IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1633

LOWER TRIBUNAL CASE NO. 78-588

HAROLD GENE LUCAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR LEE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

ROBERT T. STRAIN
FLORIDA BAR NO. 325961
ASSISTANT CCRC

ELIZABETH A. WILLIAMS
FLORIDA BAR NO. 0967350
STAFF ATTORNEY

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

COUNSEL FOR APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Harold Gene Lucas' motion for post-conviction relief which was brought pursuant to Florida Rule of Criminal Procedure 3.850.

Citations shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R ___" followed by the appropriate page numbers. The post-conviction record on appeal will be referred to as "PC-R ____" followed by the appropriate page numbers. The evidentiary hearing transcripts will be referred to as "EH ____" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained.

This appeal is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Lucas was deprived of his right to a fair and reliable trial and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. Furthermore, as to the denial of Mr. Lucas' motion for post-conviction relief, there has been an abuse of discretion and a lack of competent evidence to support certain of the trial judge's conclusions.

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Harold Gene Lucas, a death-sentenced inmate on Death Row at Union Correctional Institution, urges this Court to permit oral argument on the issues raised in his appeal.

STATEMENT OF CASE

PROCEDURAL HISTORY

LUCAS I

Harold Gene Lucas was indicted August 30, 1976, and charged with one count of first-degree murder and two counts of attempted first-degree murder for the August 14, 1976, shootings of Jill Piper, Richard Byrd, and Terri Rice in Bonita Springs, Florida. (R1. 549)[1] Ms. Piper died and Mr. Byrd and Ms. Rice recovered from their wounds. Mr. Lucas was, thereafter, convicted as charged. (R1. 683) After the jury recommended a sentence of death, the trial court sentenced Mr. Lucas to death February 9, 1977. (R1. 683) Additionally, Mr. Lucas was sentenced to thirty years imprisonment on each of the two convictions for attempted murder, those sentences to run consecutively. Id. To support its imposition of the death sentence, the trial court found two aggravating circumstances. (R1. 677-682) First, the court found a prior conviction for a felony involving use or threat of violence to persons (Mr. Lucas' contemporaneous attempted murder convictions.)[2] Id. Secondly, the court found that the offense was heinous, atrocious, and cruel. Id. As a mitigating circumstance,

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

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

the court found that Mr. Lucas had no significant prior criminal history. Id. On direct appeal, the Florida Supreme Court remanded the case for re-sentencing on the ground that the trial court erroneously considered as two non-statutory aggravating circumstances, the heinous, atrocious nature of the attempted murders. Lucas v. State, 376 So. 2d 1149 (Fla. 1979).

LUCAS II

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

LUCAS III

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

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

significant prior criminal history. Id.

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

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

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

LUCAS IV

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

On direct appeal, the Florida Supreme Court found that the finding of a heinous, atrocious, or cruel act could also have been a finding that the offense had been committed in a cold, calculated, and premeditated fashion. Lucas v. State, 568 So. 2d 18 (Fla. 1990). Therefore, because the trial court's order was unclear both as to its findings of aggravation and in mitigation,

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

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

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

LUCAS V

On remand, the trial court refused to allow the presentation of additional testimony and prepared its findings of fact in advance of the sentencing hearing. (R4. 93-116)[6] Finding two aggravating circumstances, (1) the prior conviction for a felony involving use or threat of violence to persons and (2) the heinous, atrocious, or cruel quality of the crime, the trial court sentenced Mr. Lucas to death for a fifth time. (R4. 965-982) The court also found several mitigating circumstances: (1) that Mr. Lucas had no significant prior criminal history, (2) that Mr. Lucas acted under an extreme mental or emotional disturbance at the time of the offense (very little weight), that Lucas acted under extreme duress at the time of the offense (no meaningful weight), (4) that Mr. Lucas' ability to conform his conduct to the requirements of law was substantially impaired at the time of the offense (supported by some evidence but not enough to counterbalance either aggravating

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

factor), (5) that Mr. Lucas committed the offense as the result of emotion and passion (incapable of mitigating the defendant's punishment because no CCP), (6) that Mr. Lucas' conduct while in prison was good, (7) that Mr. Lucas had been rehabilitated while in prison (little weight), (8) that Mr. Lucas was the victim of alcohol and drug abuse (reflection of lifestyle and character but does not reduce moral culpability), and (9) that prior to the offense Mr. Lucas had maintained gainful employment. (R4. 965-982)[7]

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

POSTCONVICTION

Mr. Lucas filed motions under Fla.R.Crim.P. 3.850 on October 3, 1994, August 22, 1995, October 3, 1995, and January 19, 1999, the last of which amended and supplanted the earlier motions. (PC-R. Vol. I - 001-032). The State of Florida's response to the last amended motion was filed on June 25, 1999. On July 6, 2000, the trial court conducted a hearing under Huff v. State, 622 So.2d 982 (Fla. 1993). (PC-R. Vol. I - 085-108).

