IN THE SUPREME COURT OF FLORIDA

LOUIS B. GASKINS,

Appellant,

v. CASE NO. 76,326

STATE OF FLORIDA,

Appellee.

_____/

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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SUMMARY OF THE ARGUMENTS

Point I: Gaskins has failed to show the trial court abused its discretion by denying the motion to change venue. The jurors who had read about the murders either could not clearly recall what they had read or were certain it would not influence their decision, or both. The test for changing venue is whether the general state of mind of the community is *so* infected by knowledge of an incident and accompanying prejudice, bias and preconceived opinions, that a juror could not possibly put it out of his mind and try the case solely on the evidence presented in the courtroom. Defense counsel was given additional peremptory challenges and did not request more even though the judge indicated he would give additional challenges if needed. Gaskins has provided no example of prejudicial publicity and has not met his burden to raise a presumption of partiality.

Point 11: Mss. Sturmfels experienced extreme mental anguish, pain, suffering and a horrible excruciating death. She watched her husband being shot in their home. She was shot and tried to crawl to safety. She sat in the hall and saw blood pouring from her head. She heard Gaskins break the window, enter, shoot her husband, then shoot her. The murder was heinous, atrocious and cruel. Even if this aggravating circumstance was stricken, the outcome would be the same.

Point 111: Dr. Rotstein diagnosed Gaskins as having schizotypal personality disorder. He concluded the statutory mitigating circumstance of "substantially impaired capacity" was the corresponding legal classification even though his report

provided information inconsistent with this classification. The trial court considered all the information in Dr. Rotstein's report and concluded the legal category of "extreme, mental or emotional disturbance" most closely corresponded to the mental disorder described. The trial court considered and weighed all the mental mitigation. Gaskins contends that both statutory mitigating circumstances were present thus giving double the weight. The trial court properly weighed, not counted, the mitigating evidence. Error, if any, was harmless.

Point IV: Gaskins has failed to show his constitutional rights were violated and the trial court abused its discretion by failing to report bench conferences. The issue was waived for failure to object.

Point V: Gaskins has failed to show the trial court abused its discretion in admitting evidence. The defense waived the issues that the cigar was not connected up and the boots were not relevant to any material issue. Error, if any, was harmless.

Point VI: There was no objection to the verdict forms on both premeditated and felony murder for each victim or to the adjudication on both theories and the issue is waived. There exists no prohibition against the state charging both felony murder and premeditated murder. Error, if any, was harmless.

Point VII: Gaskins was present at the demonstration and the issue was waived.

Paint VIII: The trial court did not comment on the evidence and this issue is waived.

Point IX: The trial court gave the standard jury instruction on reasonable doubt which has been approved by this court. The issue was waived far failure to object.

Point X: The Florida capital sentencing statute is constitutional on its face as applied.

STATEMENT OF THE CASE AND FACTS

The appellee accepts the appellant's statement of the case and facts with the following additions to the statement of the facts.

GUILT PHASE

Mr. Rector's first reaction upon looking down and seeing the bullet hole in his chest was:

> I think my first statement at that point was, I looked at my wife and said "some son of a bitch killed me". I thought I was dead. I couldn't understand what was going on at all and I went to the front door. I was really scared and also really angry and I got to the front door and fell to my knees and I opened the door slightly and started screaming, whoever was out there, they had hit me and probably killed me and to leave and told my wife I had to get to the hospital immediately **and** to get the keys.

(R 430-31). When they ran out of the house and realized bullets were hitting against the car Mr. Rector knew for sure that somebody was trying to kill them (R 432).

Dr. Arruza, the medical examiner who performed the autopsy on Mrs. Sturmfels, testified that she had a total of five gunshot wounds as follows:

> (1) one that entered on the right side of the head and the bullet was recovered in the skull on the left side;
>
> (2) one that entered pretty much under the left cheek and the bullet was recovered inside the nostril;
>
> (3) the third one was back through and through, the back of the head;
>
> (4) one to the right side of the chest and the bullet was recovered next to the spine;

(5) bullet from right to left and downwards and then to the side and went up and back.

(R 719-720).

Bullet **(2)** was not fatal but would cause bleeding in the nasal area. A person could move around with that wound (R **720).** Bullet **(4)** caused a massive hemorrhage to the lung and was fatal. A person could move for the first few minutes but would collapse pretty fast because of the loss of blood **(R 721).** Bullet **(5)** was not fatal. Bullet (3) entered and exited but did not go into the cranial cavity or fracture the skull and was not fatal. Bullet (1) went through the brain. A person could not move after this bullet. Bullet (1) would cause a more immediate death than bullet **(4) (R 722-23). Mrs.** Sturmfels could have moved around until she was shot in the head (R **724).** All the wounds were inflicted when the victim was alive. All shots were within less than an hour. The doctor would probably place the head wound last because it is immediately fatal (R **727).**

Gaskins' precise and unedited statement regarding the Sturmfels' shootings was as follows:

> Aimed, aimed at him, pulled the trigger and he was shot. To his wife it appeared that he was having a heart attack and then he said, Oh, my God, what's happening and I shot him again and his wife realized what was going on. **She** proceeded to run. I shot her. He was still standing and he tried to run and I shot him again. He fell down. Didn't move anymore. **It** was like **his** wife got a little burst of energy from somewhere; proceeded to crawl **out** and shot her again. She still proceeded. She got into the hallway out of sight, so **I** went around to the other doors that faced the hallway. She was sitting there holding her head looking at the blood. I shot her again. She fell over. I went back around to the front; pulled the screen out; bust the window; opened it up; proceeded in

> and closed the window back, closed the blinds; checked them out and shot him again in the head at point-blank range. Went around to the lady. She was still groggily or dying; shot her again in the head at point-blank range and then closed the blinds in the rest of the house.

(SR 4-5, 44-45).

PENALTY PHASE

In addition to the ballistics demonstration, the state offered all exhibits and all previously rendered testimony as evidence in support of aggravation (R 964).

SENTENCING

The state offered the entire statement of Gaskins made on December 30, 1989 (R 1014). The statement included portions which were not made known to the jury involving prior criminal acts. The acts included an attack upon Carla Dimarco and Cynthia Reber at a bank (R 1015, SR 12), staking out a bank on A1A near a golf course (R 1015, SR 13), and staking out Harris' grocery in Flagler County (R 1016, SR 14). Gaskins had also previously shot and killed a coworker named Sam Miller during a robbery (SR 10-11).

Defense counsel stipulated to the state expert examining Gaskins (R 1249) and the state offered the report of psychiatrist Jack Rotstein at sentencing to which defense counsel did not object (R 1017). Defense counsel did not offer Dr. Rotstein's testimony in the penalty phase for tactical reasons (R 967-970). Dr. Rotstein's report[1] regarding the murder of the Sturmfels relates:

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[1] The entire report is attached for the convenience of the court.

Mr. Gaskins said that on the night that that happened, "I was sitting at home, putting up Christmas decorations. I was sitting on the bed. My mind went blank. I walked out the back door."

He put on his camouflage jacket with the hood, his white goggles "to walk through bushes so sticks won't poke you in the eye." He also wore his brown gloves with fur lining, boots, work pants and a brown hood. He took a .22 semi-autamatic rifle with him that he had stolen from a neighbor "as a kid."

When asked what his plans were at the time, he said "I didn't know what I was fixing to do. I drove across the railroad tracks. I turned right and went down the road. I saw a light in the woods. I never been down there before. I smoked a cigar. I got everything ready, first. Then, I masturbated."

