IN THE SUPREME COURT OF FLORIDA

LOUIS B. GASKIN,
Appellant,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 76,326

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
CHIEF, CAPITAL APPEALS
112-A Orange Avenue,
Daytona Beach, Fl. 32114
(904)252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT.)

TABLE OF CITATIONS (CONT.)

TABLE OF CITATIONS (CONT.)

OTHER AUTHORITIES:

TABLE OF CITATIONS (CONT.)

IN THE SUPREME COURT OF FLORIDA

LOUIS B. GASKIN, Appellant,	)	
vs.	)	CASE NO. 76,326
STATE OF FLORIDA, Respondent.	)	

INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE

On March 27, 1990, the fall term grand jury, in and for Flagler County, Florida, returned a ten-count indictment charging Louis Bernard Gaskin with two counts of first degree murder in the death of Robert Sturmfels (premeditated and felony murder), two counts of first-degree murder (premeditated and felony murder) in the death of Georgette Sturmfels, one count of armed robbery of the Sturmfels, one count of burglary of the Sturmfels' home, two counts of attempted first-degree murder of Joseph and Mary Rector, one count of armed robbery of the Rectors, and one count of burglary of the Rector's home. (R1108-10)

Citing the extensive media coverage surrounding the case, defense counsel filed a motion to sequester the jury during the trial. (R1170-1) At a hearing before trial commenced, the court stated that it saw no reason to grant the motion at that

time. The trial court stated that it would sequester the jury if the need arose. (R1064-7) Defense counsel also filed a motion for individual and sequestered voir dire based, inter alia, on the pre-trial publicity. (R1180-4) As a direct result of that publicity, defense counsel also filed a motion for a change of venue pursuant to Rule 3.240, Florida Rules of Criminal Procedure. (R1188-92) At a hearing, the trial court indicated that they would make an effort to pick a jury and, if problems arose, defense counsel could renew the motion. (R1070-4) Defense counsel did renew the motion when it became apparent that only one person in the first eighteen veniremen had no knowledge of the case. (R180) The trial court denied the motion and noted defense counsel's continuing objection on those grounds. (R180-3) Defense counsel felt compelled to unsuccessfully renew the motion several more times during jury selection. (R289) The trial court repeatedly overruled the objections and a jury was seated.

Appellant also filed a motion for statement of aggravating circumstances (R1172-4) which the trial court ultimately denied. (R1061-4) Appellant also filed a motion to use a special verdict form for the unanimous jury determination of statutory aggravating circumstances. (R1175-6) At a pre-trial motion hearing, the court deferred ruling on the motion until the charge conference. (R1060-1) No one discussed the motion again on the record. The special verdict forms were not used.

Defense counsel also filed a notice of a challenge to the panel (1177-8) which the trial court denied. (R1059-60) The

trial court granted motions for a venire list and for individual and sequestered voir dire. (R1057-9,1179-84) Defense counsel also filed a lengthy motion to declare the death penalty statute unconstitutional. (R1193-1217) The trial court denied the motion. (R1074-6)

Appellant filed a motion to preclude the imposition of the death penalty. (R1218-28) The trial court pointed out that the motion was premature and deferred ruling until an appropriate time. (R1077-8) No ruling appears on the record.

Appellant also filed a motion to prohibit any reference to the advisory role of the jury pursuant to Caldwell v. Mississippi, 472 U.S. 320 (1985). (R1229-31) The trial court granted this motion in part. (R1079-87)

Appellant filed a motion to declare the death penalty unconstitutional based on the unbridled prosecutorial discretion used in the decision to seek the ultimate sanction. (R1239-42) The trial court denied the motion. (R1076-7)

The case proceeded to jury trial on January 11, 1990, before the Honorable Kim C. Hammond. (R1) During the state's case-in-chief, the trial court admitted three items of evidence over defense objections. (R487,693-703,830) At the conclusion of the state's case, defense counsel moved for a judgment of acquittal which the trial court denied. (R856-8) Appellant presented no evidence at the guilt phase. (R859) After deliberations, the jury returned with verdicts of guilty as charged on nine of the ten counts. The jury found Louis Gaskin

not guilty of the attempted murder of Mrs. Rector. (R938-44,1285-94) The trial court immediately adjudicated Gaskin guilty on all nine counts. (R947-9)

The trial court conducted a penalty phase on June 18, 1990. (R952-1012) Due to the illness of the wife of one of the jurors, an alternate was seated for the second phase. (R952-3,1010-11) After hearing evidence and argument, the jury deliberated and returned with recommendations (8 to 4) that Louis Gaskin should die for each of the two murders. (R1003-8,1301-2) Following the announcement of the verdicts, defense counsel moved ore tenus for a new trial which the court denied. (R1011)

The trial court held a sentencing hearing on June 19, 1990. (R1014-52) The state offered into evidence the unedited statement of Gaskin to police following his arrest. (R1014-16;SR1-16) The state also offered into evidence and the court considered the psychiatric report of Dr. Jack Rotstein. (R1016-22; SR17-40) The parties agreed to use Dr. Rotstein's report in lieu of live testimony. (R1024) The state also offered a certified judgment and sentence for an unrelated burglary. (R1022)

The trial court adjudicated Gaskin guilty of all nine offenses. (R1303-4) On the non-capital offenses, the trial court sentenced Gaskin to two thirty-year terms and three terms of natural life and ordered each to run consecutive to one another. (R305-10)

The trial court sentenced Louis Gaskin to die in the

electric chair for the murder of Robert and Georgette Sturmfels. (R1311-24) The court found (1) that the murders were committed in a cold, calculated, and premeditated manner; (2) that Gaskin had previously been convicted of another capital offense or of a felony involving the use or threat of violence; and, (3) that the murder was committed while the defendant was engaged in the commission of a robbery or burglary. Although the court also found that each murder was committed for pecuniary gain, the court recognized that improper doubling would occur in the weighing process, and therefore considered these two circumstances as one. Additionally, the trial court found that the murder of Georgette Sturmfels was especially wicked, evil, atrocious, or cruel. 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. The court concluded that the aggravating circumstances outweighed the mitigation circumstances and ordered Louis Gaskin executed. **(R1311-24)**

Appellant filed a notice of appeal on January 16, 1990. (R1097) Subsequently, this Court granted a motion to relinquish jurisdiction so that the trial court could entertain a motion to vacate and amend two of the previously imposed sentences on the non-capital **offenses.** Pursuant to a stipulation, the trial court vacated the two thirty-year sentences imposed on counts V and IX and resentenced Gaskin to life imprisonment on each of those two

counts to run consecutive to each other and to any other sentence. Gaskin also pled guilty to some other charges as part of the deal. In exchange, the state agreed to forego its quest for the death penalty in case number 90-07-CF-A, involving the murder of Charles M. Miller. (R1332-40) This Court has jurisdiction. Art. V, s.3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

GUILT PHASE

On December 20, 1989, Joseph and Mary Rector were spending an evening at their Flagler County home at 1 Ricker Place, Palm Coast, Florida. (R426-8,449-52) The Rector's retired to their bedroom where they watched about half of the eleven o'clock news before turning off the television. (R428,452) A few minutes later, the couple heard a loud noise. Thinking that a log must have rolled out of the fireplace, Mr. Rector got out of bed and checked the house. Finding nothing, he returned to bed, whereupon they heard another loud sound. (R428,452) Having armed himself with a knife, Rector investigated once again but more cautiously. (R429,452) After hearing a similar noise for the third time, Rector told his wife to call the sheriff. (R429)

Mrs. Rector soon discovered that their phone was not working. They took the phone into the bedroom where they tried plugging it into another jack with no success. (R429,453-7) As he stood in the dark bedroom, Rector saw his window shade appear to explode. He looked down, saw blood on his chest, and realized he had been shot. (R429) At that point, Rector believed that his wound was caused by an accident or children's mischief. (R431) He decided that the prudent course of action would be getting to the hospital. He urged his wife to get the keys to her car, ran out the front door, and dove into the passenger seat. His wife followed and drove the car. As she began backing out of the driveway, they heard what sounded like bullets hitting the side

of the car. At that point, Rector began to think someone was trying to kill them. (R431-2,453-7) Rector eventually made it to the hospital and survived. (R432-3) Neither Rector ever saw their assailant. (R447-8,457,463-4)

The police arrived at the Rector home after Mrs. Rector notified them later that night. (R461,465-7,478) They gathered evidence at the scene and concluded that someone had broken into the house. (R479-89) The house had been ransacked. A purse, a wallet, cash, checks, credit cards, and a pair of pants were missing. (R433-5,,462-3) The phone lines had been cut. (R484) They found no culprit in the area despite an extensive search using a trained tracking dog. (R491-95,501)

The investigation at the Rectors' home continued the next day, December 21, 1989. (R512) Richard Tillsdale, a rural carrier for the United States Post Office, made his usual delivery to the Rector's home. Tillsdale handed the Rectors' mail to one of the many deputies at the scene. (R513-15)

Tillsdale proceeded to his next stop at 10 Ripley, the Sturmfels' residence, approximately three-quarters of a mile from the Rectors' home. (R513-15) While delivering the Sturmfels' mail, Tillsdale noticed drapes blowing out of the front window of the home. He also noticed one car missing and suspected that someone might have broken into the house. (R516) He rang the doorbell but received no answer. As he left, he noticed a broken window and also observed what appeared to be several bullet holes in the top of a window. (R516) Tillsdale returned to the

Rectors' home and reported what he had seen to the deputies there. (R516)

Steve Leary, a crime scene processor with the Florida Department of Law Enforcement, and Deputy Allen Miller went to the Sturmfels' home and found all the doors locked. (R545) They found an open window with the screen removed at the rear of the home. Miller crawled in and unlocked the front door. Leary entered the home and found it ransacked. (R545-6) They found the body of Mr. Sturmfels on the floor of the den and the body of Mrs. Sturmfels on the floor of the bedroom. (R546-54) The physical evidence indicated that the Sturmfels' assailant stood at various locations outside the home as he fired into the den window. (R555-6,560)

Leary opined that the assailant shot Mr. Sturmfels as the victim sat in his den recliner. Mr. Sturmfels, hit first, stood up, turned to leave the den, but was shot again. He fell to the floor where he remained. Mrs. Sturmfels, on the couch at the time, stood up to follow her husband, but was shot. She managed to make her way into the hall, when the assailant came around the house, and shot her again through the french doors. The intruder then cut a window screen, removed it, unlocked the window, and climbed into the house. (R580) He then fired one more shot to each of the Sturmfels heads. (R580-1) He dragged Mrs. Sturmfels' body down the hall into the master bedroom where he left her. He covered both victims with blankets. (R581) After ransacking the house, the intruder drove the Sturmfels'

truck around to the back of the house where he loaded the fruits of his burglary through a back window into the Ford Bronco. (R581) Deputy John Dixon found the Sturmfels' truck abandoned in the woods. (R520-3) Subsequent autopsies revealed that the Sturmfels died as a result of multiple gunshot wounds. (R704-28)

