IN THE SUPREME COURT OF FLORIDA

LOUIS B. GASKIN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NUMBER 76,326

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellee adds the following facts: Gaskin filed a pretrial motion claiming the aggravating circumstance of cold, calculated and premeditated[1] was vague, overbroad, arbitrary and capricious on its face and as applied (R 1193-1217). No similar objection was made as to the heinous, atrocious, or cruel factor or to the fact that the instruction itself was vague. At trial, the jury was instructed that the aggravating circumstances that could be considered were: (1) the defendant was previously convicted of another capital offense or felony involving violence; (2) the capital felony was committed while the defendant was engaged in the commission of a robbery or burglary; (3) the crime was committed for financial gain; (4) the crime was especially wicked, evil, atrocious or cruel; (5) the crime was committed in a cold, calculated, premeditated manner without a pretense af moral or legal justification (R 999). Trial counsel did not object to the instruction on the heinous, atrocious and cruel aggravating circumstance[2] or request a special instruction on this aggravating circumstance.

The jury recommended a death sentence and the judge sentenced Gaskin to death, finding the aggravating circumstances of (1) both murders were committed in a cold, calculated and Premeditated manner;[3] (2) Gaskin had previously been convicted of another capital offense of a felony involving the use or threat

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[1] Hereinafter referred to as "CCP".

[2] Hereinafter referred to as "HAC".

[3] Florida Statute 921.141(5)(i).

of violence;[4] (3) the murders were committed while the defendant was engaged in the commission of a robbery or burglary;[5] and only as to Mrs. Sturmfels (4) the murder was especially wicked, evil, atrocious, or cruel.[6] In mitigation the trial court found (1) the murders were committed while Gaskin was under the influence of extreme mental or emotional disturbance; and (2) Gaskin had a deprived childhood. The trial court found that even if the HAC aggravator were stricken, death was still the appropriate penalty (R 1317).

On direct appeal, Gaskin challenged the application of the aggravating circumstance of heinous, atrocious and cruel in Point II, and in Point IX raised a variety of constitutional challenges. Among the many constitutional challenges raised were whether the HAC and the CCP factors, not the instructions, were unconstitutionally vague. This Court affirmed both death sentences. *Gaskin v. State*, 591 So.2d 917 (Fla. 1991). Regarding the constitutional issue, this court found:

> We also reject without discussion Gaskin's multiple assertions regarding the constitutionality of the capital-sentencing statute as each of his arguments has previously been decided adversely to his position.

Gaskin, supra, at 920.

As to the HAC aggravator, this court found:

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[4] Florida Statute 921.141(5)(b).

[5] Florida Statute 921.141(5)(d).

[6] Florida Statute 921.141(5)(h).

> The facts show that Mrs. Sturmfels knew her husband was being murdered, and that she must have contemplated her own death. She was shot at least twice before crawling down the hall where she watched blood pour from her wounds. She must have been in physical pain and mentally aware of her impending death as Gaskin first disabled her and then stalked her throughout the house. We find under the totality of facts presented here that the trial court did not abuse its discretion in concluding that this circumstance had been proven beyond a reasonable doubt. We note that even if this aggravating circumstance has not been found, we are persuaded that the trial court would have nevertheless imposed the death penalty, as it did for the death of Mr. Sturmfels in the absence of this aggravating factor.

Gaskin, supra, **at 920-921.**

SUMMARY OF THE ARGUMENT

Gaskin's claim is procedurally barred for failure to object to the jury instruction at trial or to raise the claim on direct appeal. Even if the claim is cognizable, any instructional error is harmless at worst. The trial court's independent finding of this factor and this court's affirmance of it cures any instructional error that may have occurred at trial. Further, the trial court found that death was the appropriate penalty even without this factor.

POINT 1

GASKIN'S CLAIM IS PROCEDURALLY BARRED; ANY INSTRUCTIONAL ERROR IS HARMLESS.

The record reflects that at no time at trial or on direct appeal did Gaskin argue that the instruction for the aggravating factor of HAC was vague. Rather, Gaskin argued that this aggravating factor did not apply. This court, in *Gaskin v. State*, 591 So.2d 917, 921 (Fla. 1991), held:

> According to Gaskin's own statement after twice shooting Mr. Sturmfels, 'his wife realized what was going on.' She tried to run away but Gaskin shot her. Gaskin turned back to Mr. Sturmfels, who was still standing, and shot him again. When Mrs. Sturmfels attempted to crawl out of view, Gaskin shot her still again as she continued to try to crawl to safety. Gaskin then tracked her around the house until he got her in view through the other doors that faced the hallway. 'She was sitting there holding her head, looking at the blood.' Gaskin then shot her again, and fell over. While Mrs. Sturmfels lay there 'groggily or dying,' Gaskin subsequently entered the home through a window. Although Mr. Sturmfels was already dead, Gaskin 'shot him again in the head at point blank range.' He then sought out Mrs. Sturmfels and 'shot her again in the head at point blank range.'
>
> The facts show that Mrs. Sturmfels knew her husband was being murdered, and that she must have contemplated her own death. She was shot at least twice before crawling down the hall where she watched blood pour from her wounds. She must have been in physical pain and mentally aware of her impending death as Gaskin first disabled her and then stalked her throughout the house. We find under the totality of facts presented here that the trial court did not abuse its discretion in concluding that this circumstance had been proven

> beyond a reasonable doubt. We note that even if this aggravating circumstance had not been found, we are persuaded that the trial court would have nevertheless imposed the death penalty as it did for the death of Mr. Sturmfels in the absence of this aggravating circumstance.

591 So.2d at **920-921.**

Since trial counsel **did** not object to the HAC instruction and, under Florida law, a claim is not preserved for appellate review unless there is an objection, Gaskin's "Espinosa claim" is procedurally barred. ***See*** Rule 3.390(d), Fla.R.Crim.P.; *Gunsby v. State,* 574 So.2d **1085, 1089** (Fla. 1991); *Martin v. Singletary,* **599 So.2d 119** (Fla. 1992), and *Kennedy v. Singletary,* **599** So.2d 991 (Fla. 1992). In fact, in *Sochor v. Florida,* 112 S.Ct. 2114 (1992), the United States Supreme Court determined that this Court enforced its procedural bar where, as here, no objection was raised at trial or on appeal with regard to the underlying claim. This court, in ***Kennedy,*** *supra,* rejected the identical claim with regard to whether procedural bar applied to the error identified in *Espinosa v. Florida,* 112 S.Ct. 2926 (1992).

To the extent confusion may exist with regard to why the United States Supreme court summarily granted certiorari and remanded in light of *Espinosa v. Florida,* in the instant case, it is submitted the United States Supreme Court has deferred to this Court's authority to apply otherwise valid state procedures to the "*Espinosa* matter." Specifically, simply because the United States Supreme Court, in ***Espinosa,*** *supra,* torturously concluded that **the** instruction given with regard to HAC is "vague", did not and

does not mean such error cannot be held to be procedurally barred where the state courts, as a matter of practice and case authority, apply procedural bar to claims which have not been timely objected to at trial. The *Espinosa* claim, as evidenced in *Kennedy v. Singletary, supra,* is not a fundamental error claim albeit the United States Supreme court identified it as constitutional error, It is axiomatic that all constitutional error which may occur is not fundamental error. Clearly, the failure to object to a "vague" jury instruction has never constituted fundamental error and this court has, in a legion of cases, so held.

As a reference point, it should be noted that this court, in reviewing *Booth v. Maryland,* 482 U.S. 496 (1987), claims, found that although constitutional error may have existed when victim impact evidence was presented, said error was procedurally barred in cases where a defendant made no contemporaneous objection. ***See*** *Parker v. Dugger, 550* So, **2d** 459 (Fla. 1989), and *Clark v.* ***Dugger,*** **559** So.2d 192 (Fla. 1990). Applying that similar circumstance to **the** instant case, it is clear that where, as here, Gaskin failed to object to the jury instruction with regard to HAC, said claim is procedurally barred and this court should so hold in an opinion on remand.

Even if Gaskin's claim is cognizable, instructional error is harmless at worst. *Chapman v. California,* **386** U.S. **18 (1967). In** *Sochor v. Florida, supra,* the United States Supreme court held that there was no error where this court had limited the application of the HAC factor. This court, in *Gaskin,* found that the crime was indeed heinous, atrocious and cruel but additionally concluded:

> . . . We find under the totality of facts presented here that the trial court did not abuse its discretion in concluding that this circumstance had been proven beyond a reasonable doubt. We note that even if this aggravating circumstance had not been found, we are persuaded that the trial court would have nevertheless imposed the death sentence, as it did for the death of Mr. Sturmfels in the absence of this aggravating Circumstance.

