drugs could impair his ability to think rationally and understand the nature of his conduct. (PR630-632)

SUMMARY OF ARGUMENT

I. In his original penalty phase trial, Lucas presented evidence tending to prove the mitigating circumstances of extreme mental or emotional disturbance, §921.141(6)(b), Fla.Stat.: and impaired capacity, §921.141(6)(f), Fla.Stat. The sentencing judge found the evidence insufficient to prove these circumstances. This Court vacated Lucas's death sentence for other reasons and remanded for a new sentencing proceeding. At the resentencing, Lucas requested the opportunity to present additional evidence to prove the existence of the mental mitigating circumstances. The trial judge denied the request and did not allow the presentation of additional evidence. This action violated the principle expressly announced in Mann v. State, 453 So.2d 784,786 (Fla.1984) that additional evidence tending to prove aggravating or mitigating circumstances may be presented at a resentencing proceeding.

II. Lucas's trial lawyer during the penalty phase of his case believed that mitigating circumstances were limited to those enumerated in §921.141, Fla.Stat. He had relied upon misleading language in Cooper v. State, 336 So.2d 1133,1139 (Fla.1976) to reach that conclusion. Lockett v. Ohio, 438 U.S. 586 (1978) and Songer v. State, 365 So.2d 696 (Fla.1978) were decided after Lucas's trial. Those decisions clarified the law that mitigating circumstances are not limited. At his resentencing, Lucas asked to present background and character evidence in mitigation which his original trial lawyer had not pursued because of his misunderstanding of the law. The resen-

tencing judge erroneously denied the request rendering Lucas's death sentence unconstitutional in violation of Eddings v. Oklahoma, 455 U.S. 104 (1982).

III. To aid in the preparation and presentation of statutory and nonstatutory mitigating evidence, Lucas requested the appointment of a toxicologist and a psychologist. The trial judge erroneously denied the request based on his ruling that Lucas would not be allowed to present additional evidence. For the reasons presented in Issues I and II of this brief, the trial court also erred in refusing to appoint the experts to assist Lucas.

IV. The trial court found as an aggravating circumstance that Lucas created a great risk of death to many persons. §921.141(5)(c), Fla.Stat. Only two other persons were present besides Lucas and the homicide victim at the time of the murder. Any risk of death created to more than that number of persons is speculative. Consequently, the finding is erroneous. E.g., Johnson v. State, 393 So.2d 1069 (Fla.1981); White v. State, 403 So.2d 331 (Fla.1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979).

V. The circuit judge who heard Lucas's trial and imposed the original sentence died before the resentencing proceeding. A judge previously unfamiliar with the case handled the resentencing proceeding after reading the transcript of the trial. He did not hear any live testimony. The imposition of a death sentence by a judge who did not hear live testimony and who never had the opportunity to judge, weigh and evaluate the demeanor of the witnesses violates the Eighth and Fourteenth Amendments.

VI. The trial court erred in refusing to impanel a new sentencing advisory jury. The original jury was tainted as the result of hearing improper evidence in aggravation and not hearing valid mitigating evidence. Since the original jury's recommendation was tainted, Lucas was entitled to a new one from an uncontaminated jury.

VII. Lucas should not be sentenced to death because such a sentence is disproportional to the crime he committed. When compared to other similar cases which this Court reversed for life sentences, Lucas's death sentence cannot stand.

ARGUMENT

ISSUE I.

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

Lucas filed a motion requesting permission to present additional evidence to prove statutory mitigating circumstances. (R303) Specifically, he asked to present evidence to the circumstance of extreme mental or emotional disturbance, §921.141(6)(b), Fla.Stat. and impaired capacity, §921.141(6)(f), Fla. Stat. (R318) These mitigating circumstances had been rejected and inadequately proven in the original sentencing and were again rejected in this resentencing because the evidence was "very speculative." (R402)(A3) Lucas also asked that experts, a toxicologist and a psychologist, be appointed to assist in the preparation and presentation of the evidence. (R308,317-319) The trial court denied his requests and precluded the presentation of evidence which could have established these mental mitigating factors.