On December 20, 1989, Alfonso Golden, his wife Alfreda, and their children spent the evening at Alfonso's mother's home. (R5604-7,617-18) The family had been drinking and playing cards throughout the evening. (R618) The liquor flowed and Alfonso renewed an old argument with his mother's boyfriend. (R618-19) Alfonso called the police in an attempt to quell the disturbance before it got out of hand, as it had previously. Patrolman Bruce Sepielli of the Bunnell Police Department arrived at the scene. He loaded Alphonso, Alfreda, and their children into the patrol car and drove them back to their own home. (R604-7,619-20) Such is the level-headedness of small-town justice. (R607)

Officer Sepielli dropped the Goldens off at their home about 11:15 p.m. (R606) Around about midnight, Louis Gaskin, whom Alphonso had known for eleven years, came by the house. (R620-1) Gaskin was dating Janice Gilyard, Alphonso's cousin. (R622) Alphonso agreed to let Gaskin leave some Christmas presents at Alphonso's house for safekeeping. (R621) The pair removed two video cassette recorders, a couple of lamps, a clock, an iron, some jewelry, and a rifle from Gaskin's car and stored them at Alphonso's home. (R621,626,628-30) Gaskin told Golden that he had "jacked" the presents from someone. (R622) He told

Golden that the victims were "stiff" and, if he did not believe him, to watch the news. (R623) Golden was fairly intoxicated at the time and did not pay much attention to Gaskin's boasts. (R623) Gaskin showed Golden a bankroll of approximately $300. Golden asked for and received $10. (R622) Gaskin also gave Golden one of the VCRs as a Christmas present. (R624) Gaskin returned on Christmas day to pick up the lamps, the clock, and the VCR. (R639) Golden sold his newly-acquired VCR to a local shop on December 28, 1989. (R624,665-70) Gaskin presented his girlfriend with a VCR, two lamps, and a clock as Christmas gifts. (R773-4)

After finally catching the news one night several anguished days later, Alphonso Golden called the authorities to report what he knew. (R623-30) Authorities subsequently identified property obtained from Alphonso Golden and Lewis Gaskin's girlfriend as property belonging to the Sturmfels. (R670,679-80,673-4,828-31,835-7)

At 10:30 a.m., December 30, 1989, pursuant to a warrant, authorities from the Flagler County Sheriff's Office arrested Louis Gaskin at his home. (R783-5) Deputy Mark Carmen advised Gaskin of his constitutional rights and Gaskin indicated that he understood. (R806-12) Carmen and Sergeant Bullock transported Gaskin to the Flagler County Jail where he was booked and placed in a cell by himself. (R812) Deputy Carmen then searched Gaskin's home where he seized two lamps, a clock, a VCR, and a camera pursuant to a search warrant. (R813-17)

Deputy Carmen and Investigator Schweers had been up all night working on the case. After completing the arrest and accompanying paperwork, they delayed any questioning of the suspect, and all went home for some sleep. (R785-6,793-5,817) They returned to the jail at about 7:00 p.m., and using a form, advised Gaskin of his constitutional rights. (R786-7,800,817-19) Gaskin readily agreed to talk about the case. (R848-9) After running through the statement once, Detective Schweers asked for and Gaskin consented to a taped interview. (R849-50)

Gaskin told police that he drove his car from Bunnell to Palm Coast on the night of December 20, 1989. He spotted a light in a house as he drove around. After parking his car in the woods, Gaskin made sure his gun was loaded and walked up to the Sturmfels' residence at 10 Ripley Place. (SR3) He walked around the house, looked in the window, and saw a man sitting in a recliner while a woman sat on the sofa. (SR3) Gaskin made sure that no one else was home by checking the vehicles in the driveway. The Sturmfels were still sitting in their den when Gaskin checked back. Gaskin walked around the house approximately five times in an attempt to gather enough courage to pull the trigger. After doing so, he returned to the window, aimed at the man, and pulled the trigger. (SR4) The gun failed to fire. Gaskin walked around the house again, cocked his gun, and returned to the den window. He paused there for approximately five minutes and then walked around the house again. Gaskin repeated this process approximately two times. He

then aimed through the window at Mr. Sturmfels, pulled the trigger, and shot the man. (SR4) Sturmfels stood up and Gaskin shot him a second time. Mrs. Sturmfels stood to leave the room and Gaskin shot her also. Mr. Sturmfels was still standing, so Gaskin shot him a third time. He fell to the floor and did not move again. (SR4)

Mrs. Sturmfels crawled from the den into the hallway out of Gaskin's sight. He went around to the glass doors that face the hallway and saw her sitting on the floor. (SR4) Gaskin shot her once more, and she fell over. (SR4-5) He then pulled the screen out, broke the window, and entered the home. He fired one more bullet into Mr. Sturmfels' head at point-blank range. Gaskin shot Mrs. Sturmfels in a similar manner. (SRS) He dragged her body from the hallway into the bedroom and covered her with a bedspread. (SR6) He also covered the body of Mr. Sturmfels with a blanket. Gaskin then went through the house taking two lamps, video cassette recorders, some cash, and jewelry. He loaded them into Mr. Sturmfels truck which Gaskin had pulled around to the bedroom window. (SRS-6) He then drove the truck to his own car parked in the woods and unloaded the items. (SR6)

He then drove until he saw another house nearby. He parked his car and looked in the windows of the home where he observed the Rectors sitting in their den. Gaskin cut the phone lines leading to the home, looked in the windows again, and saw that the Rectors had gone to bed and, in the process, had turned out the lights. (SR6-7) In an effort to roust Mr. Rector, Gaskin

took a log from a stack of firewood in the yard and threw it onto the roof of the home. Mr. Rector got out of bed, turned on the lights and looked outside. Gaskin could have shot Rector at that point, and admitted that he did not know why he did not. (SR7) Rector returned to bed only to be roused once more by the sound of Gaskin throwing rocks at the house and at the cars in the driveway. Gaskin then aimed in the direction where he thought Rector stood in the darkened house. He shot and hit Mr. Rector and heard him yell. (SR7-8) Gaskin then crouched in front of the van parked in the driveway and waited for the couple to come out. When they did, Gaskin resisted an urge to shoot Rector again. As the Rectors drove away, Gaskin shot at the tires and in the direction of the fleeing car. (SR8) After the Rectors left, Gaskin broke into the locked house and stole cash from the Rectors' wallet and purse. (SR8) He then went to Alphonso Golden's house where he dropped off most of the loot. (SR9-10)

In addition to cooperating fully with the police in relating the detailed account of his crimes, Gaskin also told authorities where they could find evidence that he had disposed of in a nearby canal. (R819-24) The police collected the evidence the day after Gaskin's arrest.

PENALTY PHASE

The state's evidence at the penalty phase dealt exclusively with the ballistics involved. The trial adjourned to the Flagler County Shooting range where the jury saw Sergeant Prather fire six Federal .22 long rifle cartridges from the rifle

used by Gaskin that night. Sergeant Prather than fired six Federal .22 short cartridges from the same gun, also in rapid succession. Prather than fired one Federal .22 long cartridge into a water jug and then shot one .22 short Federal cartridge into a water jug. Sergeant Prather concluded the demonstration by firing six .22 standard short cartridges from the same gun. (R954-8) Sergeant Prather testified that the type of ammunition used by Gaskin on the evening of the crimes is the quietest of the three types of shells that fit Gaskin's rifle. Although quieter, they have less "killing power" and frequently result in that particular rifle jamming. Jamming of the rifle would necessitate the manual pulling of the bolt back in order to load another round before firing again. (R959-64)

Janet Morris, Louis Gaskin's first cousin, had known Louis for over twenty years. He was a good boy and everybody in school liked him. Janet and Louis' great-grandparents raised both Louis and Janet. Louis was an average student. (R971-3) He had no disciplinary problems in school. After leaving school, he spent two years in the Job Corps and got his GED. (R979) Louis then began working at a lumber mill where he enjoyed a reputation as a good worker. (R973) Everyone at work and in the community liked Louis. (R980) He even received a promotion at work. (R980)

Although Louis was not abused in his upbringing, his great-grandparents were very strict. ((R975,977-8) Unlike the other children, Louis was not allowed to go to the usual places with the other children to play. He could roam no more than two

houses away from his own home. He could not even go to the local gym only a block away. Still, he never gave anyone any trouble during his formative years. (R978-9) He was the type of boy that would help a stranger change a flat tire. (R980)

The jury heard the above evidence and, in a relatively close vote (8-4), said that Louis Gaskin should die. Although the jury did not hear it, the trial court did consider, and found a mitigating circumstance as a result, the psychiatric report by Dr. Jack Rotstein. (RS17-40) Louis told Dr. Rotstein that he, "built a world without fear." (SR18) Louis demonstrated his fearlessness by playing Russian roulette, and by playing with snakes. (SR18) Louis explained his fascination with ninjas. He would dress in a ninja costume before committing any crimes. (SR20) He admitted that he was obsessive about the subject and "dreamt of being one." (SR20) He explained that ninjas were trained assassins, skilled in the martial arts. They are silent killers and masters of weaponry. (SR20)

Louis explained what happened on the night of the murders. "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." (SR20) He put on his ninja outfit and armed himself. "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 got everything ready, first. Then, I masturbated." (SR20) When asked what his thoughts were at the time, he said, "I had a partial thought. I

might rape someone. It wasn't the main thing." (SR21) He thought of having sex with his girlfriend. (SR21) After walking around the house a few times he thought that the "devil was telling me to kill him." (SR21) God was telling him to go back home. (SR21) "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." (SR22)

The doctor asked Gaskin how he felt when he saw Mrs. Sturmfels crawling and in pain. "No pleasure, no sorrow. . . " (SR22) When asked about any feeling of guilt, Gaskin explained, "The guilt was always there. The devil had more of a hold than God did. I knew that I was wrong." (SR22) After the murders, he considered having sex with Mrs. Sturmfels' dead body. (SR22)

Gaskin described the attack on the Rectors, "The whole thing was like a movie." (SR23) When his friend, Alfonso Golden, turned him in, "At first, I was mad at him, I was thinking of suicide. I forgive him so that I can be forgiven." (SR23) "I thanked him, the next time it could have been somebody I love." (SR29) The psychologist thought that Louis was happy about his arrest, since he was afraid that his criminal behavior might otherwise continue. (SR35)

After his arrest, Louis Gaskin became a religious convert. (SR18,24) He said to himself, "Lord help me remember the Lord's prayer." At that point, the chaplain came and he felt that was his answer. (SR24) Initially, Gaskin wanted to die in

the electric chair and go to hell. (SR24) Ultimately, he decided that it was wrong to want to die. (SR18) He felt remorse and knew he must be punished for "breaking the law of the land." (SR18)

Dr. Rotstein concluded that Gaskin had engaged in multiple deviant sexual behavior such as pedophilia (both males and females), exhibitionism, incest, bestiality, and violent sex. (SR25-6) He tried sexual intercourse with a dog and stuck an arrow "up a cat." (SR26) Louis described one peculiar episode in which he was sitting in his car talking, when he suddenly began to weep inexplicably and uncontrollably. (SR26) Neither Gaskin nor Dr. Rotstein had an explanation for this surprising episode.

