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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the Appellant Harold Gene Lucas in reply to the Answer Brief of the Appellee, the State of Florida. 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. The Initial Brief of the Appellant will be referred to as "IB ___" followed by the appropriate page numbers. The Answer Brief of the Appellee will be referred to as "AB ___" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained.

Appellant will rely upon his arguments in the Initial Brief of Appellant on Argument I.

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 Respondent argues that the trial court was correct 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 because "[T]his is a purely legal claim which must be reviewed de novo." AB 28.

Mr. Lucas argues that the claim and issue constitutes factual matters with evidence to present to the evidentiary court. The Respondent even notes that there are facts that could be presented at an evidentiary hearing. Namely, the Respondent outlines the "[emotional] suffering on death row and the differences between a death sentence and a life sentence in [the] general population [of a prison]." AB at 28. Yet the Respondent simply indicates that "notwithstanding these facts, this claim is facially invalid because it is premised on an argument which has been repeatedly rejected in state and federal court." AB 30-31.

While the Respondent recognized that a denial of certiorari by the United States Supreme Court is not an adjudication on the

merits, the Respondent relies heavily on the position of Justice Thomas in *Knight v. State*, 746 So.2d 423 (Fla. 1998), *cert. denied*, 528 U.S. 990 (1999)(Thomas, J., concurring). AB 29-30. The Petitioner argues that the position of Justice Stevens could be of equal value:

> [T]hough novel, petitioner's claim is not without foundation. . . [I]t is arguable that neither ground [the 'two principal social purposes of the death penalty: retribution and deterrence,' as cited in *Gregg v. Georgia*, 428 U.S. 153, 177, 183 (1976)] retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. . . [F]inally, the actual deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal.

Lackey v. Texas, 514 U.S. 1045, 1045 (1995)(Stevens, J., respecting denial of certiorari)(citations omitted).

Justice Stevens furthermore suggested in *Lackey* that it may be appropriate for state and federal courts to "serve as laboratories in which the issue receives further study before it is addressed by this Court," (citing *McCray v. New York*, 461 U.S. 961, 963 (1983)(Stevens, J., respecting denial of certiorari) while the lower courts address "the reasons for the various delays that have occurred in [the] petitioner's case." *Lackey*, 514 U.S. at 1045

(1995)(Stevens, J., respecting denial of certiorari).

As noted in Appellant's Initial Brief (IB at 3-7), the trial court sentenced Mr. Lucas to death February 9, 1977. On direct appeal, this 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). Upon remand, the trial court again sentenced Mr. Lucas to death. Upon appeal, this 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).

On the next remand, the trial court again sentenced Mr. Lucas to death without a jury trial. This 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.

On remand, the second penalty phase trial was held and the jury recommended a sentence of death. The trial court followed the jury's recommendation. On direct appeal, this 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, this Court found, as a matter of law, that the aggravating

circumstance of cold, calculated, and premeditated could not be supported by the evidence.

Following another remand and death sentence, in 1992 this Court upheld the death sentence for the first time. *Lucas v. State*, 613 So. 2d 408 (Fla. 1992). Also for the first time, the Appellant's death sentence became final when the United States Supreme Court subsequently denied a timely filed petition for writ of certiorari on October 4, 1993. 510 U.S. 845 (1993). From this history, it would appear that it was the trial court which caused such a "delay" rather than the "United States Supreme Court's Byzantine death penalty jurisprudence" as the evidentiary court so pointedly emphasized. PC-R. Vol. VII - 900. See *Moore v. State*, — N.E. —, 2002 WL 1376148 (Ind. June 26, 2002) (which considered the petitioner's postconviction continuance requests as being largely responsible for some of the delay in that case's history). *Moore v. State*, — N.E. —, 2002 WL 1376148, *8, fn. 2 (Ind. June 26, 2002)

Lastly, contrary to the Appellee's position, the presentation of an unclear rationale for its ruling as opposed to an attachment of those specific parts of the record that refute the claim does not 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).

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply 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, 7819 NW 228th Street, Raiford, Florida 32026 on this _____ day of July, 2002.

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CERTIFICATE OF COMPLIANCE

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

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