IN THE SUPREME COURT OF FLORIDA

LOUIS B. GASKIN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

CASE NUMBER 76,326

APPEAL FROM THE CIRCUIT COURT
IN AND FOR FLAGLER COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT ON REMAND FROM THE UNITED STATES SUPREME COURT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

Louis Gaskin was found guilty of two counts of first-degree murder in the death of Robert Sturmfels (premeditated and felony murder); two counts of first-degree murder in the death of Georgette Sturrnfels (premeditated and first-degree murder); one count of armed robbery of the Sturmfels; one count of burglary of the Sturmfels' home; one count of attempted first-degree murder of Joseph Rector; one count of armed robbery of the Rector's; and one count of burglary of the Rector's home. The jury found Gaskin not guilty of the attempted first-degree murder of Mary Rector.

At the penalty phase, the sum guidance given the jury on Florida's especially heinous, atrocious, or cruel aggravating circumstance was:

> Four, the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(R999) Prior to trial, Gaskin filed a motion to declare the statute unconstitutional based, inter alia, on the vague wording of this aggravated circumstance. (R1193-1217) The trial court denied the motion. (R1074-76) After hearing the evidence and the standard instructions, the jury recommended death. The trial court's findings of fact concerning the death of Mrs. Sturmfels relied in part on a finding that the murder was especially heinous, atrocious, or cruel. (R1311-24) On direct appeal, Gaskin contended, inter alia, that Florida's statutory scheme and jury instructions (specifically the aforementioned HAC instruction and HAC generally), were unconstitutional. See Initial Brief, pp. 65-69. This Court rejected Gaskin's arguments on direct appeal. Gaskin v. State, 591 So.2d 917 (Fla. 1991).

In his Petition for Certiorari, Mr. Gaskin raised only one issue:

> Whether adequate guidance is provided by instructing a sentencing jury that it consider as an aggravating circumstance whether the crime was committed in an "especially wicked, evil, atrocious, or cruel manner."

The United States Supreme Court vacated this Court's decision affirming Mr. Gaskin's convictions and sentences in Gaskin v. Florida, 120 L.Ed.2d 894 (1992). The Court remanded "for further consideration in light of Espinosa v. Florida, 505 U.S. ___ (1992)." In Espinosa, the Court held that use of an unconstitutional jury instruction[1] on an aggravating circumstance

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[1] That the jury could consider as aggravation that the murder was "especially wicked, evil, atrocious or cruel."

violated the Eighth Amendment. The Court reasoned that jury sentencing proceedings are sufficiently important that the Eighth Amendment applies to them.

SUMMARY OF ARGUMENT

The jury instructions at Gaskin's penalty phase were unconstitutionally vague. This issue was preserved by the filing of a pretrial motion. Even if counsel failed to adequately preserve the issue, Espinosa and Sochor represent a change in Florida law which must now be applied to Mr. Gaskin's claims. The State cannot meet the onerous burden of proving the constitutional error harmless beyond a reasonable doubt.

ARGUMENT

THIS COURT SHOULD REMAND FOR A NEW PENALTY PHASE AS TO BOTH MURDERS SO THAT THE JURY RECEIVES CONSTITUTIONAL INSTRUCTIONS THAT ADEQUATELY CHANNEL THEIR DISCRETION IN DECIDING THE ULTIMATE FATE OF LOUIS GASKIN.