It is well settled, that the sentencing authority in a capital case must consider and weigh all evidence relevant to statutory mitigating circumstances. See, e.g., State v. Dixon, 283 So.2d 1,9 (Fla.1973). This Court has reversed death sentences where the sentencing judge refused to hear evidence relevant to statutory mitigating circumstances. Miller v. State, 332 So.2d 65 (Fla.1976) (where trial court refused defendant's request to present psychiatric evidence in mitigation). The

fact that Lucas's case is on resentencing does not change this requirement. Relitigation of aggravating circumstances has been permitted at resentencing proceedings. E.g., Mann v. State, 453 So.2d 784 (Fla.1984). Consequently, a capital defendant must be allowed to relitigate mitigating circumstances at resentencing. Furthermore, in light of the Eighth and Fourteenth Amendments mandate that all evidence of any mitigation be considered and weighed, Eddings v. Oklahoma, 455 U.S. 104 (1982), the argument for relitigation of mitigating circumstances is even more compelling.

In Mann v. State, 420 So.2d 578 (Fla.1982), this Court reversed Mann's death sentence for a new sentencing proceeding because the sentencing judge had improperly considered two statutory aggravating circumstances. One of those circumstances was that Mann had a prior conviction for a violent felony based upon a Mississippi burglary conviction. The burglary judgment did not demonstrate that the burglary included violence. 420 So.2d at 581. At the resentencing proceeding, the State was permitted to introduce the burglary indictment which alleged that the burglary included an assault. Mann v. State, 453 So.2d 784 (Fla.1984) The trial judge again found the burglary to be a prior conviction for a violent felony, and this Court affirmed. Ibid. Furthermore, this Court rejected Mann's arguments that the State should not have been permitted to introduce additional evidence in a second opportunity to prove an aggravating circumstance which it had failed to prove in the first proceeding. In so doing, this Court said,

Our remand directed a new sentencing proceeding, not just a reweighing. In such proceedings both sides may, if they choose, present additional evidence.

Mann, 453 So.2d at 786.

This Court also reversed Lucas's death sentence for a "new sentencing proceeding." Lucas v. State, 417 So.2d at 252. The reversal was expressly for "an additional sentencing hearing" 417 So.2d at 250, which contemplates the presentation of evidence. Indeed, Justice McDonald in his concurring opinion stated that the judge should consider character and background evidence not previously considered. 417 So.2d at 252. (See Issue II, infra.) Mann controls this case. Lucas was entitled to present additional evidence at his resentencing proceeding in an effort to prove that he suffered from an extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct was impaired. Those mitigating circumstances were deemed insufficiently proven in the first proceeding, just as the aggravating circumstance in Mann was found insufficiently proven. Like the State in Mann, Lucas should have been afforded the opportunity to buttress his proof at the resentencing. The court's failure to give him such an opportunity renders his death sentence unconstitutional. Amends. VIII, XIV, U.S. Const. This Court should reverse his death sentence.

ISSUE II.

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

At Lucas's original sentencing, his trial lawyer did not present evidence of Lucas's character and background in mitigation. His lawyer, mistakenly relying on Cooper v. State, 336 So.2d 1133 (Fla.1976), believed that mitigating circumstances were limited to those unenumerated in §921.141, Fla. Stat.^{2/} (R306)(PRS39-48) Subsequent to the trial, the United States Supreme Court decided Lockett v. Ohio, 438 U.S. 586 (1978) holding that the Eighth and Fourteenth Amendments prohibited such limitations on mitigating circumstances. Shortly after Lockett, this Court held in Songer v. State, 365 So.2d

^{2/} In Cooper v. State, this Court said at footnote 7,

7. The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6); (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist...." (emphasis added). This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty.

336 So.2d at 1139.

696 (Fla.1978) that mitigating circumstances had never been limited in Florida to those listed in the statute contrary to the language found in Cooper. Consequently, Lucas's trial lawyer labored under an erroneous view of Florida's death penalty law and failed to present significant nonstatutory mitigating evidence.