Gaskin revealed that he failed both the third and sixth grades and quit school in the ninth grade. (SR27) Gaskin sucked his thumb until he was almost sixteen years old. He wet the bed until he reached his teen years. (SR35) He did not like school and was always in trouble, skipping classes. (SR27) Gaskin said that he could read well and described great proficiency in math. (SR27)

Louis' great-grandmother died in March of 1989. His great-grandfather was still alive at the time of Gaskin's sentencing. He called his great-grandfather a respectable man, but admitted a partiality toward his recently deceased great-grandmother. Gaskin explained that his mother lived with the family only for a short time. Although she lived in Bunnell at the time of his trial, she did not testify for her son. Louis

explained that his mother did not get along with any of her children. Louis was mistreated and abused by his mother. This forced his great-grandmother to intervene to care for and raise Louis. (SR38) Louis has a sister and they share the same parents. He has two brothers, but they did not share Louis' father. Everyone in his family had legal difficulties. One brother committed a child rape. Another brother and a sister were arrested for theft. His mother still earns her livelihood by selling drugs. (SR27)

Gaskin described several disturbing thoughts to the doctor. At times he thought about, "A tube sticking up someone's butt and then sticking barbed wire up through the tube and then leaving the barbed wire in." (SR28) He tries not to think of such things now. "I think of God. I play checkers and I read the bible." (SR28) He describes hearing voices having conversations inside his head. One voice is "harsh and another is gentle, another may be full of anger." (SR29) He found these internal disputes to be very stressful. (SR29) Dr. Rotstein found it interesting that, after fully confessing to police Gaskin asked his interrogators, "Do you think I am sick?" (SR34)

Gaskin once told his girlfriend that he had seven different personalities. (SR32) Some people in the community believed that Gaskin had a brilliant mind, since he enjoyed playing chess. (SR33) A childhood friend described him as a "lonely child." (SR33)

One psychologist who examined Louis indicated that

Gaskin's testing was consistent with a diagnosis of schizophrenia. **(SR34)** Evidence indicated multiple personalities, sometimes three, sometimes five. (SR34) Gaskin would hear voices before actually engaging in any violent acts. (SR34) The psychologist thought it highly unusual for someone to readily disclose such a large amount of deviant behavior. (SR35) The psychologist opined that the most accurate diagnosis was "personality disorder and rule out **schizophrenia." (SR35)**

Dr. Rotstein had some difficulty in diagnosing Louis Gaskin. **(SR36-40)** Rotstein concluded that the information did not support a diagnosis of schizophrenia. **(SR36)** Although Louis fulfilled many of the criteria for anti-social personality, Rotstein concluded that Louis did not fit into the usual pattern of that disorder. **(SR36-7)** Rotstein also dismissed a diagnosis of schizoid personality disorder and concluded that schizotypal personality disorder appeared to best fit Gaskin's behavior. **(SR37)** He is uncomfortable socially. He has preoccupations which perhaps reach the level of delusions. He has experiences which sound very much like auditory hallucinations. Gaskin also described episodes of derealization or depersonalization during the assault on the Rectors. **(SR37)** "The whole thing was like a movie." (SR23)

His ninja preoccupation shows a total disregard for reality. **(SR38)** Rotstein concluded that Gaskin exhibited a personality disorder which approaches schizophrenia, but does not quite reach the requisite diagnostic criteria. This best

describes the schizotypal personality disorder. (SR38)

Gaskin's low self-esteem and feelings of masculine inferiority coupled with the schizotypal personality disorder resulted in the tragic action that Louis Gaskin took that night. (SR38-9) Dr. Rotstein concluded that, as a result of his abnormal mental functioning, Louis Gaskin was definitely unable to conform his conduct to the requirements of the law. **(SR39-40)** This was the only mitigating circumstance considered by Dr. Rotstein.

SUMMARY OF ARGUMENT

Appellant was denied his right to a trial by a fair and impartial jury where the trial court denied his motion for change of venue. Of the forty-nine jurors questioned on the record, only four claimed to have no knowledge of the case, Three of those were peremptorily challenged by the state. The fourth, who sat on the jury, strongly supported the highly-publicized efforts of the prosecutor to rid the Seventh Circuit of pornography. The veniremen's assessments of their impartiality are, for the most part, completely unrealistic. Jurors who socialized with the murder victims insisted they could be fair. The jury that convicted and sentenced Gaskin to die was not a fair one.

The trial court erred in finding the murder of Georgette Sturmfels to be heinous, atrocious, and cruel. Mrs. Sturmfels was killed simultaneously with her husband. Both were shot repeatedly as they watched television in their home. A murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, and cruel.

Although the trial court found that Gaskin was under the influence of extreme mental or emotional disturbance, the court rejected the other statutory mental mitigator (inability to appreciate the criminality or to conform one's conduct). The uncontroverted evidence clearly established this mitigating circumstance. The trial court's failure to find it violates this Court's pronouncement in Campbell v. State, ~~infra~~.

Approximately twenty unreported bench conferences occurred at Gaskin's trial. Additionally, the trial court excused twenty-four potential jurors based on "hardship reasons." These excusals were also accomplished off the record. These omissions frustrate Gaskin's right to appeal and deny him meaningful access to the courts.

The trial court admitted three items of evidence which were irrelevant. Defense counsel objected on those grounds but was overruled. A camera, a cigar, and a pair of Gaskin's boots were admitted before the state established any relevance. Whatever minimal relevance the evidence had was outweighed by the danger of unfair prejudice and confusion of the jury.

Although only two people were killed, the trial court adjudicated Gaskin guilty of four counts of first-degree murder. This violates double jeopardy principles and the pronouncement of this Court in Houser v. State, 474 So.2d 1193 (Fla. 1985).

At the penalty phase, the trial convened at the Flagler County Shooting Range where the state presented a demonstration using the murder weapon. The record fails to adequately reflect that Louis Gaskin was actually present at this critical portion of the trial.

Fundamental error occurred when the trial court commented on the evidence. At the firing range demonstration during the penalty phase, the trial court stated that, "Our purpose for the demonstration. . . ." (R957) (emphasis added) This was clearly a comment on the evidence and, perhaps more

damaging, the court's unfortunate pronoun usage placed him squarely on the side of the prosecution.

Gaskin contends that the trial court erred in instructing the jury as to what was meant by the term "reasonable doubt." Condemnation of any attempt to define the term is almost universal, because the definition engenders more confusion than the term itself.

Gaskin urges that the Florida Capital Sentencing statute is unconstitutional for a variety of reasons.

~~POINT I~~

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A CHANGE OF VENUE WHERE PRE-TRIAL PUBLICITY PRECLUDED THE SELECTION OF A FAIR AND IMPARTIAL JURY.

Bunnell, Florida is a small community. (R43) This case involved the cold-blooded murder of two retirees as they sat in their home watching television. Theft was the motive. The culprit tried the same stunt at another nearby home. Needless to say, Flagler County was in an uproar.

Defense counsel repeatedly harped on the extensive media coverage that these crimes received in the local papers. The elected state attorney chose to personally try this case. He acknowledged the "tremendous publicity" the case had received. (R8) Citing the extensive media coverage, defense counsel filed a motion to sequester the jury during the trial. (R1170-1) At a hearing before trial commenced, the court stated that it saw no reason to grant the motion at that time. The court indicated that it would grant the motion if the need arose. (R1064-7) Defense counsel also filed (and the court granted) a motion for individual and sequestered voir dire based, inter alia, on the pre-trial publicity. (R1057-8, 1180-4) Defense counsel also filed a motion for change of venue pursuant to Rule 3.240, Florida Rules of Criminal Procedure. (R1188-92) At a pre-trial hearing, the court indicated that they would attempt to select a jury and, if problems arose, defense counsel could renew the motion. (R1070-4)

The First Group of Jurors

Jury selection began on June 11, 1990 at the Flagler County Courthouse in Bunnell, Florida. (R1) Anticipating a difficult time selecting the jury, defense counsel requested and received additional peremptory challenges. Eighteen prospective jurors were placed in the box and questioning began. (R22-3,30) As if to emphasize the small size of the community, two of the first eighteen prospective jurors placed in the box knew the defendant. Mr. Mckinnon had known Louis Gaskin almost twenty years, (R44-5) Mr. Edwards not only knew the prosecutor and several of the witnesses, but his family also knew Mr. Gaskin's family. A preliminary inquiry quickly revealed that the court had to question **ten** prospective jurors before finally finding **one** who claimed to know nothing about the case. (R40-68) That was the only juror in the first group who claimed to know nothing about the case.

Two jurors in the first group were very candid. Mr. Morgan admitted that he had followed the case closely in the media, knew a lot of details, and thought he would have a problem sitting as an impartial juror. (R69,100) Mrs. Thompson also read about the case in the newspapers. (R77) She remembered vividly that "everybody was so frantic . . . People were frightened. . . I remember feeling uneasy." (R78) Mrs. Thompson candidly admitted that she was not sure that she could be fair. (R79-80,104-5) Mrs. Nooles (who ultimately sat as a juror) eventually admitted that she followed the media counts closely.