INTRODUCTION

On direct appeal, Mr. Gaskin contended that Section 921.141 was unconstitutional on its face and as applied to him. See Initial Brief, pp. 65-75. Specifically citing the failure of the aggravating factors to adequately channel the sentencer's discretion, Mr. Gaskin contended that all of the aggravating circumstances were unconstitutionally vague and overbroad in violation of the Eighth and Fourteenth Amendments. See Initial Brief, pp. 67-69. Louis Gaskin, through counsel, argued that the "heightened premeditation" aggravating circumstance was unconstitutionally vague and ambiguous, thereby failing to channel the jury's sentencing discretion. Mr. Gaskin also challenged the "especially wicked, evil, atrocious, or cruel" aggravating circumstance on similar grounds. Additionally, Gaskin also challenged the constitutionality of Section 921.141(5)(d), Florida Statutes, contending that the statute creates an aggravating circumstance in all felony murders. (R1195-1217,1074-76)

Needless to say, Espinosa is not limited to the heinous circumstance. The Court has recently vacated this Court's decision affirming the death sentence in Hodges v. State, 595

So.2d 929 (Fla. 1992), a case that did not involve the heinousness circumstance. The certiorari petition in Hodges pertains solely to the coldness circumstance, yet the Court reversed on the basis of Espinosa. 61 USLW 3254.

PROCEDURAL BAR

As set forth in the Statement of the Case and Facts and the Introduction, Appellant contends that the issue has been preserved. Even if trial and/or appellate counsel failed to adequately raise the issue, they clearly would be justified in light of this Court's previous pronouncements in other cases. On June 8, 1992, the United States Supreme Court reversed this Court's longstanding jurisprudence and held that Maynard v. Cartwright, 486 U.S. 356 (1988), is applicable in Florida. Sochor v. Florida, 112 S.Ct. 2114 (1992). Thus, Eighth Amendment error before either of the constituent sentencers (in Florida the constituent sentencers are the judge and the jury) requires application of the harmless-beyond-a-reasonable-doubt standard. Specifically, the Supreme Court held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," Stringer v. Black, 503 U.S. ___, ___ (1992) (slip op., at 12), by placing a "thumb [on] death's side of the scale," id., at ___ (slip op., at 8), thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," id., at

___ (slip op., at 12). Even when other valid aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, supra, at 752 (citing Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dusser, 498 U.S. ___, ___ (1991) (slip op., at 11). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. Id., at ___ (slip op., at 10).

Sochor, 112 S.Ct. at 2119.

On June 29, 1992, in Espinosa v. Florida, 112 S.Ct. 2926 (1992), the United States Supreme Court again reversed this Court and held that this Court had previously failed to correctly apply Maynard and Godfrey v. Georgia, 446 U.S. 420 (1980):

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So.2d 182, 185 (Fla. 1987), cert. denied, 435 U.S. 971 (1988); Grossman v. State, 525 So.2d 833, 839 n.1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of

> weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

112 S.Ct. at 2928.

In light of Sochor and Espinosa, the United States Supreme Court granted certiorari review and reversed five other Florida Supreme Court decisions. See Beltran-Lopez v. Florida, 112 S.Ct. 3021 (1992); Davis v. Florida, 112 S.Ct. 3021 (1992); Gaskin v. Florida, 112 S.Ct. 3022 (1992); Henry v. Florida, 112 S.Ct. 3021 (1992); Hitchcock v. Florida, 112 S.Ct. 3020 (1992).

Essinosa and Sochor represent a change in Florida law which must now be applied to Mr. Gaskin's claims. In Thompson v. Dugger, 481 U.S. 393 (1987), to be a change in Florida law because it "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners, including Thompson, to defeat the claim of a procedural default." The same can be said for Essinosa and Sochor.

Moreover, an examination of this Court's jurisprudence demonstrates that Espinosa overturned two longstanding positions of this court. First, this Court's belief that Proffitt v. Florida, 428 U.S. 242 (1977), insulated Florida's "heinous, atrocious or cruel" circumstance from Maynard v. Cartwright error was soundly rejected. Espinosa, 112 S.Ct. at 2928. ("The State here does not argue that the 'especially wicked, evil, atrocious, or cruel' instruction given in this case was any less vague than the instructions we found lacking in Shell, Maynard or Godfrey"). Second, this Court's precedent that Eighth Amendment error before the jury was cured or insulated from review by the judge's sentencing decision was also specifically overturned. Espinosa, 112 S.Ct. at 2929. ("We merely hold that, if a weighing State decides to place capital-sentencing authority to two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances").