During Lucas's first resentencing proceeding, the trial lawyer's error in not presenting background and character evidence was presented to the sentencing judge. (PRS39-46) However, the court refused to hear the mitigating evidence. On appeal, this Court held that the trial judge had followed this Court's mandate on resentencing and that "on the evidence pre-sented, section 921.141 was not unconstitutionally applied" (emphasis added). Lucas v. State, 417 So.2d 250,252 (Fla.1982) Justice McDonald in his concurrence said, however,

I concur with this opinion. On remand, however, the trial judge should consider the recent United States Supreme Court decision of Eddings v. Oklahoma, U.S., 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Eddings reminds us that it is important for the sentencing authority to explicitly consider and weigh the defendant's background and character....

Ibid.

In the second resentencing proceeding now on appeal, Lucas again attempted to introduce evidence of his character and background in mitigation. (R306-307) Circuit Judge Reese denied the request (R355) and refused to hear any additional evidence in mitigation. As a result, Lucas has been sentenced to death in violation of the mandate of the Eighth and Four-

teenth Amendments that all evidence in mitigation be considered and weighed in sentencing. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). This Court must reverse Lucas's death sentence for resentencing.

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.

Lucas filed a motion requesting the appointment of a toxicologist and a psychologist to assist in the preparation and presentation of statutory and nonstatutory mitigating evidence. (R308,316-321) During argument on the motion, Judge Reese said that if he ruled the presentation of such evidence appropriate, he would also appoint the experts to assist Lucas's lawyers. (R320) However, Judge Reese denied Lucas's motions to present additional statutory and nonstatutory mitigation. (R355,357) Therefore, he also denied the request for the appointment of experts. (R356) Because the trial judge erred in prohibiting the presentation of additional evidence for the reasons expressed in Issues I and II of this brief, he also erred in denying the motion to appoint experts. Lucas is entitled to a new sentencing proceeding where he may present additional evidence in mitigation with the assistance of a toxicologist and psychologist.

ISSUE IV.

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

The homicide in this case occurred either on the front yard of the Piper's residence or in the livingroom depending on whether the testimony of Terri Rice or Ricky Byrd is believed. (PR237-239,249-250,280) Since Jill Piper's body was found in the front yard (PR48,83), Terri Rice's testimony that Jill never entered the house after being shot is the more believable. (PR237-239,249-250) However, at either location no more than one other person was present at the scene of the murder.

At the time Jill Piper was shot on the front yard, Terri Rice was present some distance behind Jill. (PR236-239) Ricky Byrd was inside the residence and not subject to any risk from the gunshot. (PR238,280) If Byrd's testimony that Jill entered the house after the first shots and was ultimately killed in the livingroom is believed, no one besides the homicide victim was present at the time. Both Byrd and Rice had retreated to the master bedroom area in a separate location in the house. (PR238,281) They were in no danger of being shot at that time.

The trial court improperly found as an aggravating circumstance that the homicide created a great risk of death to many persons. (PR402)(A3) Initially, the evidence demonstrates that no more than one other person was actually present at the scene of the shooting and only two others were present at the house. This Court has held on several occasions that more than

three others besides the homicide victim must be endangered for this circumstance to apply. E.g., Johnson v. State, 393 So.2d 1069 (Fla.1981). "Many" means more than three. 393 So.2d at 1073. Two certainly is insufficient. See, Kampff v. State, 371 So.2d 1007 (Fla.1979). Consequently, there was insufficient other persons present to satisfy the requirements for this aggravating factor.