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

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

On June 22, 2001, the trial court entered its Order Denying Amended Motion to Vacate Judgments of Conviction and Sentences. (PC-R. Vol. VII - 862-906). A timely appeal was filed with the trial court on July 19, 2001, which appeal is now properly before this Court.

STATEMENT OF FACTS

A. TRIAL

The evidence adduced at trial was summarized in the opinion of this court affirming Mr. Lucas' conviction in his 1977 trial, Lucas v. State, 376 So. 2d 1149 (Fla. 1979), as follows:

> "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 her 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 of the house."
>
> Lucas, 375 so.2d at 1150.

B. EVIDENTIARY HEARING

The evidence adduced at the evidentiary hearing focused on two key issues as provided by the testimony of several experts. Paul Kish, an expert in crime scene reconstruction, provided uncontroverted testimony about the opinions he made in his analysis of the case. First, that the shooting appeared to have all taken place outside of the particular dwelling. (PC-R. Vol. IV - 498).

Secondly, that there was a failure "to see adequate evidence to allow [him] to make the final conclusion that she, in fact, was – was dragged. There was a lack of evidence in regards to injuries upon her body that suggest a dragging." (PC-R. Vol. IV - 499-500). Thirdly, "there was no evidence in the medical testimony that would indicate a beating upon her body" and he "saw no physical evidence to support this accusation of a – of a beating." (PC-R. Vol. IV - 501).

Additionally, testimony from the original medical examiner, Dr. Wallace M. Graves, Jr., reflected that there were no signs of a beating being incurred by the victim. Dr. Graves testified in both the 1977 and 1987 proceedings and had reviewed his original autopsy material for the hearing. (PC-R. Vol. III - 331-332). This evidentiary hearing testimony for Mr. Lucas was similarly uncontroverted by the State.

Trial counsel Gene Taylor stated that his theory of voluntary intoxication was chosen over involuntary intoxication due to his belief that "it is a little difficult to argue that when somebody lays in wait and shoots somebody in the back, that they were unaware of what they were doing. And that was the biggest hurdle I had to pass, I thought." (PC-R. Vol. III - 180-181). Trial counsel admitted he did not know what kind of drug Mr. Lucas had taken, outside of consumption of beer and marijuana, because "...we didn't concentrate that much on the more exoteric type drugs [at

that time]." (PC-R. Vol. III - 171). Trial counsel further testified that "[A]t the time, I don't think we even knew – I think we thought mitigation factors were limited by the statutory list of mitigating factors, and then it was determined that's not true..." (PC-r. vol. III - 185).

The evidentiary hearing later included the testimony of Dr. Jonathan Lipman, a neuropharmacologist, who testified that medical literature showing the dire consequences of PCP ingestion were available in 1976 (PC-R. Vol. IV - 401) and that hair testing to confirm the presence of the drug was available in the late 1970's (PC-R. Vol. IV - 407).

SUMMARY OF ARGUMENT

1. Facts adduced at the evidentiary hearing revealed that trial counsel was ineffective by not determining the drug used by Mr Lucas at the time of the crime, namely PCP, and by failing to show that the victim did not suffer a beating at the time of the shooting. As a result, Mr. Lucas suffered prejudice by having an improper death sentence imposed upon him in violation of his constitutional rights.

2. The trial court erred by denying an evidentiary hearing in determining that the claim regarding cruel and unusual punishment due to length on death row was a legal issue, not a factual matter for which testimony and evidence could be presented.

ARGUMENT I

THE TRIAL COURT'S RULING FOLLOWING THE POST-CONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.