He looked in the window. "A guy was sitting in the chair. He was fifty or sixty and the lady was laying on the sofa."

He had masturbated in the car prior to doing this. He said that he had used a napkin to wipe away the semen.

When asked what his thoughts were at the time, he said "I had a partial thought. 1 might rape someone. It wasn't the main thing." He said that he was thinking of having sex with his girlfriend.

While talking about this, he began to move his legs back and forth, clearly with excitement and, perhaps, he was getting erotically stimulated while talking about this. He said "I got up, pulled my pants up, smoked a cigar, proceeded towards the house. I walked around the house to see how many were there."

Mr. Gaskins said that he wanted to be sure there was no one sitting in the corridor of the house watching and that there were no dogs in sight. He again described the fact that "the guy was on the Lazy Boy watching TV, the woman was on the sofa." "I walked around a few more times. The devil was telling me to kill him. God was telling me to go back home. I was trying to decide what to do."

"I thought about cutting the phone lines. I didn't know whether it was an electrical line or a phone line. I walked around four or five times more."

"I aimed at the guy. God said 'No'; the devil said 'yes'. I pulled the trigger. There was no bullet in the chamber. I breathed a sigh of relief and also a sigh of disappointment. I walked around four or five times more. I couldn't make up my mind. I aimed the gun. I couldn't do it. I wasn't afraid, The shots wouldn't be heard."

"I shot through the window. He grabbed his chest. He stood up. I shot him again. He fell down."

After that, he shot the woman. He shot her about five times. "She crawled into the hallway. I couldn't see her. 1 saw her sitting in the hallway and I shot her again."

He then said that he ripped the screen, crawled in and closed the blinds. "I shot them both in the head at point blank range." Mr. Gaskins then stated that there was no need to do that.

He then searched for about fifteen minutes to find the man's wallet. "I went into the kitchen and saw his wallet and her purse." Apparently, he had about a hundred dollars in his wallet and she had about thirty dollars in the purse. "I looked for stuff that was valuable. I took his watch, a VCR, two lamps, two cameras." He said "I took everything I figured I had touched with my hands." He looked in the closets, drawers and bathrooms.

He then moved the woman into the bedroom. "She was bleeding something awful at first. I covered her up." Part of the reason for moving her into the bedroom was that when he walked, he had to step on her.

He was very careful to take away any material that he had left fingerprints on. At that point, he was thinking of having sex again. He inserted his finger into Mrs. Sturmfels' vagina, two or three times and had plastic gloves on while doing this. He said "The urge wasn't there. I was thinking of having sex with her dead body". When asked how he felt when he saw her crawling and in pain, he said "No pleasure, no sorrow. I wanted to be sure she didn't get to the phone."

When asked if he had any feeling of guilt when looking at the two older people lying dead, he said "The guilt was always there. The devil had more of a hold than God did. I knew that I was wrong. I wasn't insane. 'There was no insanity involved,"

Later, he took the battery out of the Sturmfels' truck to place in his own car. He then started back home.

(SR 21-23).

Dr. Rotstein's report regarding the assault on the Rectors relates:

"On the third or fourth turn, I turned left. I was just riding. I don't know why. I was back in the same vicinity. I made two more right turns. I parked the car. I lighted a cigar. I loaded a gun. I went to a house and scoped it out. There was a young couple. There were two sofas. They had kids, but no kids were at home."

When asked how he knew that there were children, he said "There were toys present with motorcycles of different sizes." He said "I thought about cutting the phone. I didn't have my cutters. I cut the phone line."

He said that the woman was dressed "in a black negligee, a teddy, with black stockings. The guy had on shorts." "I wanted to rape her, how she looked. I didn't want no harm to come to her. I needed to figure out a way to kill him and not let her escape. I threw logs on the roof. I assumed that he would come out. He came to the front door and I don't know why I didn't shoot. They shut the lights and got in bed. I threw a log. I could see her putting on a jump suit. I estimated where he was and then shot him. He started hollering, 'some fucker is trying to kill me.'"

"I figured that they would try to get out. She came out holding him. I didn't want to hurt her." "The whole thing was like a movie. So, I was back to robbery. I shut the alarm system off, I opened the door and wiped the knob. I ran into the kitchen for her purse. I dropped one glove."

> He then went to his girlfriend's brothers house, Alphonse Golden, on the twentieth of December, 1989. Mr. Gaskins said that he came back to get hi5 stuff on Christmas. He gave his girlfriend the VCR, two lamps and a grandfather clock.

(SR 23).

Dr. Rotstein's report shows that Gaskins had been in a carpenter's union and had worked far a construction company. He also worked at a plant manufacturing wooden trusses. For the last three years Gaskins had been working at Bunnell Cypress running a saw for $6.75 an hour. Gaskins described the work as "dirty, hard work, but fun" (SR 28). When Dr. Rotstein described the symptoms of his disorder, Gaskins denied ever feeling manic (SR 28). Gaskins said that when he felt like a ninja "no one could hurt me." When he would think of being a ninja he would "think of stealing and raping a girl." Gaskins told Dr. Rotstein that his mood would change according to the surroundings. He denied ever feeling paranoid. He did admit that he felt unattractive to women. When asked if he wanted to have a big powerful build, Gaskins told Dr. Rotstein "size does not matter, it is what you know about fighting" (SR 29). Dr. Rotstein concluded that the patient showed no evidence of organic brain syndrome. His orientation, fund of information, simple calculation and memory seemed perfectly normal (SR 30). Dr. Rotstein observed that Gaskins has a severe defect in abstract thinking. Part of this may be due to insufficient education, (SR 30). In describing Gaskins' emotional state Dr. Rotstein concluded:

At no time did he seem depressed or anxious. He made a point repeatedly of telling me that he was fearless, that he feared nothing, that he could handle snakes and in fact there was nothing that he feared.

He became much more animated when discussing ninjas, at times almost eloquent in his description of them.

His affect was always appropriate to what he was talking about.

(SR 31).

Regarding perceptual disturbances Dr. Rotstein concluded:

This is an extremely important question here, namely whether this patient has true auditory hallucinations or not. When I raised this question with him, he said no that he did not have them, that he heard no voices from outside, it was apparently his own inner thoughts arguing with each other as to whether he should carry out an act or not. This is of great diagnostic importance.

When describing the events of the assault on the Rectors he describes a feeling as if it was "like I was in a movie." He is clearly describing an episode of Derealization here. It is hard to distinguish here between Depersonalization and Derealization. He describes a feeling as if he is in a movie and clearly can feel both himself and his environment to be strange.

His thoughts are always coherent, logical and certainly in no way difficult to follow.

His train of thought shows no abnormalities.

(SR 31).

Regarding his thought content Dr. Rotstein concluded:

This is another area of great difficulty. The patient describes himself as being "obsessed with the idea of being a ninja." He apparently joined a group of black individuals who form a kind of ninja society of which he was the leader. They then *go* at night and attack people. In addition, all of the murders he commits are done while he is in a ninja costume and with the feeling that he is

acting like a ninja. It is hard to know the distinction here between profound preoccupation versus a delusion.

The patient, at least by his description, clearly knows that he is not a true'ninja but at the time he is carrying on his homicidal behavior he may clearly feel that he is one. At this point he passes from a profound preoccupation to a delusion, that is fixed belief that has no rational basis.

(SR 31).

