IN THE SUPREME COURT OF FLORIDA

LOUIS B. GASKIN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee,

CASE NO. 76,326

APPEAL FROM THE CIRCUIT COURT
IN AND FOR FLAGLER COUNTY
FLORIDA

REPLY 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 CITATIONS

IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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.

Appellant maintains that the pervasive publicity so infected the venire that the selection of a fair and impartial jury was an impossible task.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE MURDER OF MRS. STURMFELS WAS NOT HEINOUS, ATROCIOUS, AND CRUEL.

The state's reliance on Hildwin V. State, 531 So.2d 124 (Fla. 1988) is misplaced. The victim in Hildwin was strangled.

At first glance, Harvey V. State, **529** So.2d 1083 (Fla. 1988)(involving a situation where elderly people were accosted and shot in their home appears to be right on point. However, it is clear from the opinion that Harvey and his co-defendant discussed the necessity of disposing of the victims in their presence. Harvey, 529 So.2d at 1087. When the victims thus became aware of their impending death, they tried to run in desperation, and were shot. Those facts are clearly distinguishable from Mrs. Sturmfels' death.

Johnson V. State, 497 So.2d 863, 871 (Fla. 1986) involved a woman who was strangled and stabbed three times, following which it took the helpless victim three to five minutes to die. Johnson is therefore distinguishable.

In finding this aggravating circumstance applicable in Kokal V. State, 392 So.2d 1317, 1319 (Fla. 1986), this Court pointed out the events preceding the murder. Kokal struck his victim with a pool cue as a prelude to robbery. The victim was then marched about one hundred feet at gunpoint where he was beaten unconscious with a pool cue as he pleaded for his life and

then was killed with a single shot from a .357 revolver.

Relying on Chandler v. State, 534 So.2d 701 (Fla. 1984), the state contends that a finding of heinousness is appropriate where a wife witnesses the murder of her husband. Chandler subdued and abducted an elderly couple from their home and then beat them to death with a baseball bat in each others' presence. In Cherry v. State, 544 So.2d 184 (Fla. 1989), the husband died of a heart attack during a burglary and the wife was then beaten to death.

In contrast, Georgette Sturmfels never realized what was happening and died within seconds. She suffered no unnecessary pain. The state has failed to meet its burden in establishing this aggravating circumstance beyond a reasonable doubt.

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT IMPROPERLY REJECTED THE UNREFUTED EVIDENCE OF A MITIGATING CIRCUMSTANCE.

The fact remains that the trial court rejected this mental mitigator for which the defense offered unrefuted evidence. This was in clear contradiction of the edict of this Court announced in Campbell v. State, 570 So.2d 415 (Fla. 1990). Rather than "reclassifying" the evidence provided by the mental health expert, the trial court **substituted** his own conclusion. Contrary to Appellee's assertion, there were no factual conflicts to resolve.

Relying on Gunsby v. State, 16 FLW S114 (Fla. January 15, 1991), the state contends that this Court has no authority to reweigh the evidence found by the trial court. Yet, the trial court, rather than resolving any imaginary conflicts in the evidence, simply reweighed the uncontroverted evidence and reached a different conclusion than the mental health expert. Dr. Rotstein did his job in examining Louis Gaskin at the prosecutor's request. (SR17) This was the only evidence dealing with Gaskin's mental state. The trial court should have done his job and accepted the unrefuted evidence that this mitigating circumstance applied.

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, and in the initial brief, 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 II 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 25th day of April, 1991.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER