IN THE SUPREME COURT OF FLQRIDA

HAROLD GENE LUCAS,

Appellant,

v. Case No. 78,118

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Your appellee accepts the Statement of the Case and Facts set forth by appellant at pages 2 – 3 of his supplemental brief as a substantially accurate reflection of what occurred in the trial court in 1987. As will be discussed below, these matters should not be at issue at the present time in the instant proceeding based upon the limited remand by this Honorable Court. In any event, your appellee would add to the Statement of the Facts that no objection was ever made to the trial judge in 1987 as to the purported unconstitutionality of the jury instruction on the heinous, atrocious or cruel aggravating factor. In addition, this point was never raised on appeal in Case No. 70,653 (the most recent appeal in this cause).

SUMMARY OF THE ARGUMENT

Where no objection was ever made to the purported unconstitutionality of the jury instruction on the heinous, atrocious or cruel aggravating circumstance, this Court should find the claim unpreserved and, therefore, not cognizable on appeal. This is especially true where no claim concerning the unconstitutionality of either the statute or instruction pertaining to heinous, atrocious or cruel was presented on direct appeal after the jury recommendation was rendered in 1987. Alternatively, appellant's claim has absolutely no merit where the trial judge instructed the jury on the limiting construction enunciated by this Court in Dixon and approved by the United States Supreme Court in Proffitt.

ARGUMENT

ISSUE VIII

WHETHER APPELLANT IS ENTITLED TO RELIEF BASED UPON ESPINOSA V. FLORIDA.

As his eighth point on appeal, appellant presents the now-familiar claim that the jury instructions given in the instant case pertaining to the heinous, atrocious or cruel aggravating factor were unconstitutional. The facts of the instant case do not present even a colorable claim for the application of Espinosa v. Florida, 112 S.Ct. 2926 (1992).

There has been no claim, nor could there be, that appellant objected to the purported unconstitutionality of either the statute or the jury instructions pertaining to the heinous, atrocious or cruel aggravating factor. Nor was this claim raised in the appeal resulting from the 1987 trial proceedings. As discussed above under Issue I, this cause was remanded only for reconsideration and rewriting of the findings of fact by the trial judge, and was not an open invitation to raise new issues which should have been raised, if at all, previously. Where no objection was made at trial or where no claim of unconstitutional vagueness was ever made, this issue is clearly not preserved and, therefore, not cognizable on appeal. See, e.g., Ragsdale v. State, No. 72,664 (Fla. October 15, 1992) (slip opinion at page 10). Thus, where it is absolutely clear that no objection was ever made to the trial judge on the basis of purportedly vague instructions on aggravating factors, this Honorable Court should

hold that there is a clear procedural bar in unambiguous terms so as to foreclose the possibility that endless litigation will ensue pertaining to this claim. The United States Supreme Court has ruled that this Honorable Court's procedural bars are to be given credence in the context of the claim raised by appellant dealing with the purported unconstitutionality of the instructions on our aggravating factors. See, Sochor v. Florida, 112 S.Ct 2114 (1992).

Even were it possible for this Honorable Court to reach the merits of this claim, it is clear, beyond a reasonable doubt, that appellant would be entitled to no relief. Appellant has correctly recognized that the trial judge instructed the jury pursuant to the limiting construction of the heinous, atrocious or cruel aggravating factor propounded by this Honorable Court in State v. Dixon, 283 So.2d 1 (Fla. 1973). The Dixon limiting construction was approved by the United State Supreme Court in Proffitt v. Florida, 428 U.S. 42 (1976), and subsequent attacks upon the constitutionality of the heinous, atrocious or cruel aggravating factor have always been rejected by the United States Supreme Court. Espinosa dealt with the situation where the jury was not instructed on the Dixon standard but, in the instant case, they were. This Honorable Court has recently recognized that a jury instruction such as that given in the instant case is not unconstitutionally vague. Power v. State, 17 F.L.W. S572, S576, n. 10.

Inasmuch as there is a clear procedural bar due to the failure to preserve a claim of unconstitutional vagueness, and inasmuch as the jury was instructed on the Dixon standards, appellant's eighth point must fail.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 26th day of October, 1992.

Robert J. Krauss

OF COUNSEL FOR **APPELLEE.**