Dr. Rotstein's report shows that Dr. Krop, the defense expert, felt that the most accurate diagnosis was "personality disorder and rule out schizophrenia" (R 1132-1137; SR 35). **Dr.** Rotstein's diagnosis was:

The diagnoses that have suggested themselves so far are as follows:

A.) Antisocial personality
B.) Schizophrenia
C.) Schizoid personality
D.) Schizotypal personality

For the diagnosis of schizophrenia I would have to note the presence of delusions, prominent hallucinations, catatonic behavior, flat or rather inappropriate affect plus decreased level of functioning.

In the case of Mr. Gaskins he certainly does show evidence of flat affect in the sense that he can discuss his horrendous activity without showing or revealing any trace of emotional feeling. On the other hand, as stated earlier, there is some question as to whether he really has a true delusion about being a ninja or merely an extreme preoccupation. It is doubtful whether he actually hears voices, although this certainly is a question. In addition, until the very time when he went on his murder spree he was continuing to work and had worked at the same place for 3 years and his friends reported no decline in hi3 ability to function and even when he came to the house of his girlfriend and gave them the articles that he had stolen from the various people that he had assaulted or murdered, he showed no evidence to them of any decline in mental functioning.

He showed no evidence of gross paranoia, catatonia or depression.

I would have to state therefore that the information that we have does not support a diagnosis of schizophrenia.

As for antisocial personality, he certainly fulfills many of the criteria for this disorder.

Prior to the age of 15 he was often truant, was physically cruel to animals, engaged in fire setting and was involved in deviant sexual activity.

Mr. Gaskins was involved in a plethora of deviant sexual behavior which is not usually seen in antisocial personalities. He was involved before the age of 15 in pedophilia, voyeurism, exhibitionism, bestiality and incest. This certainly is not the pattern that would be seen usually in this disorder.

Since the age of 15 he has been able to sustain consistent work behavior. For example he has been in the same job for 3 years, something which one would not expect from an antisocial personality. He has not been irritable or aggressive socially.

He has tended to stay in the same place and to establish a relationship with a woman for a year. There have been no reports of lying, no reports of misuse of a vehicle. He used marijuana as a youngster when driving a motorcycle. There is no report of recent use of drugs.

The sum total of this would indicate that although Mr. Gaskins has many antisocial tendencies he does not fit into the usual pattern of an antisocial personality.

Schizoid personality disorder shows an indifference to social relationships. These people tend to have no close relationships to anyone including their family, to choose solitary activities, have no desire to have sexual experiences, show indifference to the praise or criticism of others and usually have no close friends.

Certainly, Mr. Gaskins is a loner, however he has had close relationships with members of his

family. He apparently has desirable sexual experiences and did enjoy this with his girlfriend. He seems to have been able to establish relationships with other males in as much as he was the leader of a group of ninjas.

I would therefore feel that the schizoid personality disorder would not quite fit this man's pattern.

Schizotypal personality disorder appears to best fit this man's behavior. He is uncomfortable around others socially. He has preoccupations which almost or perhaps do reach the level of delusions and has perceptional experiences which sound very strongly like auditory hallucinations. He also describes episodes of Derealization or Depersonalization during the assault on the Rectors.

His behavior is somewhat odd in the sense of dressing up in the costume of the ninjas. Much of this shows a total disregard for reality.

His affect is somewhat flat or inappropriate in as much as he describes his horrendous activity with no show of emotions. The only exception is his discussion of ninjas.

I think that what the patient does exhibit here is a personality disorder which approaches what one would think of as schizophrenia but does not quite reach the diagnostic criteria for it. This best fits the schizotypal personality disorder.

He was apparently mistreated and abused by his mother and his care was then taken over by his great grandmother. She was a strict disciplinarian and extremely protective and did not allow him to engage in the rowdy behavior of other children. He apparently responded to this by being somewhat of a loner.

Later he tried very hard to impress his peers, for example in stealing money from his grandparents and showing it to his friends at school.

Later he had fantasies of driving a motorcycle and being the "baddest motorcyclist in the area."

When this fell through he later developed the fantasy of being a ninja. He joined up apparently with a group of other individuals and formed a

> ninja group of which he was the leader. They began to engage in extremely assaultive and dangerous activities. In this he probably enjoyed the respect of the group.
>
> He shows persistent evidence of counterphobic activities. He constantly reiterates his fearlessness and that he is afraid of nothing. The handling of snakes is apparently a key point in his type of behavior. The phallic quality of the snake is clearly apparent here.
>
> His spree of murders in a sense can be seen partly as a counter phobic too. He was literally proving that he could kill and carry on as a ninja without being emotionally upset by what he did.
>
> Although this may be psychodynamic formulation, clearly his activity could be seen as due to a profound feeling of low esteem and feelings of masculine inferiority. The solution was counterphobic behavior and the fantasies of being first a motorcyclist and later a ninja.
>
> However, the psychodynamic formulation alone cannot explain this man's behavior.
>
> There are literally millions of males who have feeling of inferiority and concern about their masculinity. The whole body building industry is probably based on this.
>
> What differentiates Mr. Gaskins from the others is the peculiar nature of his mental disorder, namely schizotypal personality disorder. For whatever reason, his mental functioning is abnormal **and** he took what is perhaps a universal problem for all males and carried it to a horrendous length.

(SR 36-39).

Dr. Rotstein concluded that Gaskins was competent to stand trial, was sane at the time of the alleged offense, that is, "he knew that what he did was wrong and is able to clearly discuss this." Dr. Rotstein concluded that since this is a capital case and "the question of mitigating factors occurs here", the mitigating circumstance that would apply would be found in

section 921.141(6)(f): "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." (SR 39). In the doctor's opinion once Gaskins is dressed up in his ninja suit his profound preoccupation becomes a delusion in which he sees himself as a ninja and then commits some horrible crime. (SR 40). Dr. Rotstein felt that at the moment of the crime Gaskins was unable to conform his conduct to normal human behavior. (SR 40).

POINT I

GASKINS HAS FAILED TO DEMONSTRATE AN ABUSE OF DISCRETION IN THE TRIAL COURT'S DENIAL OF HIS MOTION FOR A CHANGE OF VENUE.

Gaskins argues that the trial court shauld have changed venue since pretrial publicity precluded selection of a fair and impartial jury. He cites instances during voir dire, many of which involve persons who did not sit on the jury. He claims that what the unchosen jurors said may have influenced the jurors who were ultimately chosen, but even if this is true it cannot be attributed to the state. The trial court granted defense counsel's motion for individual voir dire regarding publicity and feelings on capital punishment (R 1058). Defense counsel did not object when the trial court conducted some general questioning about the jurors' knowledge of the case (R 40-45). Defense counsel explored the jurors' reactions ta what they read in the **newspaper** while other jurors were present **(R** 112, 113, 114, 116, 117, 118, 120, 122, 241, 242, 243, 244, 246, 247, 248, 249, 251). Since counsel had the opportunity to individually question jurors **on** this issue, any issue that the venire was tainted for failure to question them individually on this issue was waived.