(R114-15) She was extremely upset that such a crime was not confined to big cities and could happen in her own small community. (R114-5)

Many of the jurors initially expressed faint recollection about the murders. For example, Mrs. Leary admitted reading about the case, but stated she did not remember what she read. (R40) Closer examination revealed that she was interested enough to locate the scene of the murders on a map. (R115) Two of the first eighteen venireman were out of state at the time of the murders. (R111-2,115) Mr. Dobbs (who served at the penalty phase) said that he first heard of the murders by reading about the upcoming trial in the newspaper. (R111-2) Mrs. Irwin was in Maryland at the time of the murders, but her neighbors thoughtfully saved all of the newspaper articles for her. She admitted that her neighbors were quite upset. (R115) Mrs. Irwin frequently discussed the crime with friends. They found it very upsetting to think that something so tragic could happen in their own neighborhood. (R115-6) The murders were fairly close (within biking distance) to Mrs. Irwin's home. (R115-6)

Mr. Coleman was also out of state when it happened. He had read one or two articles since his return, including the account in the newspaper on the morning of trial. (R118) That article apparently reiterated everything that the media had previously printed about the case. (R118) Mrs. Muller was also out of state at the time. She also read the weekend article and figured her jury duty might be on that case. (R119-20) She "felt

it was a horrible thing to happen . . . . " (R120)

Mr. Morgan lived only four houses from the murders and admitted that the neighbors were "pretty frightened." (R120-1) Mr. Pauly (who ended up on the jury) read about the murders in the paper when they happened. (R121) He was obviously saddened by what he termed a rare occurrence in Palm Coast. (R122)

Mrs. Hamblin initially claimed that she had only faint recollections of the newspaper accounts she read. (R72) Subsequently, she recalled that the incident made her very uncomfortable since she also lived in a rural area. She was "definitely concerned." (R122)

Mr. Edwards heard of the murders before it even hit the newspapers. (R122) When asked for his impressions, Edwards expressed his hope that the police catch the culprit and, if proven beyond doubt, execute him. (R123)

Mrs. Bennett also heard about the murders at work and followed the media accounts at the time and shortly before trial. (R123) She was shocked and called the murders a "terrible thing." (R123)

Mrs. Donohue was the only juror in the first group who was not appalled at the murders. She opined that coming from New York City with a husband who worked as a policeman could explain her lack of reaction. (R124)

In spite of all the reservations expressed by the first eighteen potential jurors, only three of them expressed any doubt about their ability to put aside their adverse feelings and

decide the case on the facts heard at trial. **(R125-6)** Mr. Morgan owned **up** that he could not be impartial. (R126) Mrs. Thompson, who had previously admitted that she would have a problem, ultimately wavered on the question. (R126) Juror Rummel "thought" he could be fair. **(R125-6)** Subsequently, Mr. McKinnon asked to be excused after hearing venireman Leary make an extremely prejudicial comment to venireman Asseo during a recess. **(R139-45)** All three of those jurors were excused for cause.

After seeing the taint of the extensive publicity in the first eighteen people in the venire, defense counsel renewed his motion for change of venue. Counsel pointed out that only one person in the entire venire denied any knowledge of the case. **(R180)** The trial court parried that such an approach would exclude any literate person from jury duty. **(R180)** Defense counsel pointed out that "death is different," but the trial court again denied counsel's request. (R180-1) Rather than renew his objection when considering each potential juror individually, defense counsel noted his continuing objection on venue grounds. Five of the first eighteen were excused for cause. **(R181-2)**

The Second Group of Jurors

No one in the second group of veniremen expressed any ignorance about the case. **(R200-55)** Despite their familiarity with the shocking murders, most of the jurors were adamant that they could retain their impartiality. Mr. Feron had clear recollections of newspaper accounts of the crimes. The murders occurred close to his home and he was very frightened. He

started locking his doors for fear that he might be next. (R242) yet Feron insisted that he could be fair. **(R204-5)**

Although Mr. Gapa claimed that the murders did not upset him "that much" (he came from Detroit), he kept a shotgun in his house and was ready to protect himself. (R248) After the murders, thinking that it could happen again, he kept his windows and doors locked and his drapes drawn. He admitted to being frightened after the murders. Shortly after the crimes, a car backfire outside their home caused Mr. Gapa and his family to dive for cover. (R218)

Most amazing of all, Mr. Gapa happened to know the murder victims. He socialized with the Sturmfels at their home (the scene of the crime) several times a year. (R216-18,232-3) In spite of all this, Mr. Gapa insisted that he could be "honestly fair." (R232-3) After all, he did not live too awfully close to the scene of the murders, just three and a half blocks from the Sturmfels! (R233) One must remember that the murders occurred in a rural area and Gaskin supposedly selected the houses based on their isolation from others. Yet Mr. Gapa explained that he did not live "that close" to the Sturmfels, just three and one half blocks away. The evidence seems to indicate that Mr. Gapa was probably the Sturmfels' next closest neighbor besides the Rectors, the other victims.

Mr. Gapa's answers during voir dire are suspect to say the least. His examination calls into question the truthfulness of the entire venire. It supports defense counsel's allegation

at a pre-trial hearing that jurors are not truthful about their behavior and opinions. (R1064-7) Gappa was friendly with the victims who were his neighbors. He was obviously familiar with the murder scene. He had been in the Sturmfels' home many times. Still, he insisted he could put all that aside and be fair. That was good enough for the trial court.

Similarly, Mr. Correa actually worked (evidently both at the time of the murders and the trial) with Noreen Rector, one of the victims who escaped Gaskin's bullets that night. (R210-12) Although Correa was in New York at the time of the crimes, he returned to work where he heard that one of his co-worker's husband had been shot. (R212) Correa had worked with the victim for almost two years. (R245-6) Nevertheless, Mr. Correa also insisted that he could be fair. (R211) Correa maintained a firm belief that knowing and working with Noreen Rector would not effect his ability to serve on the jury. (R245-6) Mr. Correa's answers during voir dire are simply incredible, as are Mr. Gapa's. The entire process is thereby called into question.

Mrs. Flanigan was out of town when the murders occurred. Her friends filled her in immediately on her return. Additionally, she read the articles in the newspaper. (R244) Flanigan admitted her fear of living in a rural area. She deliberately chose to live in a secured neighborhood with a gate and a guard. (R244-5)

The murders also bothered Mrs. Valentine. She and her family make a concerted effort to search out and move to safe

areas in this dangerous world. (R247) Valentine thought it odd that such a horrible crime could happen in Flagler County. (R247)

Mrs. Checcio claimed she felt no less secure after the murders. A5 always, she kept her doors locked and placed a stick in her window. (R249) Mr. Monahan used to leave his doors unlocked when he first moved to Flagler County. That practice had since gone by the wayside. (R250)

Mr. Mitchell was a private security guard who happened to be working on the night of the murders. As a result he was privy to the police radio transmissions as they responded to the crime scene. (R223-5) Mitchell was instructed to guard the town, but to stay away from the area of the murders. (R250-1) Nevertheless, Mr. Mitchell assured counsel that he could be fair. (R251-5) This turned out to be very fortunate, as Mr. Mitchell ended up sitting on Gaskin's jury!

Ms. Salazar, like Mr. Correa, worked at the same Publix with Noreen Rector. Unlike Mr. Gapa, Ms. Salazar had talked with Noreen about the incident. Unlike Correa, Ms. Salazar candidly admitted that she could not be a fair juror. The parties stipulated to Salazar's excusal for cause. (R311-12) Ms. Markowski also knew Noreen Rector. Their children attended the same school. Ms. Markowski candidly admitted her partiality and she was excused for cause. (R313-14)

The small size of the Flagler County community was again reinforced when Mrs. Torres revealed that she lived less than one mile from the Sturmfels and was their friend before

their murders. Refreshingly, Mrs. Torres (unlike Gappa) acknowledged that she would have trouble being impartial and was excused. (R338-9)

Mr. Herrera went to the same school as did Gaskin. Herrera was a year or two younger than Gaskin and was barely acquainted with him. (R348-9) Herrera apparently had no problem with impartiality.

Mr. Russell was one of the rare venireman who candidly revealed that he was unsure of his ability to remain impartial in light of the considerable amount that he had read about the case in the newspaper. (R329,350) He still had memories and thoughts about what he had read. (R329) Russell thought he could put what he knew aside but he "still [had] thoughts about what [he] read. They will always be there." (R329-30)

Although Mr. Stuckey admitted that he had read the newspaper accounts of the murders, he said that he had formed no conclusion about the case. (R335-7) Closer questioning revealed that the Sturmfels (the murder victims) were the first people that Mr. Stuckey met after he moved to Flagler County. (R355) Incredibly, Mr. Stuckey ended up on Mr. Gaskin's jury!

As counsel and the court sifted through the second group of jurors, defense counsel again renewed his continuing objection based on the failure of the court to grant his motion for change of venue. (R289) Everyone agreed that Appellant was not waiving the issue. The trial court excused three more jurors for cause. (R288,291)

The Final Group of Jurors

In the third and final group, the trial court excused five more jurors for cause. (R366,399) When it was time to exercise peremptory challenges after questioning the third group of jurors, defense counsel once again renewed his motion for change of venue in light of the answers given by the venire. (R400) In that third group, a record number of three venireman claimed to know nothing about the case. (R315-19,330-1) Unfortunately, none of these three ended up on Louis Gaskin's jury, because the state exercised peremptory challenges on all three. (R400-2)

Of the almost fifty potential jurors questioned an the record, only four claimed to have no knowledge of the murders (which had been covered extensively in the local media). The state chose to excuse three of those jurors and Juror Houser was the only ignorant juror to remain on Gaskin's jury. It should be noted that, during voir dire, Houser made it clear that she strongly sided with state attorney John Tanner's highly publicized attempt to eradicate pornography and bring decency back to the Seventh Judicial Circuit. (R53,98)

The Standard of Appellate Review

In Sheppard v. Maxwell, 384 U.S. 333 (1966), the United States Supreme Court held that the trial court's failure to protect Sheppard from the massive, pervasive, and prejudicial publicity that accompanied the prosecution resulted in a denial of Sheppard's right to a fair trial. Sheppard recognized an

affirmative, fundamental duty on the part of the trial court to assure a fair trial by an impartial jury.

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effecting prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so Permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings threaten the fairness of the trial, a new trial should be ordered.

Sheppard v. Maxwell, 384 U.S. at 362. (emphasis added).

Traditionally, the record of voir dire has been found to be, not only the best, **but** also the most reliable source of evidence to indicate the existence or absence of both juror and community prejudice. Rideau v. Louisiana, 373 U.S. 723 (1963). The voir dire at Louis Gaskin's trial clearly shows that the community of Flagler County was so patently biased that neither Louis Gaskin nor the state of Florida could receive a fair trial.

The murders occurred on December 20, 1989. Trial commenced less than six months later on June 11, 1990. It is clear from the voir dire transcript that media coverage was massive, probably as massive as it can get in Flagler County. Both the prosecutor and the defense attorney reiterated the extensive publicity the case had received. The trial judge was the sole voice contending otherwise. (R8-9) As previously mentioned, of the forty-nine potential jurors questioned on the record, only four claimed to have no knowledge of the case.