The trial court denied Claims I and II of Mr. Lucas' Rule 3.850 motion after the conclusion of the evidentiary hearing. The hearing involved two basic claims of ineffective assistance of counsel as outlined by hearing counsel upon the court's request:

> "What we have been granted a hearing on at this time, after the Huff hearing, are primarily I.A.C. charges for ineffective assistance of counsel... This case as Your Honor knows, involved significant drug use... and we are going to seek to prove – that the trial attorney was ineffective in failing to determine what drugs Mr. Lucas was under and the affects of those drugs, specifically, PCP or angel dust.
>
> In the 1987 hearing, one of our primary claims we would like the Court to be aware of is, to try and establish that, in fact, the trial attorney should have shown that there could not have been a beating inside the house, and in that respect, negate the aggravators.
>
> After this case has been up and down five or however many times, what is left are two aggravators. And we are going to contend that effective counsel could have put on evidence that might have eliminated one of those. These are going to be two of our basic claims"
>
> (PC-R. Vol. III - 152-154).

The court was in error for denying Mr. Lucas relief on Claims I and II of the Rule 3.850. The ruling deprived Mr. Lucas of his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The United States Supreme Court requires that a defendant show two elements in establishing a claim of ineffective assistance of trial counsel:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."
>
> Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984), at 687.

Furthermore, establishment of prejudice is controlled by the following requirement:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."
>
> Strickland, 466 U.S. at 694.

After the guilt phase of a capital trial, defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned

determination of whether a defendant shall live or die [made] by a jury of people who may never have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion).

Under Florida law, a capital sentencing jury must be "[T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed ... [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances." State v. Dixon, 283 So.2d 1 (Fla. 1973).

In Francis v. State, ___ So.2d ___, (Fla. Dec. 20, 2001), this Court also recently reviewed the elements that satisfy the HAC aggravator:

> "For HAC to apply, the crime must be conscienceless or pitiless and unnecessarily torturous to the victim. See, e.g., Nelson [v. State], 748 So.2d [237] at 245 [Fla. 1999]; Harley v. State, 686 So.2d 1316 (Fla. 1996). Francis at 19.

In Shere v. State, 579 So.2d 86 (Fla. 1991), this Court rejected the heinous, atrocious or cruel aggravator when it determined that the evidence did not rise to the level of "tortuous murder." The Court considered that:

> "[T]he record shows that Snyder had no way of knowing before the first shot was fired Demo and Shere took him hunting to murder him, so there was no prolonged apprehension of death. Without warning, either Shere or Demo or both fired a rapid succession of gunshots at Snyder from close range with two weapons. The killing took place quickly, and there is no evidence that Snyder experienced pain or

> prolonged suffering. There is no evidence that he remained conscious throughout the shooting, and the first could have struck his head. Likewise, there is no evidence to suggest that Shere desired to inflict a high degree of pain. Four of the wounds were potentially fatal, which is an indication that they tried to kill him, not torture him. There was no testimony that any of the wounds were defensive in nature. Moreover, the fact that multiple gunshot wounds were inflicted is not, by itself, sufficient to support a finding of heinous, atrocious or cruel.
>
> Shere, 579 So.2d at 96.

As to the HAC aggravator, the thrust of the evidentiary hearing testimony showed that there was no beating of the victim by Mr. Lucas. This was remarkably ignored by the court in its "Facts Adduced at Evidentiary Hearing Germane to Claim II" (PC-R. Vol VII - 888-894). Its significance comes from the errors in reading and understanding the record by the re-sentencing court in 1987 and 1991. That court repeatedly referred to facts not proven at trial nor in re-sentencing regarding the victim being beaten. From the sentencing Order of May 14, 1991, the following excerpts are found:

> "the evidence is established beyond every reasonable doubt that based upon the testimony of the victims that after the defendant shot and wounded, *severely beat* and ultimately murdered Jill Piper, [that the defendant pursued the two victim...]. (R.4 987)(emphasis added).
>
> "...but that after these initial shots the defendant pursued the victim and proceed to *savagely beat her* as she pled for her life..." (R.4 968)(emphasis added).
>
> "...the defendant was now reduced to pitifully

> pleading for her life as the 24 year old defendant *beat her* and inflicted further injuries upon her." (R.4 969)(emphasis added).
>
> "...Jill Piper would have been in great physical pain from the gunshot wounds to the back and *the savage beating* she was receiving..." (R.4 969)(emphasis added).
>
> "With the 16 year old victim having endured these horrible circumstances of being threatened, wounded *and beaten*..." (R.4 969)(emphasis added).
>
> "...the victim had endured prior gunshot wounds *and a severe beating*..." (R.4 969-970)(emphasis added).

Contrary to any indications of a beating of any kind, let alone a savage or severe beating, by Mr. Lucas upon the victim, the testimony at the evidentiary hearing showed that none occurred.