Gaskins correctly sets out the test in Florida for determining whether a change of venue is required as stated in Provenzano v. State, 497 So.2d 1177, 1182 (Fla. 1986), and McCaskill v. State, 377 So.2d 1276, 1278 (Fla. 1978) (Initial Brief at 38). Yet he has failed to even begin to show that any juror **was** prejudiced, biased, **or** had preconceived opinions to the

point he could not possibly put the matter out of his mind and try the case solely on the evidence in the courtroom. The voir dire statements of the chosen jurors were as follows:

Mr. Stuckey said he read the newspaper but hadn't reached a conclusion one way or the other (R 337). Mr. Delaney[2] had not read anything in the newspaper since he became a praspective juror but had read something at the beginning of the year. There was nothing he read that made him feel he knew what the facts of the case were. He felt he had an open mind about the case and could be objective. He was not sure what he read. Nothing he read had prejudiced him (R 321).

Mr. Dobbs[3] said he was out of state from December 1 until April 1. He read some things when he came back but indicated he always tried to keep an open mind (R 47). He said that "you have to wait until the end'' to judge the evidence (R 48), and that he could be fair and impartial. He had read the paper the Thursday or Friday prior to the day of jury selection. The article said the trial was beginning (R 111). Mr. Dobbs had not read the paper that morning (R 112). He said he did not have any particular feelings from reading the paper since he hardly knows anyone that lives there anyway (R 112). He had just read the one article (R 113).

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[2] This juror sat only for the guilt phase.

[3] Mr. Dobbs sat at the penalty phase only. He was chosen as an alternate and replaced Mr. Delaney who sat at the guilt phase. The state had stricken Dobbs but accepted him as an alternate juror (R 402-403).

Mrs. Nooles said there was nothing about the case that caused her to feel she could not do her duty and serve and follow the law (R 54). She was in Maryland during the time of the murders but her neighbor kept the papers for her (R 58). She saw it in the paper and from to time it had been on the radio. She indicated she had an open mind and felt that sometimes papers were not accurate and that she could make her decision based on the evidence (R 58). Mrs. Nooles said she had a lot of questions about what she read at the time. She had read articles that were recently in the paper and the questions were not answered, and she still had a lot of questions about what she read (R 114). Originally she was upset by such an occurrence. She did not know the people involved, but Palm Coast was her home now. It upset her that something like that should happen but she was not frightened by it (R 114). Mrs. Nooles also indicated that she read the name of the street in the area in the paper and looked it at on the map but did not go to the crime scene.

Mrs. Houser did not know anything at all about the case (R 68). Mr. Pauly read about the case in the paper last December, did not accept what he read as fact, and did not have a clear recollection of what he read. He said he would only accept what he saw and heard in the courtroom if he should serve. He did not have a clear recollection of what was in the paper (R 70). He was sure he could be fair and impartial (R 71). Mr. Pauly had not read anything in the paper that morning (R 121).

Mrs. Donohue read about the case in the newspaper in December but did not recall having any information since then

about it (R 81). She did not have a clear recollection of what she read in December and did not feel that it caused her in any way to be prejudiced in the case (R 81). She indicated that she would listen to what was presented in the courtroom to make her decision (R 81).

Mrs. Buddick read about the case and saw it on TV in December (R 207). She guessed she "kind of remembered" the case and what was said in the paper and in the media and did not feel she had prejudged the matter (R 207). When defense counsel asked Mrs. Buddick what her feelings were about the murders she said "Well, I guess I didn't like the idea but it happens everywhere, this is nothing new. It could happen anywhere, anytime is the way I feel." She did not feel any personal threat and still lived the way she was living. She didn't take extra precautions and felt that she was safe (R 243-244). Mrs. Buddick said that she could keep an open mind (R 253).

Mrs. Kunkler read about the case when the incident first happened. She didn't recall much of what she had read. She did not feel that would prevent her from being fair and impartial (R 335).

Mr. Hart said it had been a long time since he read anything about the case. There was nothing he read that made him feel prejudiced and he would have no problem putting anything he read aside, listen to what was presented, and make his decision on what was presented (R 341).

Mrs. Valentine read what was in the paper in December but did not remember the details (R 215). She said she could erase

what she had read and make her decision based on what she heard in the courtroom (R 215). When defense counsel asked her reaction to the crimes Mrs. Valentine said:

> It bothered me, we as a family with young children, we searched out areas every time we have moved to be in a small area that we feel safe in with our children. In that respect, of course, it bothered me. I don't like to feel invaded for any reason. I also know someone that had moved to that area fairly recently and I knew it had shook them up." (R 247).

When defense counsel asked whether there was much comment aver in Flagler Beach, Mrs. Valentine said "Not really, just the general feeling, funny feeling that something like that would happen in Flagler County, you just don't think of it." Mrs. Valentine said she could be impartial (R 254).

Mr. Jubinsky did not have a clear recollection of what he may have heard and said he would not be influenced by whatever he might have read (R 216). He said he didn't really have any reaction to the crime and it didn't bother him one way or the other. He was also about thirty miles from the crime scene (R 247). Mr. Jubinsky said he would rather hear the facts and then form his opinion (R 254).

Mr. Mitchell was on duty as a security guard the night of the crime (R 224) but was told not to go into that section (R 225). He was told to be on guard and to try to make things as safe as possible in the community (R 251). When asked what sort of feelings he had he said "Well, I didn't think too much about it, I was just trying to do my job and as far as the incident was concerned, I really didn't think about it. I just wanted to get

things safer for people around me and all." He said that knowledge of what happened did not make him feel a decrease in security for him and his family (R 251). Mr. Mitchell said he would keep an open mind based on the evidence that was presented (R 255).

If any of the jurors were objectionable, they could have been excused. Not only was the court liberal in excusing Jurors for cause if the need arose, but the court also gave each attorney fifteen peremptory challenges and indicated he would give more if needed (R 8). When the list of jurors chosen to sit was read, defense counsel did not request additional peremptory challenges (R 404). When he granted the motion for additional peremptory challenges, the court stated:

> When I agreed to add the additional five peremptory challenges to each side, the State characterized the publicity that had been given. I want you to know that I don't concur with that characterization of the amount of publicity that has been afforded this case. In fact I have not found it to be particularly extreme in light of the nature of the charges. I think almost any news media or community will have some publicity. I have not found it to be extraordinary, frankly. I just wanted the record to reflect that that shouldn't be interpreted that I concurred in that.

(R 8-9). The state attorney then stated he "did not mean to indicate that I felt that was supportive of a motion for change of venue or any characterization of that nature" (R 9).

When defense counsel asked the court to change venue after the first group of jurors because many of them had information about the case, the court observed:

> Would that necessarily mean that in every community, in every city and every state of this

> union where people are literate and read their newspaper, it would be very hard, it would be impossible, in fact, any literate person would be necessarily precluded from jury duty, if that would be the case.

(R 180).

Gaskins has failed to carry his burden of demonstrating an abuse of discretion in the actions of the trial court. Appellate courts recognize that the trial judge who is present during voir dire is in a far superior position to properly evaluate the **responses** to questions propounded to jurors. Cook **v. State, 542 So.2d 964, 969 (Fla. 1989).** An application for change of venue is addressed to the court's sound discretion, and a trial court's ruling will not be reversed absent a palpable abuse of discretion. Davis **v.** State, **461** So.2d **67, 69** (Fla. **1984). As** set out in the initial brief, the test is whether:

> the general state of mind of the inhabitants of a community is so infected by knowledge of an incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

Id. at 69, citing Manning v. State, **378** So.2d **274, 276** (Fla. **1979). As** this **court** stated in Davis, media coverage and publicity are only **to** be expected when murder is committed. The critical **question** is not whether a juror possessed knowledge of the case, but whether the knowledge they possessed created prejudice against the defendant. Id. at 69.