Although a jury was selected without great difficulty, Appellant submits that this was due to the manner in which the trial court led the potential jurors down the "path of impartiality." No one, in any situation, likes to admit that they could not be fair. See Williams v. Griswald, 743 F.2d 1533 no. 14 (11th Cir. 1984)("the juror may be reluctant to admit any bias in front of his peers.") The trial court frequently commented on the notorious inaccuracy of newspapers. (R61-2) Additionally, the trial court would not ask the hard questions and probe jurors' genuine feelings. Rather, the trial court would prompt jurors to agree with his statement that they could "put aside" any knowledge they might have about the case, decide the case on the evidence, and decide it fairly. Indeed, "going through the form of obtaining the jurors' assurances of impartiality is insufficient. . . . " Silverthorne v. United States, 400 F.2d 627, 638 (Fifth Cir. 1968); see also, Irvin v. Dowd, 366 U.S. 717, 728 (1961)(jurors' statements of their own

impartiality to be given "little weight"). General conclusory protestations of impartiality during voir dire are not sufficient to rebut the prejudice due to pre-trial publicity. Coleman v. Kemp, 778 F.2d 1487, 1543 (11th Cir. 1985) see also, Robinson v. State, 506 So.2d 1070 (Fla. 5th DCA 1987). Under certain circumstances, a trial court commits reversible error by permitting the jurors to decide whether their ability to render an impartial verdict is impaired. United States v. Gerald, 624 F.2d 1291, 1297 (5th Cir. 1980).

In United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981), no member of the collective panel admitted to having formed an opinion on the guilt of the accused. Yet because forty-eight of the fifty-six prospective jurors stated that they had read or heard about the case, the court reversed, holding that the trial court's inquiry was insufficient to reveal possible prejudice.

In this case, ninety-two percent of the jurors knew about the case. Many had discussed the case with family, friends, and co-workers. Some had read about the case after receiving their notice of jury duty, Most of the jurors were frightened at the time of the murders. Many were afraid that "they might be next," and took appropriate security measures. Because the case was tried locally, various potential jurors knew the victims. Mr. Stuckey ended up on the jury, even though the murder victims were the first people he met after moving to Flagler County. (R355) Mr. Mitchell, who also ended upon the

jury, was working his regular job as a security guard on the night of the murders. He heard the police radio transmissions as authorities responded to the scene. Law enforcement officials instructed him to "guard the town" while they investigated the murders. (R223-5,250-1) Of course, both Mitchell and Stuckey assured the court that they could be fair. The test in Florida for determining whether a change of venue is required is:

> [W]hether the general state of mind of the inhabitants of the community is so infected by knowledge of the 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 in the courtroom.

Provenzano v. State, 497 So.2d 1177, 1182 (Fla. 1986), citing McCaskill v. State, 377 So.2d 1276, 1278 (Fla. 1978). Although pre-trial publicity alone does not necessitate a change of venue, Straight v. State, 397 So.2d 903 (Fla. 1981), the critical factor is the extent of prejudice or lack of impartiality among potential jurors that may accompany the knowledge. Copeland v. State, 457 So.2d 1012, 1016 (Fla. 1984). "If it is possible to empanel a jury comprised of persons who can be relied upon to decide the case based upon the evidence, and not be influenced by knowledge gained from sources outside the courtroom, then a denial of change of venue is proper." Copeland, 457 So.2d at 1017. The burden is on the defendant to raise a presumption of partiality. Provenzano v. State, 497 So.2d 1177 (Fla. 1986). An atmosphere of deep hostility raises a presumption, which can be

demonstrated by either inflammatory publicity or a great difficulty in selecting a jury. Murphy v. Florida, 421 U.S. 794 (1975). The question of jury partiality is one of mixed law and fact, requiring an appellate court to independently evaluate the voir dire testimony of impanelled jurors. Irvin v. Dowd, 366 U.S. 717 **(1961).**

This Court's review of the record should conclusively demonstrate that Gaskin did not receive a fair trial by a reliable, impartial jury. One member of the jury assisted law enforcement on the night of the murder by "guarding the **town."** Another juror moved to Flagler County, and the first two local residents he met ended up the murder victims. Only one juror knew nothing about the case prior to entering the courtroom. Over ninety percent of the venire had read about the case in some detail. The jurors' assurances that they could be fair under the circumstances are incredible and unreliable. Louis Gaskin did not receive a fair trial. He deserves at least that. Amend. V, VI, VIII, and XIV, U.S. Const.; Art. I, ss. 9 and 16, Fla. Const.

POINT II

THE MURDER OF GEORGETTE STURMFELS WAS NOT HEINOUS, ATROCIOUS, AND CRUEL.

The trial court correctly found that the murder of Robert Sturmfels did not fall within the purview of Section 921.141(5)(h), Florida Statutes (1989) [the capital felony was especially heinous, atrocious or cruel]. The trial court wrote:

> The First-Degree Murder of Robert Sturmfels is legally not considered wicked, evil, atrocious, or cruel. Although ROBERT STURMFELS was shot four times, he was shot in rapid succession and died quickly. (R1315)

However, the trial court reached a contrary conclusion as to the simultaneous murder of Georgette Sturmfels. The trial court wrote:

> The evidence shows that the First Degree Murder of GEORGETTE STURMFELS was wicked, evil, atrocious or cruel. GEORGETTE STURMFELS saw and realized that her husband had been shot and they began to run from their den. Mr. Sturmfels was shot again and fell to the floor. GEORGETTE STURMFELS was shot in the cheek and she fell to the ground. The shot was not fatal but caused bleeding in her mouth. Again, the defendant shot her. The shot hit her head but did not break her skull. She then began to crawl out of the den into the hallway of her house for protection. She was isolated and helpless. As she crawled into the hallway she was shot a third time. She crawled down the hallway as the defendant made his way around the side of the house. As she sat in the hallway holding her bloody face the defendant shot from outside a french door at the other end of the house through a Christmas tree striking her in the chest. The bullet went

> across and down her body striking vital organs and immediate medical treatment could have saved her. The defendant then entered the house and shot her in the head. (R1322)

In the seminal case of State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court addressed the meaning of "especially heinous, atrocious or cruel.":

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked or vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Id. at 9.

The murder of Georgette Sturmfels, while many things, was not especially heinous, atrocious or cruel. Appellant struck quietly and quickly. The victims never knew what hit them. Georgette Sturmfels died within minutes of the initial attack. The jury obviously did not view Georgette's murder as more heinous than her husband's. Their recommendations on both murders were by the same vote (8 to 4). In Lewis v. State, 398 So.2d 432 (Fla. 1981), this Court announced the principle that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious and cruel."

This Court has reversed findings of heinous, atrocious and cruel in other, factually similar cases. Hallman v. State, 560 So.2d 223 (Fla. 1990) [guard killed with single shot to the chest with death probably occurring within a matter of a few minutes.]; Williams v. State, 16 FLW S166 (Fla. February 7, 1991) [defendant restrained a bank guard, then shot her with little delay]; Amoros v. State, 531 So.2d 1256 (Fla. 1988) [murderer fired three shots into the victim at close range]; Simmons v. State, 419 So.2d 316 (Fla. 1982)[defendant attacked the victim in her home, delivering two hatchet blows to her head]; Rembert v. State, 445 So.2d 337 (Fla. 1984)[victim beaten with a club one to seven times and lived for several hours]; and Teffeteller v. State, 439 So.2d 840 (Fla. 1983)[victim suffered shotgun blast to the abdomen, lived for several hours in undoubted pain and knew he was facing death].

In Robinson v. State, 16 FLW S107 (Fla. January 15, 1991), this Court reversed a finding of this circumstance where the victim was abducted at gunpoint, handcuffed, transported to a remote, desolate cemetery, and sexually abused by two men. Robinson then eliminated the victim as a witness, shooting her twice in the head. A comparison of Gaskin's crime to Robinson's leads to the inescapable conclusion that this circumstance cannot be applied to Gaskin's crime.

The statute also focuses on the intent of the defendant. In Porter v. State, 564 So.2d 1060 (Fla. 1990), the crime was not meant to be deliberately and extraordinarily

painful, even though it probably was. Likewise, Louis Gaskin did not intend for Georgette Sturmfels to suffer for the brief period that she lived following the first shot. Her ultimate demise came within minutes, perhaps even less than one minute, following the commencement of the attack. We certainly do not want to reward defendants who are more expert marksmen or use greater killing power than those who do not.

Georgette Sturmfels never realized what was happening and died within seconds without unnecessary pain and suffering. Appellant clearly did not intend for her to suffer at all. A comparison with other cases reveals the inapplicability of this circumstance. The state failed to meet its burden in establishing this aggravating circumstance beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973); Amends. V, VIII, and XIV, U.S. Const.; Art. I, ss. 2, 9, 16 and 17, Fla. Const.

POINT III

THE TRIAL COURT IMPROPERLY REJECTED A FINDING THAT GASKIN'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED, THEREBY VIOLATING HIS CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court dealt with each statutory mitigating circumstance separately in his written findings. The trial court found that, at the time of both murders, Louis Gaskin was under the influence of extreme mental or emotional disturbance. (R1316,1323) In both findings of fact, the court wrote:

> Finding: The murder of **ROBERT STURMFELS** was committed while the defendant was under the influence of extreme mental or emotional disturbance. Although the court finds that the defendant's capacity was not impaired the court finds that the expert testimony combined with other facts of the case support this finding. The court notes that it has relied on the same expert testimony for the purpose of determining the factor involving substantially impaired capacity. **(R1316)**

The court made an identical finding as to the murder of Georgette Sturmfels. (R1323) In rejecting the other mental mitigating circumstance [**s.921.141(6)(f)**, Fla. Stat. (1989)], the court wrote:

> Finding: The defendant was capable of appreciating the criminality of his conduct or to conforming his conduct to the requirements of law. Although there was expert testimony introduced regarding this factor this Court has considered that testimony in making a

> in the case shows the defendant, though crudely planned, carried out the murder in a calculated fashion in order to obtain property from his victim's and then hid the property at a friend's house. The evidence shows the defendant knew at the time he was committing the murder that his conduct was criminal and had the capacity to conform his conduct to the requirements of the law. His careful plan to avoid detection was designed so he would not be caught for the crime and suffer the criminal penalties. The facts do not support any implication that the defendant was engaged in a ninja type assassination. (R1316-17)

The trial court made an identical finding as to the murder of Georgette Sturmfels. (R1323-4)

The trial court clearly erred in rejecting a finding that Louis Gaskin's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The uncontroverted evidence is set forth in the psychiatric report of Dr. Rotstein. The State Attorney's office requested Dr. Rotstein to do a psychiatric evaluation of Louis Gaskin. (SR17) Dr. Rotstein's examination and report were exhaustive. (RSR17-40) One rarely sees a psychiatrist, in a court-appointed case, put so much time and effort into his evaluation and report. Gaskin discussed the crime at great length with Dr. Rotstein. (SR21-5) Dr. Rotstein also probed deeply into Gaskin's family background. Dr. Rotstein also examined the depositions of Gaskin's girlfriend, and two of Louis' life-long friends. (SR33-34) Dr. Rotstein also listened to the taped interview of Louis Gaskin made after his arrest.

(SR34) Dr. Rotstein also considered at great length the deposition of Dr. Harry **Krop,** a clinical psychologist who also examined Louis Gaskin. (SR34-5) Dr. Rotstein concludes his twenty-seven page report with over four pages discussing his diagnosis. (SR36-40) The doctor concludes that a diagnosis of schizotypal personality disorder best fits Gaskin's behavior. (SR37) Dr. Rotstein documented his diagnosis in great detail.