Not only were the number of persons present inadequate to support the trial judge's finding, but neither Terri Rice nor Ricky Byrd were endangered at the time Jill Piper was shot. Rice testified that she was present at the time Jill was shot in the front yard, but she was some distance behind Jill. (PR237-239) Both Rice and Byrd testified that they were in the master bedroom of the house when additional shots were fired either in the livingroom or the front yard. (PR238,281) Any risk of death to them at that time was speculative. White v. State, 403 So.2d 331,337 (Fla.1981). Furthermore, the fact that Rice and Byrd were later shot does not qualify for this circumstance. Since they were shot in separate rooms and at separate times (PR238,281-282), the act of killing Jill Piper was not the source of their endangerment. Ibid. This Court specifically addressed this situation in White where six homicides occurred in a house execution style. Rejecting this aggravating factor, this Court said,

Furthermore, we disagree with the trial court's suggestion that this aggravating circumstance may be sustained based on what in fact occurred--the murder of six individuals. The murders were effected by a gunshot blast to the head. In each

case the gun was discharged at close range and involved relatively little risk of injury to other persons in the room. There were six discrete homicides, each performed in an execution fashion. We therefore hold that subsection (5)(c) was improperly applied as an aggravating circumstance under the facts of this case. Cf. Lewis v. State, 377 So.2d 640 (Fla. 1979); Kampff v. State, 371 So.2d 1007 (Fla.1979).

White, 403 So.2d at 337.

Lucas is aware that this Court approved the finding of the great risk of death to many factor in his first appeal. Lucas v. State, 376 So.2d 1149,1153 (Fla.1979). However, that decision was prior to Johnson v. State, 393 So.2d 1069, in which this Court held that three or more other persons need to be endangered before the circumstance applies. The decision also predated White v. State, 403 So.2d 331, which rejected the circumstance on similar facts, i.e. subsequent shooting victims in separate rooms of a house. Lucas is entitled to have his case reviewed on the basis of the sentencing law now in effect. It is the death sentence now on direct appeal which is in force and which can be carried out. Lucas v. State, 417 So.2d at 251. The prior death sentence which was affirmed is no longer of import and does not control the findings required to support the new death sentence imposed by Judge Reese. Judge Reese was charged with the duty to reweigh and reevaluate the aggravating and mitigating circumstances. Ibid. Moreover, Lucas's sentence is before this Court on direct appeal from his resentencing. This case is not in a post-conviction relief posture where later decisions are not applicable. Witt v. State, 387 So.2d 922 (Fla.1980).

In conclusion, the trial judge was required to reweigh and reevaluate the aggravating and mitigating evidence in this case. This Court's decisions now hold that a great risk of death to many persons cannot be found unless more than three persons are endangered at the time and location of the homicide. The facts of this case do not qualify. The aggravating circumstance was improperly found and weighed in sentencing Lucas to death, and his sentence must be reversed.

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.

Circuit Judge Thomas Reese was not the original judge in this case. (PR400-401)(A1-2) Unfortunately, the original judge, Judge Thomas Shands, died before the case was remanded for resentencing. (PR400-401)(A1-2) Consequently, Judge Reese never heard the witnesses' testimony and never had the opportunity to evaluate the credibility and demeanor of the witnesses. Judge Reese's total exposure to the evidence in the case was a review of the trial transcript. (PR394,401)(A2) Because of the capital sentencing judge's responsibility to weigh and evaluate the aggravating and mitigating evidence, including an evaluation of the credibility and demeanor of the witnesses, see, Brown v. Wainwright, 392 So.2d 1327 (Fla.1981); State v. Dixon, 283 So.2d 1,7-8 (Fla.1983), Judge Reese should have considered live testimony before reimposing a death sentence.

In Brown v. Wainwright, this Court discussed and distinguished the role of the trial judge as the capital sentencer and the role of this Court as the reviewer of that sentence. 392 So.2d at 1331-1332. The critical distinction this Court noted was the trial judge's responsibility to try, weigh and evaluate the evidence adduced at trial. Ibid. Since Judge Reese did nothing more than read the transcript of the trial

before imposing sentence, the same process this Court employs in reviewing a sentence, ibid., he did not properly try, weigh and evaluate the evidence justifying the imposition of sentence. Reading a cold transcript is no substitute for hearing live witnesses whose demeanor can be judged and factored into the sentencing weighing process.