The first proposition was discussed at length in Smalley v. State, 546 So.2d 720 (Fla. 1989). There, this Court held that, because of Proffitt, Florida was exempted from the scope of Maynard:

> It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific Eighth Amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily

> torturous to the victim. E.g., Garron v. State, 528 So.2d 353 (Fla. 1988); Jackson v. State, 502 So.2d 409 (Fla. 1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). That Proffitt continues to be good law today is evident from Maynard v. Cartwrisht, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwright, 108 S.Ct. at 1859.

546 So.2d at 722. However, Espinosa clearly held that Proffitt did not insulate Florida's standard jury instruction from compliance with the Eighth Amendment.

The second longstanding rule of law overturned by Espinosa was the view that the judge's sentencing process somehow cured error before the jury. In Breedlove v. State, 413 So.2d 1, 9 (Fla. 1982), this Court held that impermissible prosecutorial argument to the jury regarding aggravating circumstances was neither prejudicial nor reversible because the judge was not misled and did not err in his sentencing order. Under Espinosa, this conclusion was erroneous. Similarly, in Deaton V. State, 480 So.2d 1279, 1282 (Fla. 1985), this Court held that the prosecutor's jury argument in favor of improper doubling of aggravating factored was, in essence, cured when the judge properly merged the aggravating circumstances in his sentencing order. Under Espinosa, this conclusion was erroneous. In Suarez v. State, 481 So.2d 1201, 1209 (Fla. 1985), this Court rejected a challenge to the jury instructions which failed to advise the

jury of the prohibition against improper doubling. There, this Court concluded improper doubling was only error if the judge doubled up aggravators in his sentencing order ("it is this sentencing order which is subject to review vis-a-vis doubling"). Espinosa specifically rejects this reasoning. In Smallev, this Court distinguished Mavnard on this basis: "In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence." 546 So.2d at 722. Espinosa clearly overturns this distinction, as "neither actor must be permitted to weigh invalid aggravating circumstances." 112 S.Ct. at 2929.

Espinosa clearly rejected both of this Court's prior lines of reasoning. Florida jury instructions must comply with Mavnard and Godfrev despite Proffitt.[2] Further, Florida juries must be correctly instructed on the applicable law regardless of the judge's awareness of the law.

This Court has steadfastly held for many years that Mavnard and Godfrey did not affect Florida's capital jury instructions regarding aggravating circumstances. This Court repeatedly held that those cases and their progeny had no application in Florida. See Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990) ("Maynard does not affect Florida's death sentencing procedures"); Brown v. State, 565 So.2d 304, 308 (Fla. 1990) ("We have previously found

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[2] In fact, in Sochor, the United States Supreme Court questioned whether "the Supreme Court of Florida has [] confined its discussion on the matter to the Dixon language we approved in Proffitt." 112 S.Ct. at 2121.

Mavnard inapposite to Florida's death penalty sentencing@@); Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990) ("Maynard [citation] did not make Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel unconstitutionally vague@@); Mills v. Dusser, 574 So.2d 63, 65 (Fla. 1990) (Mavnard is @@inapplicable to Florida, [does] not constitute such change[] in law as to provide post conviction relief").

In fact, this Court has specifically and repeatedly upheld the standard jury instructions against any Eighth Amendment challenge. In Cooser v. State, 336 So.2d 1133, 1140-41 (Fla. 1976), this Court found that the trial court erred in finding the @@heinous, atrocious or cruel@@ aggravating factor, but found no error in allowing the jury to rely on the aggravator because "the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required." In Vausht v. State, 410 So.2d 147, 150 (Fla. 1982), Vaught argued "that the trial court failed to provide the jury with complete instructions on aggravating and mitigating circumstances." The contention was found to be "without merit. The trial court gave the standard jury instruction on aggravating and mitigating circumstances." Similarly, in Valle v. State, 474 So.2d 796 (Fla. 1985), this Court concluded, "the standard jury instructions on aggravating and mitigating circumstances, which were given in this case, are sufficient and do not require further refinements.@@ 474 So.2d at