Reaching the forensic implications, Dr. Rotstein states without equivocation:

> **A** mitigating circumstance can 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."
>
> It would be my opinion that this is a person with schizotypal personality disorder. It would appear to me that this man's heinous crimes appear to arise out of his schizotypal personality disorder.
>
> Once he is dressed in his ninja suit his profound preoccupation becomes a delusion in which he sees himself as a ninja and then commits some horrible crime.
>
> There is evidence of near hallucinatory experiences at that period plus feelings of derealization and depersonalization.
>
> At that moment he was unable to conform his conduct to normal human behavior.

(SR39-40)(emphasis added).

Recently, this Court has reiterated the correct standard and analysis which a trial court must apply in

considering mitigating circumstances presented by the defendant. In Camsbell v. State, **571 So.2d 415 (Fla. 1990),** this Court quoted prior federal and Florida decisions to remind trial courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. **See** Eddings v. Oklahoma, **455** U.S. 104, **114-15 (1982) and** Rogers v. State, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the trial judge must find that mitigating factor. Although the relative weight given each factor is for the sentencer to decide, once a factor is reasonably established, it cannot be dismissed as having no weight. Camsbell, 571 So.2d at **419-20.**

Although the trial court **properly** found that Louis Gaskin committed the murders under extreme mental or emotional disturbance, the **trial** court clearly erred in failing to find the other statutory mental mitigator. The conclusion of Dr. Rotstein that the mitigating circumstance applied was uncontroverted. One must remember that Dr. Rotstein examined Louis Gaskin at the prosecutor's request. (SR17) Even though there was no conflicting evidence on this issue, the trial court inexplicably reached a contrary conclusion.

The error cannot be considered harmless. Even though the jury was never informed of Dr. Rotstein's findings, their vote for death was a **close** one **(8** to **4).** They had no clue of any mental problems, much less the clear presence of two statutory mental mitigators. Nor is it clear that the trial court would

have reached the same result had he properly found this additional statutory mitigating circumstance. Although the trial court inappropriate claims that, "Any single aggravating circumstance found by this Court to exist outweighs all the mitigating factors . . . ", he makes no such assertion about the possible existence of other mitigating circumstance. (R1317,1324) When one considers all of the valid mitigating circumstances (two-thirds of which the jury never learned), and weighs then against the uncompelling aggravating circumstances, one cannot help but reach the conclusion that Louis Gaskin deserves to live.

POINT IV

LOUIS GASKIN'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION HAVE BEEN VIOLATED BY THE FACT THAT A MULTITUDE OF PROCEEDINGS THROUGHOUT THE TRIAL WERE NOT REPORTED BY THE COURT STENOGRAPHER.

Prior to any voir dire of the venire, the trial court asked if any of the potential jurors suffered from hardship, such that it would be difficult for them to serve on the jury. (R20) Several members of the venire came forward and the trial court heard each one individually at his bench. These discussions were not transcribed by the court reporter. (R20) Evidently neither counsel for the state nor Mr. Gaskin was a party to these discussions. As a result of these off-the-record conferences, the trial court excused four potential jurors (Gillis, Pearson, Majewski, and Chappell). (R20)

This procedure repeated itself after each newly-called group of jurors entered the jury box. (R195-6,303-4) Following the initial excusal of four potential jurors, the trial court excused eleven veniremen near the end of the first day of jury selection. (R195) After excusing Root, Hartman, Guse, Schaffer, Bostic, Nealon, Knocks, Limbert, Korb, Borovsky, and Torre, the court explained that many of these excusals were due to ill health and frailty. (R196) This is the only explanation on the record for any of the hardship excusals granted by the trial court. The final incident occurred during the second and final

day of jury selection when the trial court excused nine veniremen for alleged hardship reasons. (R303-4) In excusing those nine, the trial court referred to them only by juror number without stating their names.

These were not the only examples of, in essence, "secret portions" of Louis Gaskin's trial. Approximately twenty unreported bench conferences appear on the record, or rather, their occurrence is memorialized without further detail. (R20,23-4,128,134,139-40,305-6,308,310,366,436,465,640,796-7,856,920,923, 967,986,1023). These unreported bench conferences were prompted by requests from the prosecutor, defense counsel, and occasionally, by the trial court. There is no way to determine, for sure, exactly what transpired at these unreported bench conferences.

Appellant is aware that it is his duty to provide a record demonstrating reversible error. Fla.R.App.P. 9.200(e). However, Appellant submits that it is the duty of all of the trial participants to bear some responsibility in this arena. Louis Gaskin deserves an entire record of the proceedings below. He has a constitutional right to a complete transcript on appeal. Mayer v. Chicago, 404 U.S. 189 (1971) and Griffin v. Illinois, 351 U.S. 12 (1956). In a capital case, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2, 9, 16, and 21 of the Florida Constitution demand a verbatim, reliable transcript of all proceedings in the trial court. See also Delap v. State, 350 So.2d 462 (Fla. 1977)

where this Court recognized the importance of the availability of a full transcript.

Anything less than a full report of the proceedings has the effect of precluding appellate review. Louis Gaskin has the right to a meaningful consideration of his cause by this Court as well as other courts that may consider this case in the future. Estes v. Texas, 381 U.S. 532 (1965); Magill v. State, 386 So.2d 1188 (Fla. 1980); State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Castor v. State, 365 So.2d 701 (Fla. 1978); Clark v. State, 363 So.2d 331 Fla. 1978); Spinkellink v. State, 313 So.2d 666 (Fla. 1975); State v. Barber, 301 So.2d 7 (Fla. 1974); Wainwright v. Sykes, 433 U.S. 72 (1977); and Smith v. State, 407 So.2d 894 (Fla. 1981). The right to appeal and meaningful access to the courts are negated because both appellate counsel and this Court cannot fully review the proceedings below. See generally Hardy v. United States, 375 U.S. 277 (1964), where the Court held that the duties of an attorney could not be discharged on appeal without a whole transcript and Bounds v. Smith, 430 U.S. 817 (1977), where the Court held that the right to access to the courts encompasses a "meaningful" access. In United States v. Selva, 559 F.2d 1303 (5th Cir. 1977), the Court held that where counsel on appeal is different than trial counsel, specific prejudice need not be shown from transcript deficiencies. A demonstration of substantial omissions is sufficient to require a new trial.

Without a complete record, this Court cannot adequately

review Louis Gaskin's convictions and sentences. Indeed, undersigned counsel cannot adequately represent Louis Gaskins on appeal as a result of the cited omissions. The omissions in the transcript are substantial, and Louis Gaskin is prejudiced thereby. Many bench conferences are omitted. We cannot know what was said, what objections, if any, were made, and what rulings, if any, were made. Appellant cannot know what arguments he cannot perceive because the facts are unreported. In a death penalty case the transcript should be reliable. At the very least, this Court should remand to the lower court in an attempt to reconstruct the numerous omissions. Appellant believes that it is impossible at this point for the participants to remember what transpired, thereby requiring a new trial.

POINT V

IN CONTRAVENTION OF APPELLANT'S RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS, THE TRIAL COURT ERRED IN ADMITTING SEVERAL ITEMS OF IRRELEVANT EVIDENCE.

The Camera

A camera seized from Appellant's home at 803 Hyman Circle was introduced over defense counsel's timely and specific objection. (R813-16,830) One of the Sturmfels' neighbors identified several of the stolen items as belonging to the Sturmfels. (R825-30) However, as for the camera, the neighbor was able to state only that the camera "looks identical" to the one that the Sturmfels owned. (R830) Defense counsel objected to the state's effort to admit the camera into evidence, pointing out that no positive identification had been made. (R830) The prosecutor stated that they had done "the best that they could" in proving that the camera seized was stolen from the Sturmfels. (R830) The trial court overruled the objection and allowed the camera into evidence. (R830-1)

The Cigar

Deputy Zane Kelly used a tracking dog to search the area near the Rectors' home. (R472-78,483-98) Kelly found a partially smoked cigar on top of the alarm box outside the Rector's home. (R43) Kelly also found a cellophane, cigar wrapper some distance from the house. (R488-9) The wrapper indicated that the cigar was the "Black and Mild" brand. (R489)

When the state offered the cigar into evidence, defense counsel correctly pointed out that the state had not established any relevance at that point. (R487) Despite the objection, the trial court admitted the cigar and advised the state to connect it up later. (R487)

The prejudice arose later when Investigator Schweers told the jury that he bought Louis Gaskin cigars after extracting his confession. (R783-7) Gaskin asked for the cigars after making the statement and, when questioned more closely, specified the "Black and Mild" brand. (R787) Investigator Schweers identified state's exhibit #31 (the partially smoked cigar found outside the Rectors' home) as that brand of cigar. (R788-9)

Gaskin's Boots

The trial court accepted John Wilson, an FDLE crime lab technician, as an expert in the field of latent fingerprints, footprints, footwear, and tire track comparison analysis. (R688-9) Wilson examined much of the physical evidence gathered at the scene of the Sturmfels' murders. (R690-1) Wilson compared a footprint found on the Sturmfels' bathroom floor and a moulage from the yard with boots obtained from Louis Gaskin. Wilson could not categorically state that Gaskin's boots matched the footprints found in the Sturmfels' residence. (R693-701) In fact, Wilson concluded that Gaskin's shoes definitely did not make either of the two tracks. (R702) Wilson could only conclude that Gaskin's boots are about the same size as the two footprints. (R699-701) Wilson admitted that, due to

manufacturers' differences, the tracks could vary several sizes either way. (R702) The prosecutor eventually stipulated that the tracks were not made by Gaskin's **boots.** (SR2-3) Defense counsel argued that the evidence was too speculative to benefit the jury at all. (R703) The trial court overruled the objection and allowed the state to introduce the evidence. (R703-4)

The Evidence was Irrelevant

All relevant evidence is admissible. s.90.402, Fla. Stat, (1989). Relevant evidence is evidence tending to prove or disprove a material fact. s.90.401, Fla. Stat. (1989). The trial court improperly admitted the objectionable evidence cited above. The evidence failed to prove or disprove any material facts. The state failed to sufficiently identify the camera in question as being the same camera stolen from the Sturmfels' house. The cigar found at the scene was never linked to Louis Gaskin. The prejudice from the introduction of the cigar was severe, since the cigar found at the scene was Gaskin's preferred brand.

The most irrelevant piece of evidence of all was Appellant's boots. They **were** compared to footprints found at the scene of the murders. The state and their witness admitted that the prints did not match Gaskin's shoes. Nevertheless, the trial court admitted the irrelevant, confusing, and prejudicial evidence over **a** timely and specific objection. Even relevant evidence should be excluded when its relevance is outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. s.90.403, Fla. Stat. (1989) Since the

objectionable evidence undoubtedly contributed to Louis Gaskin's convictions, the error cannot be deemed harmless.