For Mr. Lucas, Mr. Paul Kish was stipulated to and accepted as an expert in crime scene reconstruction. (PC-R. Vol. IV -494-495). Mr. Kish provided uncontroverted evidentiary hearing testimony about the opinions he made in his analysis of the case. First, that the shooting appeared to have all taken place outside of the particular dwelling. (PC-R. Vol. IV - 498). Secondly, that there was a failure "to see adequate evidence to allow [him] to make the final conclusion that she, in fact, was – was dragged. There was a lack of evidence in regards to injuries upon her body that suggest a dragging." (PC-R. Vol. IV - 499-500). Thirdly, "there was no evidence in the medical testimony that would indicate a beating upon her body" and he "saw no physical evidence to support

this accusation of a – of a beating." (PC-R. Vol. IV -501).

Additionally, deposition testimony from the medical examiner, Dr. Wallace M. Graves, Jr., was read into the record upon stipulation and request of Mr. Lucas. Dr. Graves testified in both the 1977 and 1987 proceedings and had reviewed his original autopsy material for his deposition. His testimony regarding the case, especially his analysis of seven autopsy photographs, reflected that there were no signs of a beating being incurred by the victim (PC-R. Vol. III - 331-332). This evidentiary hearing testimony for Mr. Lucas was similarly uncontroverted by the State.

Consequently, the trial attorney should have shown that there could not have been a beating inside the house, and in that respect, negate the HAC aggravator. He was ineffective for failing to do so when he could have done so. The prejudice under Strickland is amply shown by the numerous incorrect, improper and unsupported references in the 1991 sentencing order to a savage, severe beating that did not occur.

As to the 1977 trial, Mr. Lucas alleged that trial counsel was ineffective in failing to determine what drugs Mr. Lucas was under and the affect of those drugs, specifically PCP or angel dust. Mr. Lucas did so while recognizing that the 1991 sentencing court found the following drug related matters in mitigation (with consequent weighing analysis shown): that Mr. Lucas acted under an extreme mental or emotional disturbance at the time of the offense

(very little weight), that Mr. Lucas acted under extreme duress at the time of the offense (no meaningful weight), that Mr. Lucas' ability to conform his conduct to the requirements of law was substantially impaired at the time of the offense (supported by some evidence but not enough to counterbalance either aggravating factor), that Mr. Lucas committed the offense as the result of emotion and passion (incapable of mitigating the defendant's punishment because no CCP), and that Mr. Lucas was the victim of alcohol and drug abuse (reflection of lifestyle and character but does not reduce moral culpability). (R4. 965-982).

At the evidentiary hearing, the trial counsel stated that his theory of voluntary intoxication was chosen over involuntary intoxication due to his belief that "it is a little difficult to argue that when somebody lays in wait and shoots somebody in the back, that they were unaware of what they were doing. And that was the biggest hurdle I had to pass, I thought." (PC-R. Vol. III - 180-181). Trial counsel admitted he did not know what kind of drug Mr. Lucas had taken, outside of consumption of beer and marijuana, because "...we didn't concentrate that much on the more exoteric type drugs [at that time]." (PC-R. Vol. III - 171). Trial counsel further testified that "[A]t the time, I don't think we even knew - I think we thought mitigation factors were limited by the statutory list of mitigating factors, and then it was determined that's not true..." (PC-R. Vol. III - 185).

The evidentiary hearing later included the testimony of Dr. Jonathan Lipman, a neuropharmacologist, who appeared for Mr. Lucas. Dr. Lipman testified that medical literature showing the dire consequences of PCP ingestion was available in 1976 (PC-R. Vol. IV - 401) and that hair testing to confirm the presence of the drug was available in the late 1970's (PC-R. Vol. IV - 407).

Given the slight weight to the mitigation involving Mr. Lucas' drug use, trial counsel was ineffective in 1977 for failing to determine and confirm the ingestion of PCP by Mr. Lucas. Counsel and his expert, Dr. Sprehe, at the re-sentencing in 1987, therefore, were limited as to the certainty that could have been possible regarding the usage of this drug. Such a failure and shortcoming, which bound all later proceedings, clearly meets the prejudice test found in Strickland.

