IN THE SUPREME COURT OF FLORIDA

HAROLD GENE LUCAS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 78,118

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LEE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Harold Gene Lucas, will rely upon his initial brief in reply to the argument presented in the State's answer brief as to Issue V.

Page references to the record on appeal in case number 78,118 (the instant case) are designated in this brief with the prefix "R." Page references to the record on appeal in case number 70,653 (prior appeal of Appellant's death sentence) are designated with the prefix "PR."

ARGUMENT

ISSUE I

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

On page five of its brief, Appellee cites Songer v. State, 365 So.2d 696 (Fla. 1978) in support of its argument that Appellant was not entitled to present additional evidence before the court below. However, the remand in Songer was for the sole purpose of ensuring that Songer's death sentence "was not imposed on the basis of any information which the appellant did not have an opportunity to rebut or explain [,]" 365 So.2d at 699, whereas here the lower court was charged with the responsibility of reconsidering and rewriting his findings of fact. Lucas v. State, 568 So.2d 18, 24 (Fla. 1990). The Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) remand involved in Songer was much mare limited in scope than the remand involved herein, as in the instant case the trial judge was called upon to, in effect, reexamine his findings to ascertain whether the ultimate punishment was truly called for under the facts and circumstances of this case.

ISSUE II

APPELLANT'S CONSTITUTIONAL RIGHTS WERE DENIED BY THE PROCEDURE FOLLOWED BY THE SENTENCING COURT. INSTEAD OF HOLDIBG 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,

Appellee claims that the court below had Appellant's sentencing memorandum for "several months" before Appellant was sentenced. (Brief of tho Appellee, p. 8) However, the memorandum was filed on March 15, 1991 (R 171-189), and Appellant was sentenced on May 14, 1991. (R 1-92) Therefore, the court had Appellant's memorandum in support of a life sentence for approximately two months, not "several months," as Appellee would lead this Court to believe.

Appellee also argues that the court below had all the information necessary to make his sentencing decision prior to the May 14 hearing (Brief of the Appellee, pp. 7-91, but inconsistently concedes elsewhere in its brief that Appellant raised new matters at the hearing which were not contained in his sentencing memorandum. (Brief of the Appellee, p. 22) Appellant's counsel argued for the first time at the sentencing hearing that Appellant's age of 24 and the fact that his emotional age was lower than that should be considered in mitigation, and that the victim was intoxicated and had made a prior threat against Appellant should also be considered mitigating. (R 36, 44-45, 50, 59) In addition, the trial court did not have the benefit of Appellant's own oral statement prior to preparing the court's written sentencing order, At the May 14

hearing Appellant spoke to the court and expressed his "extreme remorse for the killing of Jill Piper." (R 66) He said that he thought about her constantly, and that "she should be living today and enjoying it." (R 66) Appellant explained how he had improved his education since being incarcerated, and was not a problem prisoner. (R 67) He also said that coming back to court several times had been "very emotional" far him, and had "devastated" his brothers, sisters, nieces, and nephews over the years, and he knew that it brought up old resentment for the Piper family as well. (R 67) Appellant further told the court how he had been abused as a child, beaten by his father, who cussed him, and told him he was worthless and would never amount to anything. (R 67) All of these factors were worthy of the court's consideration, but he could not have given them the attention they deserved where he had already made up his mind to sentence Appellant to death, and reduced the sentence to writing, before he heard what transpired at the Way 14 sentencing hearing.

Appellee appears not to grasp the significance of this Court's opinion in Ree v. State, 565 So.2d 1329 (Fla. 1990). There the Court observed that it violates principles of due process for a sentence to be determined before the trial court has given adequate consideration to all proper argument and evidence presented with regard to the sentence that should be impased. Although Ree was concerned with sentences which depart from those recommended under the sentencing guidelines, the concepts expressed therein apply with all the more vigor where the person to be sentenced is facing the terminntian of his very existence.