The fact that live evidence in aggravation and mitigation was heard once by Judge Shands does not remedy the problem. Judge Shand's sentence was vacated on two occasions. Lucas v. State, 417 So.2d 250 (Fla.1982); Lucas v. State, 376 So.2d 1149 (Fla.1979). Judge Reese's sentence is now the only one in force, and only "this sentence and not any prior one... may be carried out." Lucas, 417 So.2d at 251. Judge Reese could not, did not and should not have relied upon any demeanor evaluation of witnesses which Judge Shands may have done in imposing the original sentence.

Lucas's death sentence imposed by a sentencing judge, who did not hear the live evidence in aggravation and mitigation but merely reviewed the cold transcript of the original sentencing, violates the Eighth and Fourteenth Amendments to the United States Constitution. This Court must reverse his death sentence with directions that a new sentencing proceeding be conducted including the presentation of live testimony in support of aggravating and mitigating circumstances.

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.

Lucas's motion to impanel a new sentence advisory jury should not have been denied. (R354) Nonstatutory mitigating evidence was improperly excluded from the original jury's consideration. And, nonstatutory aggravating evidence was improperly presented to the jury. Each of these problems justifies the impaneling of a new sentencing jury.

A.

Nonstatutory Mitigating Evidence Was Improperly Excluded.

At the time of the original sentencing proceeding in 1977, Lucas's trial counsel labored under the misconception that mitigating circumstances were limited to those enumerated in §921.141, Fla.Stat. (R306)(PRS39-48) He had relied on the language in Cooper v. State, 336 So.2d 1133 (Fla.1976) which said that mitigating circumstances were so limited. 336 So.2d at 1139, n.7. Since that time the United States Supreme Court decided Lockett v. Ohio, 438 U.S. 586 (1978) holding that mitigating circumstances cannot be limited. Furthermore, this Court has clarified the language in Cooper and explained that Florida law does not limit mitigating circumstances. Songer v. State, 365 So.2d 696 (Fla.1978). However, the fact remains that trial counsel relied on Cooper and did not present in mitigation evi-

dence of Lucas's character and background. (See Issue II, supra)

Lucas attempted to present this background and character evidence at his first resentencing proceeding, but the trial court denied his request. Lucas v. State, 417 So.2d 250 (Fla.1982) On appeal, this Court "[did] not fault the trial judge for following the letter of [this Court's] mandate," 417 So.2d at 252, and held "that on the evidence presented, section 921.141 was not unconstitutionally applied." Ibid. However, Justice McDonald in his concurring opinion suggested,

On remand, however, the trial judge should consider the recent United States Supreme Court decision of Eddings v. Oklahoma, U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Eddings reminds us that it is important for the sentencing authority to explicitly consider and weigh the defendant's background and character....

Ibid.

Judge Reese did not follow Justice McDonald's suggestion and violated the dictate of Eddings v. Oklahoma, 455 U.S. 104 (1982) in not impaneling a new jury to consider this evidence of Lucas's character and background. Lucas's death sentence is unconstitutional. He urges this Court to reverse his sentence.

B.

Nonstatutory Aggravating Evidence Was Improperly Presented.

In Elledge v. State, 346 So.2d 998 (Fla.1977), this Court held that resentencing with a new jury is required when inadmissible evidence of nonstatutory aggravating circumstances is presented to the original advisory jury. 346 So.2d at 1003.

An error in the evidence presented to the advisory jury requires a new jury untainted by the inadmissible evidence to render a new sentencing recommendation. See Elledge, 346 So.2d 998; see also, Mikenas v. State, 407 So.2d 892 (Fla.1981).

This case was initially remanded because the trial court considered nonstatutory aggravating factors. Lucas v. State, 376 So.2d 1149 (Fla.1979). The court had found that the attempted murders were heinous, atrocious or cruel in support of the death sentence for the homicide. (PR680) 376 So.2d at 1153. At the original sentencing trial, three of the five photographs the State presented in aggravation, depicted the attack on Ricky Byrd, not the homicide victim. (PR623) Moreover, the prosecutor argued to the jury the pain Ricky Byrd must have felt as a result of his wound. (PR640) This evidence and argument was improper. The jury recommendation was tainted, and Lucas is entitled to a new jury and a new sentencing recommendation.