ARGUMENT II

THE TRIAL COURT ERRED BY FAILING TO GRANT AN EVIDENTIARY HEARING SO MR. LUCAS COULD ESTABLISH THAT THE LENGTH OF HIS INCARCERATION ON DEATH ROW CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT AND DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The trial court erred when it denied Mr. Lucas an evidentiary hearing on the claim that his length of incarceration on death row constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Mr. Lucas argues that the claim and issue constitutes factual matters whereas the trial court ruled that "[I]t's legal. I don't think it requires an evidentiary hearing. There's no evidence to present. The facts are the facts. Facts of the case were decided." (Huff hearing)(PC-R. Vol. I - 93-94).

In the order denying Rule 3.850 relief, the trial court stated that "it appears that the main reason why this sentence has not been carried out is due [sic] what Justice Thomas described as the United States Supreme Court's 'Byzantine death penalty jurisprudence.'" (in referring to Knight v. Florida 528 U.S. 990, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999)(citations omitted by the court in its order).

The full wording of the quotation from Justice Thomas' concurring opinion in Knight is, however, instructive: "It is worth noting, in addition, that, **in most cases** raising this novel claim, the delay in carrying out the prisoner's execution stems from the Court's Byzantine death penalty jurisprudence." Knight, 120 S.Ct. at 459 (citations omitted)(emphasis added). Mr. Lucas suggests that his case is not one among "most" of the cases with this claim. Additionally, the trial court's usage of Justice Thomas' concurring opinion ignores that of Justice Stevens: "It seems appropriate to emphasize that the denial of the[se] petition[s] for certiorari does not constitute a ruling on the merits." (citing to, e.g., Barber v. Tennessee, 513 U.S. 1184, 115

S.Ct. 1177, 130 L.Ed.2d 1129 (1995)(opinion of Justice Stevens). Knight, 120 S.Ct. at 459.

In the motion from his very first Rule 3.850 postconviction proceeding, Mr. Lucas noted he was convicted of a crime which occurred on August 14, 1976, and that he has been on death row since 1977. Furthermore, he indicated that the maximum sentence for first degree murder which Mr. Lucas could have received, had the jury recommendation been life and had the original trial court imposed life, would have been life with no possibility of parole for twenty-five years. As a result of the exercise of his constitutional rights to direct appeal, Mr. Lucas' sentence and conviction did not become final until 1993. (Claim III of the Rule 3.850 motion; PC-R. Vol. I - 20-26).

Additionally and importantly as to factual issues, Mr. Lucas proffered that he could present testimony regarding his suffering as a lifer on death row and present evidence regarding the difference between life on death row and life in the general prison population. (PC-R. Vol. I - 25). He similarly presented to the trial court a litany of references and authorities as to this factual issue and as to what the trial court rejected by saying:

> "6. While it is fair to say that reasonable men and women may differ in their characterization of such matters, See, e.g., Justice Breyer's dissent from the denial of certiorari in Knight v. Florida, one fact is abundantly clear from this file, and that is that Mr. Lucas is guilty of the offenses for which

> he has been convicted. From an appellate standpoint, Mr. Lucas has had all of the 'due process' he has been 'due,' and more."
>
> (Order June 22, 2001; PC-R. Vol. VII - 900).

A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R.Crim.P. 3.850; See also, Valle v. State, 705 So.2d 1333 (Fla. 1997); Rivera v. State, 717 So.2d 477 (Fla. 1998); and Gaskin v. State, 737 So.2d 509 (Fla. 1999).

Furthermore, to support summary denial of a Rule 3.850 claim without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), citing Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993). Accord: Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000)("this Court's cases decided since *Hoffman* [571 So.2d 449 (Fla. 1990)] have made clear that an order denying an evidentiary hearing is sufficient if it sets forth a clear rationale explaining why the motion and record conclusively refute each claim...". (emphasis added).

The presentation of a rationale for its ruling as opposed to an attachment of those specific parts of the record that refute the

claim would ordinarily comply with the requirements of Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000).

However, the trial court merely gave its own characterization of the substance of the claim. There is no basis or objective rationale provided as to why the trial court disagreed with or rejected the substance of the claim. The trial court likewise failed to attach any specific parts of the record to refute this claim.

An incomplete or unobjective rationale, in the absence of a record attachment, cannot comply with Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000).

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Rule 3.850 relief to Harold Gene Lucas. This Court should order that his conviction and sentence be vacated and remand the case for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

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

_____
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 COMPLIANCE

We hereby certify that the foregoing Initial Brief of Appellant was generated in Courier New 12-point font pursuant to Fla.R.App.P. 9.210.

_____
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