ISSUE III

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

Appellee's attempt to portray Appellant's issue as akin to a so-called "gotcha" maneuver (Brief of the Appellee, p. 10) is unavailing. Although it was Appellant who requested that the post-sentence investigation be made part of the record of the proceedings below, there was nothing wrong with Appellant also asking the court not to consider inadmissible portions of that document, Appellant in no way is attempting to ambush the State in raising this issue.

Appellee also speculates that perhaps the court below did not consider the victim impact material contained in the past-sentence investigation in determining that Appellant should be sentenced to death. (Brief of the Appellee, pp. 11-12) The court could have put this matter to rest by ruling an Appellant's request that he not consider the victim impact statements, but he failed to do so, thus raising the very real possibility that the irrelevant and Inflammatory material played a role in his sentencing decision.

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.

The State's argument that Ricky Byrd was in closer proximity to Appellant and Jill Piper than was Terri Rice, and that Byrd was thus in a better position to apprehend what was happening at the Piper residence (Brief *of* the Appellee, p. 14) is belied by the testimony of both Byrd and Rice. Byrd testified that after Jill Piper was shot and ran into the house, Byrd grabbed Rice's hand, and they ran into the bedroom together. (PR 419-421) Rice similarly testified that she went into the bedroom, and that Byrd went with her. (PR 273-274) Thus there is nu support for Appellee's contention that Byrd was better situated to hear what was occurring; the evidence firmly contradicts this assertion.

The cases cited on page 16 of Appellee's brief all involved homicides more heinous than the shooting involved herein, and are distinguishable from this case, For example, in Bruno v. State, 574 So.2d 76 (Fla. 1991) the victim was savagely beaten in the head and shoulders with a crowbar in excess of 10 times until he was no longer capable of resisting. The instant case does not involve this type of conduct. Floyd v. State, 569 So.2d 1225 (Fla. 1990), unlike here, did not involve a shooting at all; the elderly victim died from 12 stab wounds. In Rivera v. State, 561 So.2d 536 (Fla. 1990), unlike Appellant's case, the victim was sexually assaulted and killed by choking. Although Jackson v. State, 522 So.2d 802 (Fla. 1988) did involve a shooting death, the victim therein, unlike Jill Piper here, was subjected to a prolonged ordeal in which he was forced to climb into a laundry

bag after being shot, and despite pleading to be taken for medical treatment, was then driven around remote areas of Hillsborough County. In Koon v. State, 513 So.2d 1253 (Fla. 1987), unlike here, the victim was "beaten ta such an extent that part of his ear was torn off" and "was subjected to hours of terror before his death." 513 So.2d at 1257. The victim in Melendez v. State, 498 So.2d 1258 (Fla. 1986), unlike Jill Piper, had his throat cut and pleaded for mercy. And, finally, in Cooper v. State, 492 So.2d 1059 (Fla. 1986), unlike in the instant case, the three victims were bound and rendered helpless, and were acutely aware of their impending deaths. A gun pointed at the head of one of the victims misfired three times, and one victim pleaded for his life.

Mare to the point are the cases cited in Appellant's initial brief, as well as Porter v. State, 564 So.2d 1060 (Fla. 1990) and Richardson v. State, 17 F.L.W. S241 (Fla. April 9, 1992). Porter was sentenced to death in the shooting of his former girlfriend, whom he had threatened to kill. This Court concluded that Porter's crime "did not stand apart from the norm of capital felonies, nor did it evince extraordinary cruelty." 564 So.2d at 1063. In rejecting the aggrwvator of especially heinous, atrocious, or cruel, the Court further noted that the record was "consistent with the hypothesis that Porter's was a crime of passion, not a crime that was meant to be deliberately and extraordinarily painful." 564 at 1063 (emphasis in original) The same could be said of the instant homicide. In Richardson the defendant appeared at the trailer of a woman with whom he had lived for several years. The woman had been drinking, and the two began to argue. Richardson pulled a pocket knife. He and the woman took their argument outside her trailer, and Richardson shot her with a shotgun. Her death was not instantaneous, but occurred only after enough blood seeped into her chest cavity

to prevent her heart from beating. This Court agreed with the appellant that the lower court should not have found the homicide to be heinous, atrocious, or cruel. The Court noted that "this factor is present only in torturous murders involving an extreme or outrageous depravity that sets the murder apart from the norm of capital felonies, exemplified either by a desire to inflict a high degree of pain or an utter indifference to or enjoyment of the suffering of another. [Citations omitted.]" 17 F.L.W. at S242. The facts did not support a finding of this aggravator in Richardson, and the facts here likewise cannot sustain this particular aggravating circumstance.