In Provenzano v. State, **497** So.2d **1177** (Fla. **1986),** there was extensive pretrial publicity and the case was tried in the same courthouse in which the defendant killed a bailiff.

Provenzano had provided the court with several newspaper articles to support his contention that pretrial publicity was inflammatory. This court observed that pretrial publicity is expected in a murder case and that, standing alone, does not necessitate a change of venue. Id at 1183. The burden is on the defendant to raise a presumption of partiality. *See also*, Holsworth v. State, 522 So.2d 348, 350 (Fla. 1988).

There was no error in the trial court's ruling especially given the total lack of any factual support (e.g., newspaper articles, press reports, etc.) demonstrating even the remote possibility that jurors might have been in any way tainted by pretrial publicity in this matter. The only proffer contained in the standard "boiler-plate" motion submitted by the appellant was two affidavits from employees of the Public Defender's office who lived in Volusia County, not Flagler County where the crimes occurred (R 1071-72, 1188-89).

There was no showing of prejudicial publicity in this case by the appellant; to the contrary, those jurors who indicated that they had any knowledge with reference to the incident could not clearly recall details. Gaskins has shown absolutely nothing that was in any way prejudicial to this particular defendant. The appellant has failed to demonstrate an abuse of discretion in the trial court's rulings denying his motion far change of venue and has likewise failed to demonstrate an abuse of discretion in the rejection of Gaskins' factually and legally unsupported assertion of a lack of impartiality in the jury panel.

Gaskins admits the jury was selected without great difficulty, but attributes this to the manner in which the trial court lead the jurors down the "path of impartiality" (Initial Brief at 36). There is absolutely nothing in the record to support this allegation. The trial court allowed the attorneys free rein in voir dire, and if there were "hard" questions to probe the jurors' genuine feelings, defense counsel was free to ask them. Although Gaskins complains that Mr. Stuckey and Mr. Mitchell ended up on the jury, he has not alleged they were biased or prejudiced. There is nothing in the record to indicate defense counsel was precluded from striking an undesirable juror.

P INT II

THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS AND CRUEL WAS PROPERLY FOUND BY THE TRIAL COURT.

Gaskins argues that the trial court erred in finding the murder of Mrs. Stusmfels was heinous, atrocious and cruel. To support his position, he compares the murder of Mr. Sturmfels to that of Mrs. Sturmfels. Although both murders were tragic, senseless, and deserve the death penalty, there simply can be no comparison of the mental anguish and terror Mrs. Sturmfels experienced. The medical examiner's testimony, Gaskins' statement, and the reconstruction by Mr. Leary establish that Mrs. Sturmfels witnessed her husband being shot and was aware of what was happening. She was shot and tried to crawl away, then was shot again. One of the shots caused bleeding to the head, most likely the one through the cheek. She then crawled to the hallway and sat there looking at her blood. In the meantime, her husband had fallen in the den and was most likely unconscious (R 709). Gaskins shot her again as she sat in the hallway, then pulled out the screen, broke the window, opened the window, entered, closed the window, closed the blinds, shot Mr. Sturmfels in the head, and finally approached Mrs. Sturmfels to shoot her at point-blank range in the head. The medical examiner testified that the last shot was probably the shot to the head because it would be immediately fatal. Therefore, Mrs. Sturmfels was shot four times as she crawled for safety then helplessly heard her assailant break into the house, shoot her husband, and then proceed to shoot her in the head.

Gaskins claims that the murder was not heinous because Mrs. Sturmfels "died within minutes of the initial attack". This court has never placed a time limit to qualify a murder as heinous. In Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988), the victim took several minutes to lose consciousness and was aware of her death. Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988), involved a situation where elderly people were accosted in their home, became aware of their impending deaths, tried to run away, and were shot. In Johnson v. State, 497 So.2d 863, 871 (Fla. 1986), it took the helpless victim 3-5 minutes to die during which time she was in terror and experienced considerable pain. In Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986), this court rejected the argument that the murder was not heinous because death was instantaneous, observing that the appellant overlooked the events preceding the murder.

The simple fact that a victim is shot does not erase the mental anguish and terror experienced before the shooting. Mrs. Sturmfels was painfully aware of what was happening as she and her husband were attacked as they sat watching television. She watched her husband fall and tried to remove herself from the shooter's range only to hear him breaking into the house and coming after her. In Routly v. State, 440 So.2d 1257, 1265 (Fla. 1983), this court cited six cases to illustrate that even if death is instantaneous, as by a gunshot wound, the victims were subjected to agony over the prospect that death was soon to occur, making the murder heinous. In Huff v. State, 495 So.2d 145 (Fla. 1986), the defendant shot his mother and father from

the back seat of a car. The murder was heinous because the evidence showed the father turned in his seat and placed his hands up in a defensive pasition, and the mother witnessed her husband being shot while knowing she was about to be killed. See also, King v. State, 436 So.2d 50 (Fla. 1983) (victim struck in forehead with blunt instrument then shot in head); Melendez v. State, 498 So.2d 1258 (Fla. 1986) (victim shot in head and shoulders and throat slit); Zeigler v. State, 402 So.2d 465 (Fla. 1981) (victim shot then struck in head with blunt instrument).

This court has repeatedly recognized mental anguish as supporting a finding of heinousness. Garcia v. State, 492 So.2d 360 (Fla. 1986); Francois v. State, 407 So.2d 885 (Fla. 1981); Adams v. State, 412 So.2d 850 (Fla. 1982); Knight v. State, 338 So.2d 201 (Fla. 1976). Mental anguish alone has been held sufficient to support a finding of heinousness. Scott v. State, 494 So.2d 1134, 1137 (Fla. 1986), citing Preston v. State, 444 So.2d 939 (Fla. 1984), and Routly, supra. A finding of heinousness is appropriate where a wife witnesses the murder of her husband. See Chandler v. State, 534 So.2d 701 (Fla. 1984); Cherry v. State, 544 So.2d 184 (Fla. 1989); Harvey, supra. The fact the murder occurred in the home also sets the murder apart from the norm. See Breedlove v. State, 413 So.2d 1, 9 (Fla. 1982); Troedel v. State, 462 So.2d 392, 398 (Fla. 1984).

Gaskins argues that because the jury recommended death by a vote of 8-4 on both murders, they did not consider Mrs. Sturmfels' murder heinous. This argument is speculative since the jury is not required to make specific findings. See Hildwin

v. Florida, 109 S.Ct. 2055 (1989). The jury felt that both murders were equally deserving of the death penalty, and the trial judge concurred. Imposition of the death penalty is a weighing process, not a counting process. Given the totality of the circumstances, death was the only appropriate sentence. Porter v. State, 564 So.2d 1060 (Fla. 1990).

Gaskins' argument that "Georgette Sturmfels never realized what was happening and died within seconds without unnecessary pain and suffering" is not supported by the record (Initial Brief at 43). Gaskins' own statement shows she knew her husband was being murdered, she was shot at least two times before she crawled down the hall, and was aware she was being stalked. The chronology of events shows that the incident could not possibly have unfolded in seconds. Likewise, Gaskins' argument that the murder is not heinous because he did not intend for her to suffer, has no merit. Hitchcock v. State, 16 F.L.W. S23, S26 (Fla. Dec. 20, 1990).

Even if the heinous, atrocious aggravating circumstance was stricken, it would not change the outcome. The trial court weighed and considered the aggravating and mitigating circumstances and found that any single aggravating circumstance outweighed all the mitigating circumstances (R 1317). The judge and jury imposed the death penalty for both murders. The trial court did not find the murder of Mr. Sturmfels was heinous, atrocious. Even if the additional aggravating circumstance in Mrs. Sturrnfels' case was stricken, it would not change the outcome. See Young v. State, 16 F.L.W. S192 (Fla. February 28,

1991); Robinson v. State, 16 F.L.W. S107 (Fla. January 15, 1991); Porter v. State, 564 So.2d 1060 (Fla. 1990); Reed v. State, 560 So.2d 203 (Fla. 1990); Rivera v. State, 561 So.2d 536 (Fla. 1990); Rivera v. State, 545 So.2d 864 (Fla. 1989); Hamblen v. State, 527 So.2d (Fla. 1988); Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Rogers v. State, 511 So.2d 526 (Fla. 1987). See also Clemons v. Mississippi, 110 S.Ct. 1441 (1990).

POINT III

THE TRIAL COURT PROPERLY CONSIDERED AND WEIGHED THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

Gaskins argues that the trial court **erred** in rejecting the mental mitigating circumstance of "substantially impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law."[4] He contends that because Dr. Rotstein presented uncontroverted evidence of this statutory mitigating factor, the trial court was bound to find this specific factor.

The trial court considered Dr. Rotstein's report and concluded that the more accurate classification of the mental issues described would be "extreme mental or emotional disturbance".[5] The fact that the trial court labeled the mitigating factor "extreme disturbance" rather than "impaired capacity to appreciate" does not mean he did not consider all the information contained in the report. In fact, the trial judge specifically stated that he considered all the information and could not conclude, as did Dr. Rotstein, that Gaskins was unable to appreciate the criminality of his conduct or conform it to the requirements of law **(R 1316-17)**. However, the trial judge did find that the expert's opinion combined with other facts of the case supported a finding of "extreme disturbance" (R 1316). He also stated that he relied on the expert testimony (the report

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[4] Fla. Stat. **921.141(6)(f)**

[5] Fla. Stat. **921.141(6)(b)**

was introduced in lieu of live testimony), in arriving at his conclusions.

The Florida capital sentencing statute contains two mental mitigators. The distinction between the two factors is a gray area. The trial judge is in a much more informed position to categorize a mental issue since he has knowledge of the case law and an understanding of the capital sentencing structure. A trial judge does not represent himself as a mental health expert, nor can a mental health expert represent himself as having the ability to understand the fine nuances and legal distinctions contained in the capital sentencing statute. The two must work together. Dr. Rotstein presented the facts, and the trial judge applied the law to the facts.

Dr. Rotstein's report shows that Gaskins knew what he did was wrong and was able to clearly discuss this (SR 39).[6] Gaskins' own statement shows that he knew what he was doing was wrong. He circled the Sturmfels' house at least five times building courage (SR 4, 44). He contemplated and planned the murders so that he would not be apprehended, going to an isolated area at night. He used short caliber bullets which would make less noise than the long caliber bullets that should have been used in his particular rifle (R 732-33). He thought about cutting the phone lines at the Sturmfels' and did cut the lines at the Rectors' (SR 22, 7). His mental process showed that he wanted to be sure to kill Mrs. Sturmfels before she could get to

[6] He also told Dr. Rotstein "I knew it was wrong, I did not care'' when talking abut a previous shooting of a woman at a bank (SR 19).

the phone (SR 22). He removed all material he thought would have fingerprints (SR 22). He hid the items he robbed at Alphonso Golden's house. He told Dr. Rotstein he knew he was wrong and there was no insanity involved (SR 22). Ds. Rotstein first said Gaskins was not schizophrenic because there were no delusions (SR 36), then said the profound preoccupation with the ninja became a delusion (SR 39). The expert expressed confusion about whether Gaskins was delusional or just profoundly preoccupied with ninja behavior (SR 31). Dr. Rotstein also noted that Gaskins described an episode of Derealization or Depersonalization during the assault on the Rectors, but makes no mention of the Sturmfels (SR 37). The resolution of factual conflicts is solely the responsibility and duty of the trial judge, and the appellate court has no authority to reweigh that evidence. Gunsby v. State, 16 F.L.W. S114, S116 (Fla. Jan. 15, 1991). Based on Gaskins' own statements and the circumstances surrounding the crime, the trial judge was correct in re-classifying the mental mitigator.

A situation like this presents a quandary in which the information contained in an expert's report establishes some type of mental mitigation, but not the one the expert thinks it does. The trial judge gave Gaskins the benefit of the doubt and rather than fashioning the mitigation as nonstatutory, he meshed the information into a workable statutory mitigator. Far from ignoring the guidelines of Campbell v. State, 570 So.2d 415 (Fla. 1990), the trial court recognized that Gaskins had some mental problems, but the facts could not support the label Dr. Rotstein

gave them. Dr. Rotstein diagnosed Gaskins' problem as a schizotypal personality disorder. The judge converted that finding into the appropriate legal category of "extreme disturbance". Dr. Rotstein is clearly qualified to attach the psychiatric label, but the trial court is the one more qualified to attach the legal label or reject the expert's conclusion altogether. See, Sanchez-Velasco v. State, 570 So.2d 908, 916 (Fla. 1990); Rivera v. State, 561 So.2d 536 (Fla. 1990); Thompson v. State, 553 So.2d 153 (Fla. 1989). The trial court may accept or reject the testimony of an expert witness just as he may accept or reject testimony of any other witness. Roberts v. State, 510 So.2d 885, 894 (Fla. 1987). For example, the trial court in Bruno v. State, 16 F.L.W. 565, S68 (Fla. Jan, 3, 1991), rejected the expert's opinion regarding "extreme emotional" and "impaired capacity". This court said that viewing the expert's testimony as a whole, the trial court had the discretion to discount much of his testimony. This court also observed that Bruno, like Gaskins, had the capacity to be employed. Id. at S68.

The diagnostic criteria for schizotypal personality disorder in the Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition, Revised ("DSM-IIIR") are:

> A. A pervasive pattern of deficits in interpersonal relatedness and peculiarities of ideation, appearance, and behavior, beginning by early adulthood and present in a variety of contexts as indicated by at least five of the following:
>
> (1) ideas of reference (including delusions of reference);

(2) excessive social anxiety, e.g., extreme discomfort in social situations involving unfamiliar people;

(3) odd beliefs or magical thinking influencing behavior and inconsistent with subcultural norms, e.g., superstitiousness, belief in clairvoyance, telepathy, or "sixth sense", "others can feel my feelings" (in children and adolescents, bizarre fantasies or preoccupations);

(4) unusual perceptual experiences, e.g., illusions, sensing the presence of a force or person not actually present (e.g., "I felt as if my dead mother were in the room with me");

(5) odd or eccentric behavior or appearance, e.g., unkempt, unusual mannerism, talks to self;

(6) no close friends or confidants (or only one) other than first-degree relatives;

(7) odd speech (without loosening of associations or incoherence), e.g., speech that is impoverished, digressive, vague, or inappropriately abstract;

(8) inappropriate or constricted affect, e.g., silly, aloof, rarely reciprocates gestures or facial expressions, such as smiles or nods;

(9) suspiciousness or paranoid ideation;

B. Occurrence not exclusively during the course of Schizophrenia or a pervasive Developmental Disorder.

DSM-IIIR, pp. 341-342. These diagnostic criteria alone (without considering the facts of the case) suggest "extreme disturbance" rather than "impaired capacity to appreciate".