POINT VI

GASKIN'S FOUR ADJUDICATIONS FOR FOUR COUNTS OF FIRST-DEGREE MURDER WHERE ONLY TWO PEOPLE WERE KILLED VIOLATE DOUBLE JEOPARDY.

Although there were only two murders committed by Louis Gaskin and only two bodies involved in the case, the jury found Gaskin guilty of four counts of first-degree murder and the trial court adjudicated Gaskin guilty of four counts of capital, first-degree murder. (R1285-8,947-9,1303) The verdicts of the jury reflect that they convicted Gaskin for the Sturmfels' murders under both a premeditated and felony-murder theory. (R1285-8)

The trial court clearly erred in adjudicating Gaskin guilty of two counts for the murder of Robert Sturmfels and two counts for the murder of Georgette Sturmfels. Faced with two dead bodies, the trial court rendered four adjudications of guilt. The rule in Florida has always been that when there is but one death, there can only be one conviction for homicide. See e.g. Brown v. State, 452 So.2d 605 (Fla. 2d DCA 1984) (DWI manslaughter and vehicular manslaughter); Goss v. State, 398 So.2d 998 (Fla. 5th DCA 1981)(premeditated murder and felony murder); and Muszynski v. State, 392 So.2d 63 (Fla. 5th DCA 1981) (second degree murder and first degree murder). Several years ago some dispute on this issue arose in the District Courts. In Houser v. State, 474 So.2d 1193, 1196 (Fla. 1985), this Court agreed that "only one homicide conviction and sentence may be

imposed for a single death." Houser controls these facts. Two of the convictions must be vacated.

POINT VII

THE RECORD FAILS TO REFLECT GASKIN'S PRESENCE AT A CRITICAL PORTION OF HIS TRIAL.

At the penalty phase, the trial convened at the Flager County Shooting Range where the state presented a demonstration using the murder weapon to fire several different types of bullets. (R952-8) Prior to the demonstration, the trial court stated:

> **THE COURT:** Madam Court Reporter, would you also note for the record who is present; namely, the Defense Counsel is present, the Jury is present, the Clerk is present and the Defendant is present in a law enforcement vehicle and I think he has the window down so he can see what is going on. (R956)(emphasis added).

The state then presented the demonstration.

Appellant submits that the record fails to sufficiently reflect Louis Gaskin's actual presence at his own trial. A criminal defendant has the constitutional right to be present at any stage of his trial when fundamental fairness might be thwarted by his absence. Snyder v. Massachusettes, 391 U.S. 97 (1934); Francis v. State, 413 So.2d 1175 (Fla. 1982). Just as an accused has the right to assistance of counsel, he also has the right to assist counsel in conducting the defense. See Snyder v. Massachusettes, **supra**, and Faretta V. California, 422 U.S. 806 (1975). A defendant must knowngly and voluntarily waive his presence at any critical stage. See Amazon v. State, 487 So.2d

8, **11 (Fla. 1989).**

Rule 3.180, Florida Rules of Criminal Procedure, states that a defendant shall be present, inter alia, before the court when the jury is present. The jury was clearly present during the demonstration. Appellant contains that the record supports the conclusion that he was not present. The trial court stated that the defendant was "present in a law enforcement vehicle and I think he has the window down so he can see what is going on." (R956) This is clearly insufficient to establish Gaskin's presence during the critical demonstration which helped establish that the murders were cold, calculated, and premeditated. At the very least, this Court should remand for an evidentiary hearing to determine Gaskin's actual presence during the demonstration.

POINT VIII

THE TRIAL COURT'S COMMENT ON THE EVIDENCE RESULTED IN FUNDAMENTAL ERROR.

During the demonstration at the firing range at the penalty phase, see Point VII, supra, the prosecutor explained that Sergeant Prather was about to fire six cartridges in rapid succession. (R956-7) The trial court instructed Sergeant Prather:

> **THE COURT:** You may do so. Our purpose for the demonstration is two-fold, one to show the difference between the short or the sound from a .22 long rifle and the sound made by the firing of a .22 short.
>
> **MR. TANNER:** Are you ready, Sgt. Prather?
>
> **SGT. PRATHER:** Yes, sir. (R957) (emphasis added)

The trial court's statement regarding "Our purpose for the demonstration . . . " is clearly an improper comment on the evidence. Section 90.106, Florida Statutes (1989), provides:

> A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.

A judicial comment on the evidence, under the right circumstances, can be fundamental error, thereby requiring no objection to prevail on appeal. See Harmon v. State, 527 So.2d 182, 187 (Fla. 1988) and Worthington v. State, 183 So.2d 728 (Fla. 3d DCA 1966). Appellant submits that the trial court's

comment in the instant case reaches that threshold.

That conclusion becomes inescapable when one considers the possessive pronoun used by the trial judge when he states, "Our purpose for the demonstration . . . ." (R957) The word "our" clearly implies (whether intended or not) that the trial court is on the side of the prosecutor. A similar comment was condemned in Webb V. State, 454 So.2d 616 (Fla. 5th DCA 1984). In sentencing Webb to fifteen years after trial instead of the ten years previously offered for a plea, the trial court explained, "we had to bring . . . witnesses from California when we were forced into trial position. . . ." Webb 454 So.2d at 617 (emphasis added). The district court found fault with the trial court's use of the pronoun "we", and vacated the sentence and remanded for resentencing. Gaskin's trial court's comment on the evidence, coupled with the unfortunate pronoun usage placing him squarely in the prosecutor's camp resulted in fundamental, reversible error.

POINT IX

THE JURY SHOULD NOT HAVE BEEN INSTRUCTED ON THE MEANING OF REASONABLE DOUBT, NOR THAT THEY MUST CONVICT ABSENT SUCH A DOUBT.

The jurors were instructed as to what was meant by the term "reasonable doubt":

> Whenever the words "reasonable doubt" are used, you must consider the following: a reasonable doubt is not a possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or if having a conviction, it is one which is not stable, but one which wavers or vacillates, then the charge is not proved beyond every reasonable doubt, and you must find the defendant not guilty because the doubt is reasonable.

(R918)[1]

Condemnation of any attempt to define "reasonable doubt" is almost universal, "because often the definition engenders more confusion than does the term itself." United States v. Martin-Trigona, 684 F.2d 485 493 (7th Cir. 1982); see also Smith v. Commonweath, 156 S.E. 577 (Va. 1931); McCoy v.

---

[1] The jury was also instructed that "[i]f you have no reasonable doubt, you should find the defendant guilty." (R 918) It is also error to tell the jury that they have a "duty to convict" since such an instruction infringes upon the independence of the jury in much the same manner as the definition of reasonable doubt. See, e.g., United States v. Spock, 416 F.2d 165, 180 (1st Cir. 1969) ("In a criminal case a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt"); United States v. Johnson, 718 F.2d 1317, 1325 (5th Cir. 1983).

Commonwealth, 112 S.E. 704 (Va. 1922); Dunn v. Perrin, 570 F.2d 21, 23 (1st Cir. 1978), cert. denied, 437 U.S. 910 (1978); United States v. Gatzonis, 805 F.2d 72, 73 (2d Cir. 1986); United States v. Link, 202 F.2d 592, 594 (3d Cir. 1953); Smith v. Bordenkircher, 718 F.2d 1273, 1276 (4th Cir. 1983) (en banc), cert. denied, 466 U.S. 976 (1983); United States v. Rodriquez, 585 F.2d 1234, 1240-42 (5th Cir. 1978), cert. denied, 449 U.S. 835 (1980); Boatright v. United States, 105 F.2d 737 (8th Cir. 1939); United States v. Pinkney, 551 F.2d 1241 (D.C.Cir. 1976); State v. Starr, 216 S.E. 2d 242, 246 (W.Va. 1975).

Any effort to detract from the importance of reasonable doubt has been held to be per se reversible error, insofar as it "tends to denigrate the 'graver, more important transactions of life'" governed by the standard. United States v. Pinkney, 551 F.2d 1241, 1244 (D.C. Cir. 1976). This Court should similarly hold the reasonable doubt instruction to be plain error, and bar its further abuse.

POINT X

SECTION 921.141, FLORIDA STATUTES (1987) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Violation of Separation of Powers

It is respectfully submitted that, by defining the operative terms of the statutory aggravating factors set forth in Section 921.141, this Court is promulgating substantive law in violation of the separation of powers doctrine of the United States Constitution and Article 11, Section 3 of the Florida Constitution. Specifically, the Florida Legislature is charged with the responsibility of passing substantive laws. Article 111, Florida Constitution (1976).

Simply said, legislative power, the authority to make laws, is expressly vested in the Florida Legislature. In an exercise of that power, the Florida Legislature passed Section 921.141, Fla. Stat. (1975) which purportedly established the substantive criteria required for authorization of imposition of the death penalty. However, the statutory aggravating factors as written are unconstitutionally vague and overbroad. See Maynard v. Cartwright, 486 U.S. 356 (1988). In actuality, however, the substantive legislation was authored in State v. Dixon, 283 So.2d 1 (Fla. 1973) where this Court provided the working definitions of the statutory aggravating factors ostensibly promulgated by the Florida Legislature. This Court can enact laws, either directly or indirectly.

Recently, in rejecting a claim that Florida's especially heinous, atrocious and cruel statutory aggravating factor was unconstitutionally vague based on Maynard, supra, this Court in dicta stated:

> It was because of [the State v. Dixon] 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 (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. (citations omitted). 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.

Smalley v. State, 546 So.2d 720, 722 (Fla.1989). Other instances where the definitions of statutory aggravating factors have been provided by this Court demonstrate that the violation of the separation of powers doctrine is unacceptably pervasive. See Peek v. State, 395 So.2d 492, 499 (Fla.1980)(parole and work release constitute being under sentence of imprisonment, but probation does not); Johnson v. State, 393 So.2d 1069 (Fla.1981) (more than three people required to constitute a great risk of death or injury to many persons)[2]; Banda v. State 536 So.2d 221,

---

Interestingly, the initial working definition provided this statutory factor by this Court in King v. State, 390 So.2d 315 (Fla. 1980) was, after seven years of usage by juries and trial judges, categorically rejected when the King case was again reviewed by this Court. See King v. State, 514 So.2d 354, 360

225 (Fla.1988) ("We conclude that, under the capital sentencing law of Florida, a 'pretense of justification' is any claim of justification or excuse that, though insufficient to **reduce** the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide."). The passage of such broad legislation for it to be refined, defined and given substance by the Supreme Court of Florida is tantamount to a delegation of legislative power and a violation of the separation of powers doctrine of state and federal constitutions.