805.[3]

The standard jury instruction regarding "heinous, atrocious and cruel" was upheld by this Court in Smallev v. State.[4] However, as noted, Espinosa specifically and pointedly rejected this Court's reasoning in Smalley: when the sentencing judge gives great weight to the jury recommendation, he "indirectly weigh[s] the invalid aggravating factor we must presume the jury found." 112 S.Ct. at 2928. This Court relied upon Smallev to reject Maynard claims in a multitude of cases. Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990); Clark v. Dugger, 559 So.2d 192, 194 (Fla. 1990); Randolph v. State, 562 So.2d 331, 339 (Fla. 1990); Freeman v. State, 563 So.2d 73, 76 (Fla. 1990); Brown v. State, 565 So.2d 304, 308 (Fla. 1990); Smith v. Dugger, 565 So.2d 1293, 1295 n.3 (Fla. 1990); Roberts v. State, 568 So.2d 1255, 1258 (Fla. 1990); Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990); Robinson v. State, 574 So.2d 108, 113 (Fla. 1991); Trotter v. State, 576 So.2d 691, 694 (Fla. 1990); Engle v. Dusser, 576 So.2d 696, 704 (Fla. 1991); Hitchcock v. State, 578 So.2d 685, 688 (Fla. 1990); Shere V. State, 579 So.2d 86, 95 (Fla. 1991);

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[3] In Valle, this Court cited Demps V. State, 395 So.2d 501, 505 (Fla. 1981), for the proposition that the standard jury instructions "are sufficient and do not require further refinements." At issue in Demas was the failure to instruct the jury regarding nonstatutory mitigating factors. When the United States Supreme Court subsequently disagreed with the standard jury instructions on that point, it was held to be a substantial change in law which "defeat[ed] a claimed procedural default." Demps v. Dusser, 514 So.2d 1092, 1093 (Fla. 1987).

[4] This Court had relied on Smalley in rejecting the identical claim made in Espinosa. See Espinosa v. Florida, 112 S.Ct. at 2928.

Davis v. State, 586 So.2d 1038, 1040 (Fla. 1991).

This Court rejected still many other challenges to the adequacy of the standard jury instructions without reference to Smalley or any other authority. As previously noted in Vaught, this Court gave the standard jury instructions regarding aggravating circumstances a nod of approval. Those standard instructions provided as to "heinous, atrocious or cruel":

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> * * *
>
> 8. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

Since this language was in the standard instructions at the time of Vausht, this Court's opinion therein constituted a clear ruling that the instruction was adequate.

Numerous other decisions were issued by this Court specifically approving the standard jury instructions against Eighth Amendment challenges. Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985) ("The judge followed the standard jury instructions. * * * We conclude there was no error in the instructions given by the trial judge regarding aggravating and mitigating circumstances."); Johnson v. State, 465 So.2d 499, 507 (Fla. 1985) ("The instruction on and finding that the murder was especially heinous, atrocious or cruel was also proper"); Bertolotti v. State, 476 So.2d 130, 132 (Fla. 1985) ("Appellant's proposed jury instruction is subsumed in the standard jury

instruction given at the close of the penalty phase"); Jennings v. State, 512 So.2d 169, 176 (Fla. 1987) (the challenge was found meritless without discussion); Hildwin v. State, 531 So.2d 124, 129 (Fla. 1988) (challenge found meritless without discussion); Mendyk v. State, 545 So.2d 846, *850* (Fla. 1989) (in response to Mendyk's challenge regarding adequacy of standard instruction on heinous, atrocious or cruel, this Court held "standard jury instructions properly and adequately cover the matters raised by appellant").[5]