As Gaskins concedes in his brief, the relative weight to be given each mitigating factor is for the sentencer to decide (Initial Brief at 47). The record shows that the trial judge considered all the information in Dr. Rotstein's analysis and weighed it against the aggravating circumstances. Whether the

psychiatric diagnosis was split up into two statutory mental mitigators or considered as one is not the issue. Imposition of the death penalty is a weighing process, not a counting process. Porter v. State, 564 So.2d 1060 (Fla. 1990). The trial court weighed all the mental mitigation, however labeled. What Gaskins advocates is that this court double the weight to be given the mental health mitigation, notwithstanding this court's position that the same aspect of a crime should not be split into two Circumstances. See, Provence v. State, 337 So.2d 783, 786 (Fla. 1976). The trial court properly weighed all the mental mitigation and found it did not outweigh the aggravating circumstances. Attaching two labels to the mitigating evidence does not change its weight or at least renders any error harmless.

This court has repeatedly stated that the weight to be given the aggravating and mitigating circumstances is for the trial court to decide, and it is not the role of the appellate court to re-weigh the evidence. Cook v. State, 542 So.2d 964 (Fla. 1989); Hudson v. State, 538 So.2d 829, 831 (Fla. 1989); Bryan v. State, 533 So.2d 744 (Fla. 1988); Lopez v. State, 536 So.2d 226, 231 (Fla. 1988); Stano v. State, 460 So.2d 890 (Fla. 1984). All the mental mitigating evidence was weighed, and this court should refrain from re-weighing. See, Gunsby, supra. So long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion. See, Hill v. State, 594 So.2d 179, 183 (Fla. 1989) and cases cited therein; Smith v. State, 575 So.2d 182 (Fla. 1987).

Gaskins' final argument is that any error is not harmless because the jury was not aware of any mental problems (Initial Brief at 47). The reason the jury was not aware of the mental problems was because defense counsel made a conscious decision, after consulting with Gaskins and obtaining his approval, not to present Dr. Rotstein's findings to the jury (R 967-69). The trial court did not preclude presentation of any mitigating evidence,

POINT IV

GASKINS CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BECAUSE BENCH CONFERENCES AND MINISTERIAL INCIDENTS WERE NOT RECORDED BY THE COURT REPORTER.

Gaskins claims that the trial court should have stated his reasons on the record far excusing jurors for hardship reasons. Defense counsel did not object to this procedure and the issue is waived. Castor v. State, 365 So.2d 701 (Fla. 1978). Furthermore, Gaskins has cited no authority to support his position that he was prejudiced by not knowing each juror's hardship. He admits the trial court explained that the excusals were due to ill health and frailty. If defense counsel had been concerned that the jurors were contriving not to serve, he could have asked their reasons be put on the record. In reality, if a juror does not want to serve for some reason, it would be ludicrous to force jury service. The defense hardly wants a juror who would be in a hurry and only wants to reach a quick result.

Gaskins also complains that bench conferences were not recorded. This court recently rejected a similar claim in Bruno v. State, 16 F.L.W. S65 (Fla. Jan. 3, 1991). Again, defense counsel did not request the bench conferences be reported, so any error is waived. Castor, supra.

Although Gaskins cites Delap v. State, 350 So.2d 462 (Fla. 1977), and other cases to support his position, his cases are inapposite. In Delap, the trial court was unable to reconstruct the trial record and the record was missing charge conferences,

charges to the jury, voir dire and closing arguments in the guilt and penalty phases. This is hardly comparable to the present situation where defense counsel never requested the bench conferences be reported and appellate counsel has failed to demonstrate how Gaskins was prejudiced. The simple fact that bench conferences were not reported could hardly deny a defendant a fair trial.

Although Gaskins contends he does not have to show prejudice, citing United States v. Selva, 559 F.2d 1303 (5th Cir. 1977), that case involved a record deficiency of the closing arguments of both defense and government counsel. The court reporter had become ill and was unable to transcribe closing argument although an attempt was made to tape record the argument. The court observed that appellate counsel was foreclosed from "examining for possible error a substantial and crucial portion of the trial." Id. at 1305. The court framed the question as whether a criminal defendant must demonstrate specific prejudice resulting from failure to record a significant portion of a trial. Id. at 1305 (emphasis added). In the present case, there was no significant portion deleted. Further, the Court Reporter Act mandates recording all proceedings in federal courts. Gaskins has pointed to no such act which applies to state courts. In any case, federal case law after Selva has established that the Court Reporter Act does not adopt a per se error approach. United States v. Gallo, 763 F.2d 1504, 1530 (6th Cir. 1985). Gallo discards the differing test applied when trial and appellate counsel are the same or not the same. The absence

of side bar discussions in the record is not as egregious as the absence of other portions. The issue may be waived if defense counsel does not object. Id. at 1531. As in Gallo, defense counsel not only waived the issue, but also many of the instances cited as error were when defense counsel requested a bench conference (R 20, 305, 366, 436, 465, 540, 856, 967). See also, United States v. Hein, 769 F.2d 609 (9th Cir. 1988); United States v. Doyle, 786 F.2d 1440, 1442 (9th Cir. 1986).

POINT V

GASKINS HAS FAILED TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION IN THE ADMISSION OF EVIDENCE.

Gaskins argues that the trial court erred in admitting a camera seized from the Sturmfels' home, a partially smoked cigar found on the alarm box outside the Rectors' home, and boots seized from Gaskins' residence.

The Camera: A camera was seized pursuant to a search warrant executed at Gaskins' residence (R 813-81). The state attorney offered the camera into evidence and defense counsel said "it would appear that there was not a positive identification of (the VCR or) the camera" (R 830). Dora Abdulkadir had previously testified that the instamatic camera "looks identical to" the one Mrs. Sturmfels had (R 830). Gaskins claims the evidence was irrelevant. The Sturmfels' camera was found in Gaskins' residence ten days after the murder. Gaskins' possession of the item tends to prove he robbed the Sturmfels and is relevant. Gaskins also claims the identification was insufficient but does not inform the court what he would consider sufficient. Instamatic cameras do not contain serial numbers, as does the VCR which the state identified by that number (R 667, 845). Being "identical to" the Sturmfels' camera is sufficient to admit the camera. The weight to be given the evidence is up to the jury.