591 So.2d at 921.

This court has consistently applied the HAC factor in situations where, such as this, the defendant shows utter indifference to, or even enjoyment of, the suffering of a victim who experiences extreme mental anguish and is aware of impending death. ***See*** *Preston v. State,* ___ So.2d (Fla. **1992**); *Douglas v. State, 575* **So.2d** *165* (Fla. **1991**); *Zeigler v. State, 580* **So.2d 127** (Fla. **1991**); *Huff v. State,* 495 **So.2d** 145 (Fla. **1986**); ***Melendez v. State,*** **438** So.2d **1258** (Fla. **1986**); *Garcia v. State,* **492** So.2d **360** (Fla. **1986**); *Scott v. State,* **494** So.2d **1134** (Fla. **1986**); *Routly v.* ***State,*** **440** So.2d **1257** (Fla. **1983**), and ***Francois v.*** *State,* 407 So.2d **885** (Fla. 1981). Error in the instruction, if any, was harmless. Even if a more complete definition **had** been given, it would not have changed the outcome under *Chapman, supra.* In fact, the trial court found that if this aggravating circumstance were stricken he would still have imposed the death penalty (R **1317**). This court similarly so held. 591 So.2d at 921. Error, if any, was harmless and properly considered by this court in the "constitutional sense" noted in *Sochor v. Florida.* ***See*** *Clemons v.* ***Mississippi,*** **494** U.**S. 738** (**1990**), and *Chapman, supra.*

Moreover, it should be further noted that in *Maynard v. Cartwright*, **486** U.S. 356 (1988), the United States Supreme Court expressly held that even where the jury is improperly instructed (in *Maynard*, the jury was the sentencer), the error may be cured when [the true sentencer (the trial judge) or] the appellate court adopts a narrowing construction and where the appellate court has **held** striking one aggravating factor can **be harmless.** *See Parker u. Dugger*, **488** U.S. ___, 112 L.Ed.2d 812, 111 S.Ct. **738** (1991), **and** *Clemons v. **Mississippi**, supra.* This court has always applied a narrowing construction and consistently conducted harmless error analysis when an invalid factor has been considered. *Sochor v. Florida, supra; **see** also **Holton u. State**,* 573 So.2d 284 (Fla. 1990).

Because **the** trial court and the appellate court both conducted an analysis determining that absent the HAC factor, the death sentence is still the appropriate sentence. Because the facts and circumstances of this particular murder, as well as similar murders, have consistently supported a finding that the murder **was** committed in a heinous, atrocious and cruel manner, any error that may have occurred was harmless error beyond any reasonable doubt, in fact it was harmless error beyond the exclusion of all reasonable doubt.

Appellee would also point out that this case, like the other cases where certiorari was summarily granted and the case remanded to this court for further consideration in light of *Espinosa*, warrants **a** clear statement by this court as to its interpretation of the Florida capital sentencing statute. In

Espinosa, supra, the United States Supreme Court, in interpreting 8921.141, concluded:

> By giving 'great weight' to the jury's recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found.

This analysis first assumes that the aggravating factor is invalid under any definition of the term notwithstanding the finding by both the trial court and this court that the factor was proven to apply beyond a reasonable doubt, under Florida's narrowing construction. *Cf. Walton v. Arizona,* 110 S.Ct. 3047 (1990). Second, it makes the jury the sentencer since it implies that the judge only serves as a rubber stamp to the jury's reasonless "recommendation". This analysis contradicts not only the express statement of this court in cases like *Smalley v. State,* 546 So.2d 720, 722 (Fla. 1989), and *Combs v. State, 525* So.2d *853* (Fla. 1988), but also prior decisions of the United States Supreme Court which recognized that the trial judge was the sentencer in Florida. *See Parker v. Dugger,* 111 S.Ct. 731 (1991); *Hildwin v. Florida,* 490 U.S. *638* (1989); *Spaziano v. Florida,* 468 U.S. 447 (1984), and *Wulton v. Arizona, supra.* In *Proffitt v. Florida,* 428 U.S. 242 (1976), the United States Supreme court approved the Florida capital sentencing system. Therein, the court specifically noted that the trial court determines the appropriate punishment after receiving a "nonbinding advisory recommendation" from the jury. *See* §921.141(3) Fla.Stat. *Espinosa* misinterpreted the Florida sentencing system by erroneously assigning the sentencing burden to the jury initially, as a "co-actor", and then insinuating that

the trial judge does nothing more than rubber stamp that "recommendation". Such a conclusion is contrary to *Combs v.* ***State,*** *supra* (wherein the court explains the function of the judge as the sentencer and the jury as merely an advisory body in Florida's capital sentencing scheme), or *Grossinan v.* ***State,*** **525 So.2d 833, 839-840** (Fla. **1988).**

Clearly clarification is necessary. It can only be assumed that until such time as this court makes **a** definitive statement as to the respective roles of the sentencer, to-wit: the trial judge, and the advisory recommendation of the jury [which only equates to what the conscience of the community might be (based on a carefully limited set of facts from which the jury must make its advisory recommendation)], will the United States Supreme court fully comprehend Florida's capital sentencing scheme,

CONCLUSION

Based on the arguments and authorities presented herein, appellee requests this court deny all relief upon remand.

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 hand delivery to the Public Defender's box at the Fifth District Court of Appeal to Christopher S. Quarles, Assistant Public Defender, this 13th day of November, 1992.

Kellie A. Nielan
Of Counsel