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.

Harold Gene Lucas should not have been sentenced to death for the murder of his girlfriend while he was intoxicated on drugs and alcohol. A sentence of death is disproportional to his crime in violation of the Eighth and Fourteenth Amendments. This Court has reversed death sentences for similar crimes in which the defendant had killed his wife or girlfriend over a domestic dispute. Blair v. State, 406 So.2d 1103 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Chambers v. State, 339 So.2d 204 (Fla.1976). Lucas's death sentence should likewise be reversed.

In Kampff v. State, 371 So.2d 1007, the defendant, like Lucas, was a chronic alcoholic. Kampff was divorced from his wife but was obsessed with wanting to remarry her. He harrassed her frequently. For several days before the murder, Kampff went upon a drinking binge consumming a large quantity of beer and whiskey. At the time of the murder, he entered the bakery where his former wife worked and shot her five times with a pistol. Two other people were present in the bakery at the time. This Court vacated the death sentence with directions that a life sentence be imposed.

The defendant in Chambers v. State, 339 So.2d 204, beat his girlfriend to death.

She was bruised all over the head and legs, had a deep gash under her left ear; her

face was unrecognizable, and she had several internal injuries.

339 So.2d at 205. She died five days after the beating from brain injury. The evidence contradicted Chamber's contention that he was under the influence of drugs and alcohol at the time of the killing. Several witnesses testified to numerous threats he had made. Nevertheless, this Court vacated his death sentence.

In Blair v. State, 406 So.2d 1103, the defendant shot and killed his wife after a series of disputes and arguments. Prior to the murder Blair had arranged for his daughters to be gone and he had dug a hole in the yard under the pretense of repairing a stopped-up sink which became his wife's grave. Later, he poured a concrete slab over the site. Blair, like Lucas, had no significant history or prior criminal activity. On appeal, this Court compared Blair's crime to other cases and remanded for a life sentence. 406 So.2d at 1109.

Lucas's crime is no more egregious than those discussed above. And, in some instances, his crime is even more deserving of a life sentence. His crime was one done in hot blood while he was intoxicated. He did not methodically plan and execute the offense as did the defendant in Blair. Drugs and alcohol were major precipitating factors just as they were in Kampff and Chambers. Like Kampff, Lucas was a chronic alcoholic. (PR627-628) He drank and consumed drugs daily. (PR307-309) Just before the murder, just as the defendant in Chambers, Lucas consumed inordinate amounts of alcohol and drugs. (PR309-316, 351-356) Friends with whom he had used drugs had never

seen him intoxicated to the degree he was the night of the murder. (PR167-170,357-358,384-385) He was acting crazy. (PR167,175,387) His eyes were glassy (PR169,388), and he was out of control. (PR167,175,385-389) Further evidence that inordinate drug and alcohol usage caused the homicide is the fact that Lucas had no significant criminal history besides alcohol related crimes; he had no history of violent offenses. (PR307) (R401-402) (A2-3)

Lucas's death sentence is disproportional to his crime and violates the Eighth and Fourteenth Amendments to the United States Constitution. He asks this Court to vacate his death sentence and to remand with directions that a life sentence be imposed.

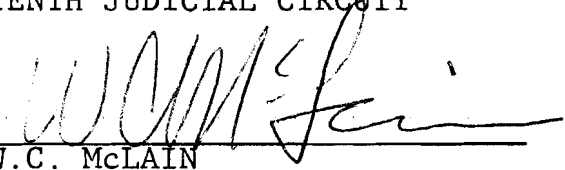
CONCLUSION

Upon the foregoing reasons and authorities, Harold Gene Lucas asks this Court to vacate his death sentence with directions that a life sentence be imposed, or in the alternative, a new sentencing proceeding with a new jury be held.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 14th day of October, 1985.


W.C. McLAIN