The Cigas: A partially smoked cigar was found on the sewer alarm box outside the Rectors' home (R 483). A "Black and Mild" cigar wrapper was found nearby (R 489). A tracking dog alerted on a footprint 2-4 feet from the cigar wrapper (R 491). The dog

tracked through the woods behind the Rectors' house and exited at the Rectors' driveway where shell casings were found (R **492).** The wrapper was fresh (R **498).** After **Gaskins** was apprehended, he asked for cigars, When asked what brand he preferred, he answered "Black and Mild'' (R 787). The partially smoked cigar was "Black and Mild" **(R 788-89).** In Gaskins' confession, he talked about cutting the phone lines (SR 47) and leaving a cigar wrapper **(SR 49).** The partially smoked cigar was sufficiently linked to the defendant and relevant to prove he was present at the scene. Although defense counsel objected when the cigar was admitted subject to being connected up, if the evidence was not connected up the burden was on the defense to move to strike the evidence which was admitted. See, Ehrhardt Florida Evidence, §105 (2nd Ed. **1984).** Apparently, defense counsel was satisfied the evidence had been connected up and the issue was waived. Castor v. State, 365 So.2d **701** (Fla. **1978).**

The Boots: Colorado boots were seized from Gaskins' residence at the same time as the camera, lamps, VCR's and other items (R **813-**16). Although the boots were not the shoes that made footprints at the Sturmfels' residence, they were within 1 centimeter of the same **size** (R 697). **The** expert testified that the person who made the footprints in the Sturmfels' residence was the same shoe size as Gaskins' and that **7-11%** of males wear a size 8 **(R 700-701).** This testimony narrowed the field of possible assailants to **7-11%** of the male population. Although Gaskins claims reversible error, his claim of prejudice is ludicrous. The expert testified the prints did not match Gaskins' boots. The defense objection

was that the evidence was speculative, not that it was irrelevant (R 702-03). The objection was not specific. Tillman v. State, 471 So.2d 32 (Fla. 1985). The state attorney indicated the boots were offered as circumstantial evidence of the chain and that the person that made the tracks was wearing substantially the same size shoe and same basic construction (R 702-703). The trial court stated he would let the jury decide the merits of the evidence (R 703).

Gaskins has failed to show an abuse of discretion. The trial court has wide discretion in the admission of evidence. Welty v. State, 402 So.2d 1159 (Fla. 1981). Unless an abuse of discretion can be shown, its ruling will not be disturbed. Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Error, if any, was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Gaskins' statement apprised the jury he had taken items from the Sturmfels and Rectors, was present in their houses, and had left a cigar wrapper behind. The testimony about the boots was not adverse to Gaskins.

POINT VI

GASKINS HAS FAILED TO ESTABLISH A DOUBLE JEOPARDY VIOLATION.

Gaskins claims that because the jury convicted and the court adjudicated him guilty on four counts of murder where there were two victims, two of the convictions must be vacated. Defense counsel did not object to the verdict forms or adjudication on all four counts, so the issue is waived (R 924-27, 930, 949). Castor v. State, 365 So.2d 701 (Fla. 1978). The state indicted Gaskins on premeditated murder and/or, in the alternative, felony murder for each victim (R 1111-13). Verdict forms were prepared for the premeditated murder of each victim (R 1285, 1287) and for the felony murder of each victim (R 1286, 1288). The state is not precluded from charging both felony murder and premeditated murder. See, Bruno v. State, 16 F.L.W. S65, S67 (Fla. Jan. 3, 1991); Young v. State, 16 F.L.W. S192 (Fla. Feb. 28, 1991). By obtaining a jury verdict on both theories, the state avoided the issue on appeal that a special verdict form should be used. See, Young at S193; Haliburton v. State, 561 So.2d 248, 250 (Fla. 1990). Although the judgment shows a conviction and adjudication for both felony murder and premeditation, there was only one sentence for each victim - death (R 1311-12; 1318-19). The trial judge's judgment and sentence on counts III and IV shows that he was aware that if the sentence was reduced it would be to life imprisonment without parole for twenty five years (R 1319). Obviously, he imposed one sentence for one murder. Whether the trial court technically

should have adjudicated on only one theory is rhetorical and any error is harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT VII

THE RECORD SHOWS GASKINS WAS PRESENT AT THE RIFLE DEMONSTRATION AND THIS ISSUE WAS WAIVED.

The trial court acknowledged Gaskins' presence at the shooting range (R 956). Gaskins claims the record is insufficient but fails to inform this court what he would have the record demonstrate. Obviously, defense counsel felt Gaskins was present as there was no objection on the record so the issue is waived. Castor v. State, 365 So.2d 701 (Fla. 1978).

POINT VIII

GASKINS HAS NOT SHOWN ERROR IN THE TRIAL, COURT'S STATEMENT TO THE JURY AND THE ISSUE IS WAIVED.

Gaskins next alleges the trial court commented on the evidence when he informed the jury why they had left the courthouse to go to the shooting range. Defense counsel did not object, and the issue is waived. Castor v. State, 365 So.2d 701 (Fla. 1978).

The trial court saying "our" purpose is not a comment on the evidence. The cases cited by Gaskins are inapposite. Although Gaskins cites Harmon v. State, 527 So.2d 182, 187 (Fla. 1988), to support his position, this court found that the trial court's comments were harmless error and the issue was waived. The issue was also waived by failure to object in Worthington v. State, 183 So.2d 728 (Fla. 3rd DCA 1966), which Gaskins cites. In Webb v. State, 454 So.2d 616 (Fla. 5th DCA 1984), the trial court had agreed to sentence Webb to ten years. When Webb refused to plead and went to trial, the judge sentenced him to fifteen years because "we" had to bring witnesses from California and "we" were forced into trial position. The appellate court found that these were not valid considerations for sentencing purpose, citing United States v. Jackson, 390 U.S. 570 (1968) which deals with whether a defendant can be penalized for exercising his Sixth Amendment right to a jury trial. Id. at 581. Webb was not a "comment on the evidence" case. The records show that the trial judge properly exercised his responsibility to conduct a fair trial. See, Jackson v. State, 545 So.2d 260 (Fla. 1989).

POINT IX

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON REASONABLE DOUBT AND THE ISSUE IS WAIVED.

Gaskins contends that the jury should not have been instructed on the meaning of reasonable doubt or that it must convict absent such a doubt. The record in the instant case demonstrates that the trial court read the standard instruction on reasonable doubt, and defense counsel did not object to it (R 918, 930). Florida Standard Instructions in Criminal Cases 2.03. Consequently, the claim has not been preserved for appellate review. Fla.R.Crim.P. 3.390(d); Squires v. State, 450 So.2d 208 (Fla. 1984). In any event, this court has previously approved the use of this standard instruction finding that it adequately defines "reasonable doubt". Brown v. State, 565 So.2d 304 (Fla. 1990).

POINT X

THE FLORIDA CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Appellant next presents a menagerie of constitutional claims asserting that the Florida sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied. Acknowledging that each of the claims has specifically or impliedly been rejected, appellant in summary form urges reconsideration af each of these issues.

Without addressing each, appellee would merely urge that acknowledgment by appellant that the claims he has presented have all been addressed or decided adversely to capital defendants and a similar result is mandated herein. See, Proffitt v. Florida, 428 U.S. 242 (1976); Barclay v. Florida, 463 U.S. 939 (1983); Garcia v. State, 492 So.2d 360, 367 (Fla. 1986); Robinson v. State, 16 F.L.W. S107 (Fla. Jan. 15, 1991); Gunsby v. State, 16 F.L.W. S114 (Fla. Jan. 15, 1991); Rogers v. State, 511 So.2d at 536; Brown v. State, 473 So.2d 1260 (Fla. 1985); Spaziano v. Florida, 468 U.S. 447 (1984); Stano v. State, 460 So.2d 890 (Fla. 1984); and State v. Dixon, 283 So.2d 1 (Fla. 1973).

CONCLUSION

Based on the foregoing arguments and authorities presented herein, appellee respectfully requests this court affirm the judgment and sentence in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Christopher S. Quarles, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Flarida 32114, this 19th day of March, 1991.

Barbara C. Davis

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Of Counsel

IN THE SUPREME COURT OF FLORIDA

LOUIS B. GASKINS,

Appellant,

v. CASE NO. 76,326

STATE OF FLORIDA,

Appellee.

APPENDIX TO

ANSWER BRIEF OF APPELLEE

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