ISSUE VI

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

On page 27 of its brief, Appellee misstates Appellant's argument with regard to the trial court's discussion of several proposed mitigating factors. Appellant did not argue in his initial brief, as Appellee suggests, that the sentencing court could not combine several factors in a single discussion. Appellant's point was, rather, that the court's discussion of the proposed mitigating circumstances (good conduct in prison, potential for rehabilitation, genuine remorse, caring deeply for victim) lacks sufficient clarity to provide support for the court's sentencing decision, and renders review of that decision by this Court virtually impossible.

At page 26 of its brief, Appellee asserts that the "trial court correctly observed that there was no evidence in the record to support [the proposed mitigating circumstance that Appellant was physically and psychologically abused as a child],'' If this is what the trial court found, then his finding was clearly erroneous. There was evidence of abuse, both in the form of the "personal history" section of the post-sentence investigation, which indicated that Appellant's alcoholic father beat his wife and children (R 204), and in the form of Appellant's own statement to the court at the May 14, 1991 sentencing hearing, in which Appellant explained how his father had beaten and belittled him. (R 67)

On page 29 of its brief, Appellee claims that Nibert v. State, 574 So.2d 1059 (Fla. 1990) involved "a judicial override of jury's recommendation of life sentence,.." This is incorrect; the jury in Nibert recommended that the defendant be sentenced to death, 574 So. d at 1061.

ISSUE VII

THE TRIA COURT ERRED IN SEBTEBCIBG HAROLD GENE LUCAS TO DEATH **BECAUSE** SUCH A SENTENCE IS DISPROPORTIONATE TO THE CRIME HE COMMITTED.

Appellee notes at page 31 of its brief that in Appellant's most recent prior appeal, this Court stated its view that it did not agree that death is necessarily disproportionate for the homicide committed herein. Appellant does not consider this statement to be a final determination as to whether the ultimate penalty may be imposed for the instant offense. Appellant argued to the court below that death was a disproportionate punishment (R 32, 37-39, 52-54, 62-63, 65, 172). The circuit judge apparently disagreed, although he did not directly address the

proportionality question, It remains up to this Court to resolve this issue once and for all, based upon the complete record.

Appellee's reliance upon Irizarry v. State, 496 So.2d 822 (Fla. 1986) as an example of a case in which this Court found that the killing was "the result of heated, domestic confrontation and, although premeditated, [was] most likely committed upon reflection of a short duration" (Brief of the Appellee, pp. 31-32) is wholly misplaced. Iriaarry was convicted of attacking his ex-wife and her lover as they slept, after driving a considerable distance to reach their abode. The incident involved neither a "heated, domestic confrontation" nor a killing that was apparently "committed upon reflection of a short duration."

Appellee's attempt to limit the line of cases involving "domestic" killings to those involving continuing relationships and a lack of lengthy premeditation is similarly unavailing; this Court has not placed such restrictions on the concept of homicides committed as a result of domestic disputes. In cases such as Irizarry, Kampff v. State, 371 So.2d 1007 (Fla. 1979), Amoros v. State, 531 So.2d 1256 (Fla. 1988), and Wright v. State, 586 So.2d 1024 (Fla. 1991), all of which are discussed in Appellant's initial brief at pages 70-75, this Court at least implicitly recognized that the passions involved in a romantic relationship with another person do not necessarily cease to exist when the relationship does, and that brooding over the breakup of a relationship may drive one of the parties to take action that has dire consequences far the other party.

CONCLUSION

Appellant, Harold Gene Lucas, respectfully renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Krauss, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 18th day of May, 1992.

Respectfully submitted,

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