This Court recognized that Hitchcock was a change in law because it declared the standard jury instruction given prior to Lockett to be in violation of the Eighth Amendment. In addition, it rejected the notion that mere presentation of the nonstatutory mitigation cured the instructional defect. After Hitchcock, this Court recognized the significance of this change, Thomsson v. Dugger, and declared, "[w]e thus can think of no clearer rejection of the 'mere presentation' standard reflected in the prior opinions of this Court, and conclude that this standard can no longer be considered controlling law." Downs v. Dusser, 514 So.2d 1069, 1071 (1987). So too here, Espinosa can be no clearer in its rejection of the standard jury instruction and the notion that the judge sentencing insulated the jury instructions regarding aggravating factors from compliance with Eighth

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[5] This list of cases is by no means exhaustive. A number of cases where the issue was raised have not been included on this list because this Court's opinion failed to refer to the issue in any fashion.

Amendment jurisprudence.

In Delas v. Dusser, 513 So.2d 659 (Fla. 1987), this Court held that the change brought by Hitchcock was so significant that the failure to previously raise a timely challenge to the jury instruction would not preclude consideration of a Hitchcock claim in post-conviction proceedings.[6] Again, the instruction rejected in Hitchcock was, as it is here, a standard jury instruction repeatedly approved by this Court. See Demps v. State, 395 So.2d at 505. Such an approach is warranted where attorneys in reliance on this Court's jurisprudence which conclusively, albeit erroneously, settled the issue adversely to the client, chose to forego arguments which appear to be meritless in favor of issues with a greater chance of success. This Court should treat Espinosa's reversal of this Court's jurisprudence as a substantial change in law. An attorney is expected to "winnow[] out weaker argument[] and focus[] on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). An attorney should not be required to present issues this Court has ruled to be meritless in order to preserve the issue for the day eight years later that the United States Supreme Court declares this Court's ruling to be in error.[7]

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[6] This Court noted in Delap that the United States Supreme Court reversed in Hitchcock despite the failure to object to the jury instruction.

[7] As this Court recently stated:

> Neither the bar nor this Court wishes to stifle innovative claims by attorneys.

"Fundamental fairness" may override the State's interest in finality. Moreland V. State, 582 So.2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness." Witt v. State, 387 So.2d 922, 925 (Fla. 1980). "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." Id. Accordingly, this Court held in Witt that "only major constitutional changes of law" as determined by either this Court or the United States Supreme Court are cognizable in post-conviction proceedings. 387 So.2d at 929-30. Here, the decisions at issue have emanated from the United States Supreme Court. Espinosa; Sochor. Obviously, the decisions qualify under Witt to be changes in law.[8]

> Nevertheless, under the Rules of Professional Conduct the pursuit of imaginative claims is not without limit. The standard embodied in Rule 4.3-1 requiring a good faith argument for the extension, modification or reversal of existing law is broad enough to encompass those cases where the claims are the result of innovative theories rather than, as here, an obvious attempt to relitigate an issue that has failed numerous times.

Florida Bar v. Richardson, 591 So.2d 908 (Fla. 1991).

[8] In Witt, this Court cited Gideon v. Wainwright, 372 U.S. 335 (1963), as an example of a change in law which defeated any procedural default. As a result of Gideon, it was necessary "to allow prisoners the opportunity and a forum to challenge those prior convictions which might be affected by Gideon's law change." Witt, 387 So.2d at 927.

Based upon the foregoing, Mr. Gaskin contends that he is not procedurally barred as the State will undoubtedly contend. Additionally, the State argued vehemently in its petition for rehearing in the Supreme Court of the United States that Mr. Gaskin was procedurally barred. After carefully considering the State's argument, the Court denied the State's petition for rehearing on September 4, 1992.

