IN THE SUPREME COURT OF FLORIDA

HAROLD GENE LUCAS, :

Appellant, :

vs. : Case No. 78,118

STATE OF FLORIDA, :

Appellee. :

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

SUPPLEMENTAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

Before Appellant's penalty phase that was held on March 30-April 3, 1987, Appellant filed several motions, including a motion to preclude re-imposition of the death penalty. (PR841-845) One of the grounds for the motion was that the especially heinous, atrocious, or cruel aggravating circumstance, which had previously been found by Judge Reese when he sentenced Appellant to death, was not applicable under the facts and circumstances of this case. (PR21-22,841-845) The court heard the motion prior to the beginning of the penalty trial, and denied it. (PR19-32)

At the jury charge conference, Appellant again argued the insufficiency of the evidence to permit the court to submit to Appellant's jury the aggravator of especially wicked, evil, atrocious or cruel, but the court overruled Appellant's objection. (PR693-694) The court did, however, say that he would "like to see the definitions of heinous, atrocious and cruel added to" Appellant's proposed jury instruction number four, and defense counsel stated that he could do that. (PR705-706) Further discussion resulted in a decision to define only "atrocious" and "cruel," because those terms, but not "heinous," appeared in the standard jury instruction on the aggravating factor in question. (PR721) Appellant's jury was subsequently instructed on the aggravator found in section 921.141(5)(h), Florida Statutes (1987), as follows (PR795-796):

> The aggravating circumstance of "especially wicked, atrocious or cruel" means a murder which is accompanied by such additional acts

to set the crime apart from the norm. It is the consciousless or pitiless crime which is unnecessarily torturous to the victim.

This aggravating circumstance does not apply where the victim dies instantaneously and painlessly without additional acts.

"Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

SUMMARY OF THE ARGUMENT

Appellant's penalty phase jury was given an unconstitutionally vague instruction on the especially heinous, atrocious or cruel aggravating circumstance, rendering the death recommendation unreliable. Although the trial court modified the standard charge somewhat, and incorporated this Court's definitions of "atrocious" and "cruel," the instruction remained inadequate to pass constitutional muster.

ARGUMENT

ISSUE VIII

APPELLANT'S SENTENCE OF DEATH CANNOT STAND, BECAUSE IT IS PREDICATED, AT LEAST IN PART, ON A TAINTED JURY RECOMMENDATION, AS APPELLANT'S JURY WAS GIVEN AN UNCONSTITUTIONALLY VAGUE INSTRUCTION OF THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

In Espinosa v. Florida, 112 S.Ct. 2926 (1992), the Supreme Court of the United States recently held that when a capital jury is instructed on aggravating circumstances, it cannot be given an instruction which is "so vague as to leave the [jury] without sufficient guidance for determining the presence or absence of the factor." Specifically, the Espinosa Court found invalid under the Eighth Amendment Florida's penalty phase jury instruction defining the section 921.141(5)(h) aggravating circumstance in terms of "especially wicked, evil, atrocious or cruel." [Fla. Std. Jury Instr. (Crim.), p. 79][1]

Although the court below did modify the standard instruction somewhat, the changes did not provide substantially greater guidance to Appellant's jury than the standard instruction would have, and did not save the instructian from constitutional infirmity.

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[1] Subsequent to Appellant's penalty trial, this Court approved an amendment to the standard jury instruction so that the new charge defines the aggravator in terms of the statutory phrase of "especially heinous, atrocious or cruel," rather than "especially wicked, evil, atrocious or cruel," and includes the definitions of "heinous," "atrocious" and "cruel" set forth in State v. Dixon, 283 So.2d 1 (Fla. 1973). In re Standard Jury Instructions Criminal Cases--No. 90-1, 579 So.2d 75 (Fla. 1990).

With **regard** particularly to the court's employment of the definitions of "atrocious" and "cruel" found in this Court's Dixon opinion, in Shell v. Mississippi, **498** U.S. ___, **111** S.Ct. 313, 112 **L.Ed.2d 1** (1990), the Supreme Court of the United States held that a limiting instruction used by the trial court to define the "especially heinous, atrocious, or cruel" factor was not constitutionally sufficient. The concurring opinion in Shell explains why limiting constructions such **as** that attempted in Dixon **are** not up to constitutional standards:

> The basis for this conclusion [that the limiting construction used by the Mississippi Supreme court was deficient] is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction itself "provide[s] some guidance to the sentencer." Walton v. Arizona, **497** US ___, ___, 111 L Ed 2d 511, 110 **S** Ct **3047** (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard [v. Cartwright, **486** U.S. 356, **108 S.Ct. 1853, 100 L.Ed.2d** 372 (1988)] clearly fail this test; like "heinous" and "atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be **used by** " '[a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Maynard **v.** Cartwright, supra, at 363, **100** L Ed 2d 372, **108 S** Ct **1853** (quoting Godfrey v. Georgia, **446** US **420, 428-429, 64 L Ed 2d 398, 100 S** Ct 1759 (1980) (plurality opinion) (emphasis added).

112 L.Ed.2d at **5.**

The Supreme Court emphasized the importance of suitable jury instructions in Gregg v. Georgia, **428** U.S. 153, 96 S.Ct. 2909, **49 L.Ed.2d 859** (1976):

> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to fallow any other course in a legal system that has traditionally operated by following priar precedents and fixed rules of law. [Footnote and citation omitted.] When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

49 L.Ed.2d at 885-886. Appellant's jury was not "carefully and adequately guided" in its deliberations; the inadequate jury instruction on HAC tainted the recommendation and rendered it unreliable. Appellant's death sentence, predicated in part on the unreliable recommendation, cannot stand, as it was imposed in violation of the requirements of due process of law, and subjects Appellant to cruel and unusual punishment. Amends. VIII and XIV, U.S. Const.; Art. I, Sections 9 and 17, Fla. Const. He must be granted a new penalty phase, before a new jury impaneled for that purpose.

Appellant is aware that in Power v. State, 17 F.L.W. S 572 (Fla. August 27, 1992), this Court found a jury instruction on HAC not to be unconstitutionally vague where it included the limiting constructian adopted by the Court in Dixon. However, the Power Court did not address the impact of Shell, and Appellant respectfully submits that the Power opinion cannot be reconciled with Shell.

CONCLUSION

Appellant, Harold Gene Lucas, respectfully prays this Honorable Court to vacate his sentence of death and remand this cause to the circuit court for a new penalty phase before a jury impaneled for that purpose.

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) 873-4730, on this 13th day of October, 1992.

Respectfully submitted,

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