Failure of Aggravating Factors to Adequately Channel the Sentencer's Discretion to Impose the Death Penalty.

"An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, **462** U.S. **862, 877 (1983).** Supposedly, the things that may be considered as **"aggravation"** by a sentencer in Florida are limited to those statutory aggravating factors expressly listed in Section **921.141(5),** Florida Statutes **(1989).** See Brown v. State, 381 So.2d 690 (Fla. 1980); Elledge v. State, **346** So.2d 998 (Fla. **1976);** Purdy V. State, 343 So.2d **4, 6** (Fla. **1977). It** is respectfully submitted, **however,** that these **"factors"** are but

---

(Fla. 1987) ("this case is a **far** cry from one where this factor could properly be found.") If King is a **"far** cry" from the **proper** case to find the "great risk to many persons" factor, how did the factor get approved in the first decision and, more importantly, why does this Court feel compelled to provide the working definitions of the substantive terms of the statutory aggravating factors?

open windows through which virtually unlimited facts may be put before the sentencer to achieve a death sentence, thereby providing unfettered discretion to recommend/impose a death penalty in violation of the Eighth and Fourteenth Amendments, Article I, Section 17 of the Florida Constitution and the holding of Furman V. Georgia, 408 U.S. 238 (1972).

For instance, this Court has held that the State is permitted to establish the full details of a defendant's prior conviction for a violent felony in **order** to allow the juror sentencer an informed basis whereby **"weight"** can be meaningfully attributed to the Section 921.141(5)(b) factor. **See** Francois V. State, **407** So.2d ***885*** **(Fla.** 1981); Elledge V. State, 346 So.2d 998 (Fla. 1977). However, this Court has at the same time recognized that such testimony is presumptively prejudicial. **See** Castro v. State, **547** So.2d 111, 115 (Fla. 1989)(improper admission of irrelevant collateral crimes evidence is presumptively harmful). Allowing such prejudicial testimony to come before the jury/ sentencer under the general heading of a statutory aggravating factor, permits consideration of non-statutory aggravating factors to **impose** the death penalty. Though the non-statutory reasons offered under this category may be constitutional in the broad sense of the word, others (such as sympathy for victims of other unrelated crimes, as occurred here by reference to the Short murder) are unconstitutional.

The same rationale applies to other statutory aggravating factors, which are in essence but categories through

which unfairly prejudicial evidence is put before the jury/sentencer. Because the statutory aggravating factors fail to adequately channel the sentencer's discretion in imposing the death penalty, the factors are unconstitutionally vague and overbroad in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances **"outweigh"** the mitigating factors, Mullaney **v.** Wilbur, 421 U.S. **684** (Fla. 1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, **445** U.S. **420 (1980).** This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, **supra;** Witt v. State, **387** So.2d 922, **931-932** (Fla. 1980)(England, **J.** concurring). Herring v. State, **446 So.2d 1049, 1058 (Fla.** 1984)(Ehrlich, J., Concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v.

Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Elledge Rule [Elledse v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141(5)(d), Florida Statutes (1985)(the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

The Florida death penalty statute discriminates against capital defendants who murder whites and against black capital defendants in violation of the Eighth and Fourteenth Amendments to the United States Constitution **and** Article I, Section 17 of the Florida Constitution. McClesky v. Kemp, 481 U.S. 279 (1987) (dissenting opinion of Brennan, Marshall, Blackman and Stevens, J.J.)

This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction. Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional.

The death penalty as applied in Florida leads to inconsistent, arbitrary, and capricious results. In King v. State, 514 So.2d 354 (Fla. 1987), this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having previously approved it on King's direct appeal in **King v.** State, 390 So.2d 315 (Fla. 1980). See also Proffitt **v.** State, 510 So.2d 896 (Fla. 1987); Proffitt V. State, 372 So.2d 1111 (Fla. 1979); Proffitt **v.** State, 360 So.2d 771 (Fla. 1978); and Proffitt **v.** State, 315 So.2d 461 (Fla. 1975).

Section 921.141(5)(h) and (i), Florida Statutes (1989) are ~~Unconstitutionally Vague~~

The trial court found that both murders were committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification [section 921.141(5)(i)]. (R1315,1322) Additionally, the trial court found that the murder of Georgette Sturmfels was especially wicked, evil, atrocious, or cruel [section 921.141(5)(h)]. (R1322) The trial court instructed the jury as to both of these circumstances in the following language:

> Four, the crime for which the Defendant is to be sentenced was especially wicked, atrocious, or cruel.
> Five, the capital offense was a homicide, was committed in a cold, calculated premeditated manner without a pretense or moral **or** legal justification. **(R999)**

Appellant contends on appeal as he did prior to trial (R1074-6,1193-1217), that these two aggravating circumstances are unconstitutionally vague and the instructions thereon provide no guidance for the jury. At the pre-trial motion hearing, the prosecutor suggested amending the jury instructions in **order** to provide guidance to the jury. (R1074-6) This was obviously never done.

Appellant recognizes that this Court has previously rejected this contention in other cases. Brown v. State, **565 So.2d 304, 308** (Fla. 1990); Smith v. Dugger, ***565*** So.2d 1293, 1295 n. 3, (Fla. 1990); and, Smalley v. State, **546** So.2d 720, 722 (Fla. **1989).** Nevertheless, Appellant insists that these

circumstances and the jury instructions thereon violate the dictates of Maynard v. Cartwright, 486 U.S. 356 (1988).

The Jury Recommendation was Denigrated in Violation of Caldwell v. Mississippi, infra.

The Florida Standard Jury Instructions, as well as comments made by the trial court, diminished the responsibility of the jury's role in the sentencing process contrary to Caldwell v. Mississippi, 472 U.S. 320 (1985). Such comments and instructions occurred throughout Gaskin's trial. (R150-3,162-79,256-62,267,270-6,284-7,366-8,273-7,380,382-5,388-98,986,992-3,998-1003) Prior to trial, Gaskin filed a motion to prohibit any such reference. (R1229-33) All parties agreed at a motion hearing to avoid such references and to emphasize that the jury recommendation would be given "great weight." (R1079-87) To a great extent, the jury was told that their recommendation would be given great weight. However, the terms "advisory" and "recommendation" were frequently used. Appellant also recognizes that this Court has previously ruled that Caldwell is not applicable in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988).

Miscellaneous Constitutional Challenges

Appellant filed a challenge to the jury panel pursuant to Rule 3.290, Florida Rules of Criminal Procedure. The motion contended that the drawing of the jury venire is conducted in a manner contrary to law, in that the panel is drawn from a list of registered voters and, as such, does not constitute random

selection from the population. (R1178) The trial court denied this motion at a hearing. (R1059-60) This Court has previously rejected a challenge based on the same grounds. Johnson v. State, 293 So.2d 71 (Fla. 1974). *See* also Wilson v. State, 306 So.2d 513 (Fla. 1975). Nevertheless, the use of voter registration rolls to select venires may still be unconstitutional in certain circumstances. Spencer v. State, 545 So.2d 1352 (Fla. 1989).

The failure to provide the defendant with notice of aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives defendant of Due Process of Law. See Gardner v. Florida, 430 U.S. 349 (1977). Appellant filed a motion seeking this very information. (R1061-4,1172-4)

Appellant also filed a motion to declare the statute unconstitutional based on the unbridled prosecutorial discretion to seek the ultimate sanction. (R1239-42) The trial court denied the motion. (R1076-7) See United States of America, ex.rel. Charles Silagy v. Peters, 713 F.Supp. 1246 (C.D.Ill. 1989).

The exclusion of jurors who hold objections to the death penalty is unconstitutional. This results in a denial of Appellant's constitutional right to a fair trial. At least one juror was excused for cause based on her objections to the death penalty. (R153-5,183) This excusal came in spite of her ability to convict at the first phase.

The death penalty in Florida is imposed in an arbitrary and capricious manner based on factors which should play no part

in the consideration of sentence. The State of Florida is unable to justify the death penalty as the least restrictive means to further its goals where a fundamental right, human life, is involved. Roe v. Wade, 410 U.S. 113 (1973).

The Florida Statute is unconstitutional on its face, because the qualifying language describing the statutory mitigating circumstances, places an unnecessary limitation on the finding of such evidence by the jury and the court. Specifically, the language of three statutory mitigators require "extreme mental or emotional disturbance," "substantial impairment of one's ability to appreciate the criminality of his conduct," and "extreme" to describe the level of duress. 921.141(6)(b)(e)(f), Fla. Stat. (1989) (emphasis added). This contention is very appropriate in Gaskin's case.

CONCLUSION

Each issue is predicated on the Fourth, fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I of the Florida Constitution, and such other authority as is set forth. Based on the cases, authorities, and policies cited herein, Appellant requests that this Court grant the following relief:

As to Points I, IV, V, and IX, reverse and remand for a new trial;

As to Points VII, and VIII, remand for the imposition of life sentences or, in the alternative, for a new penalty phase;

As to Points I1 and 111, remand for the imposition of life sentences;

As to Point VI, vacate two of the four adjudications of guilt for first-degree murder: and,

As to Point X, remand for the imposition of life sentences, or in the alternative, declare Florida's Death Penalty Statute to be unconstitutional.

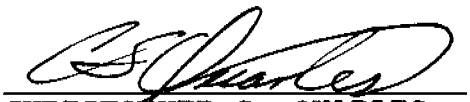
Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0294632
112-A Orange Avenue
Daytona Beach, Fla. 32114
(904) 252-3367

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 Louis B. Gaskin, P.O. Box 747, Starke, Fla. 32091 on this 4th day of March, 1991.



CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

TABLE OF CONTENTS

POINT III

THE TRIAL COURT IMPROPERLY REJECTED A FINDING THAT GASKIN WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, THEREBY VIOLATING HIS CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court dealt with each statutory mitigating circumstance separately in his written findings. The trial court found that, at the time of both murders, Louis Gaskin was under the influence of extreme mental or emotional disturbance. (R1316,1323) In both findings of fact, the court wrote:

> Finding: The murder of ROBERT STURMFELS was committed while the defendant was under the influence of extreme mental or emotional disturbance. Although the court finds that the defendant's capacity was not impaired the court finds that the expert testimony combined with other facts of the case support this finding. The court notes that it has relied on the same expert testimony for the purpose of determining the factor involving substantially impaired capacity. (R1316)

The court made an identical finding as to the murder of Georgette Sturmfels. (R1323) In rejecting the other mental mitigating circumstance [s.921.141(6)(f), Fla. Stat. (1989)], the court wrote:

> Finding: The defendant was capable of appreciating the criminality of his conduct or to conforming his conduct to the requirements of law. Although there was expert testimony introduced regarding this factor this Court has considered that testimony in making a finding of extreme mental disturbance as a mitigating circumstance. The evidence