Harmless Error Analysis

The question for this Court is whether to reverse for new sentencing proceedings. Although the better practice is to reverse, the State may try its hand at harmless error analysis. Clemons v. Mississippi, 494 U.S. 738 (1990). The State would have to prove that the constitutional error is harmless under the teachings of Yates v. Evatt, 111 S.Ct. 1884 (1991) and Chapman v. California, 386 U.S. 18 (1967). The burden is on the State, as the beneficiary of the errors, to show that no constitutional error contributed to the either death sentence.

Without speculating as to how the State will be able to make such a showing, Mr. Gaskin lays out here the law governing harmless error analysis. To prevail in the argument of harmless error, the State must show beyond a reasonable doubt that the constitutional error did not "contribute" to the sentencing decision. Sochor v. Florida, 112 S.Ct. 2114 (1992), Yates v. Evatt, 111 S.Ct. 1884, 1892 (1991), Chapman v. California, 386 U.S. 18 (1967). It is virtually impossible for the State to make this showing where, as here, the prosecution dwelt on the

unconstitutional matters in its argument to the jury. (R1990-93); Clemons v. Mississippi, 494 U.S. 738 (1990). See also United States v. Sanfilippo, 564 F.2d 176, 179 (5th Cir. 1977) (error could not be harmless where prosecutor urged jury to consider false testimony), and DeMarco v. United States, 928 F.2d 1074, 1076-77 (11th Cir. 1991) (relying on Sanfilippo).

There must be a detailed analysis of the evidence favorable to the State and favorable to the defense, and it must be shown that there was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." Yates v. Evatt, 111 S.Ct. 1884, 1893 (1991). It is not enough to say that the result "could have been the same" without the constitutional error, id. 1895; rather the question is whether the outcome "actually resulted" from considerations independent of the constitutional error. Id. 1893. The Chapman standard is "a justifiably high standard," and simply to say an error is harmless "cannot substitute for a principled explanation of how the court reached that conclusion." Sochor, 112 S.Ct. at 2123 (O'Connor, J., concurring).

Given the substantial factual disputes in the record, the considerable mitigation present, and the pervasive effect of the constitutional errors on the jury's deliberative process, one can hardly see how the State can meet these burdens. The trial court found only three aggravating circumstances in imposing the death sentence for the murder of Mr. Sturmfels and only four aggravating circumstances in the course of Mrs. Sturmfels'

murder. In mitigation of both murders, the trial court found that: (1) the murders were committed while Gaskin was under the influence of extreme mental or emotional disturbance, and (2) that Gaskin had a deprived childhood. (R1311-24) Additionally, the trial court rejected the uncontroverted evidence that Mr. Gaskin was unable to conform his conduct to the requirements of the law.[9] (SR39-40) The examining psychiatrist who concluded that this mitigating circumstance was present, was appointed by the Court at the request of the prosecution. (SR17) In spite of the fact that the jury never heard any of the psychiatric evidence[10], their vote for death was a close one (eight to four). The jury certainly did hear of Mr. Gaskin's abnormal and deprived childhood. In light of the considerable mitigation present, coupled with the improper and unconstitutional emphasis on the offending aggravating circumstances", the State cannot meet the onerous burden of the Chapman standard.[12]

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[9] Section 921.141(6)(f), Florida Statutes.

[10] The psychiatric report was prepared for sentencing and considered by the trial court only.

[11] Both the "heightened" premeditation and the HAC aggravators were emphasized by the prosecutor in very vague, general language.

[12] The fact that the trial court did not find HAC present in one of the murders does not render the error harmless as to that sentence. Even though the trial court did not find it, the jury returned a death recommendation (eight to four on both murders) after hearing the unconstitutional Espinosa instruction. Sochor, supra. Likewise, the trial court's "blanket" statement that he would impose the death penalty even if this aggravating circumstance were stricken, means absolutely nothing.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant requests that this Honorable Court remand for a new penalty phase as to both sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 in his basket at the Fifth District Court of Appeal and mailed to Mr. Louis B. Gaskin, #751166, P.O. Box 747, Starke, FL 32091-0747, this 2nd day of November, 1992.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER