

**IN THE SUPREME COURT OF FLORIDA  
CASE NO. SC15-1884**

**LOUIS B. GASKIN,  
Appellant,**

**v.**

**STATE OF FLORIDA,  
Appellee.**

\_\_\_\_\_ /

**ON APPEAL FROM THE SEVENTH CIRCUIT COURT  
OF THE JUDICIAL CIRCUIT,  
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA**

**INITIAL BRIEF OF APPELLANT**

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RECEIVED, 11/30/2015 11:18:38 AM, Clerk, Supreme Court

## **PRELIMINARY STATEMENT**

Appellant appeals the circuit court's denial of his successive motion for post-conviction relief prosecuted pursuant to Rule 3.851, Florida Rules of Criminal Procedure. The proceedings in his case will be cited to as follows:

"R." - record on direct appeal;

"R2." - record on direct appeal from remand;

"PC-R." - record of post-conviction proceedings.

"PC2-R." - record of successive post-conviction proceedings

When the direct appeal opinions of this Court are referred to after the initial cite in the procedural history, they will be referenced as Gaskin.

## **REQUEST FOR ORAL ARGUMENT**

Because of the seriousness of the claims at issue and the stakes involved, Appellant, a death-sentenced inmate on death row at Union Correctional Institution, urges this Court to permit oral argument on the issues raised in his appeal.

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## STATEMENT OF THE CASE AND FACTS

### **I. Course of Proceedings and Disposition in Court Below**

The State indicted Mr. Gaskin on March 27, 1990, charging two counts of first degree murder in the death of Robert Sturmfels (premeditated and felony murder), two counts of first degree murder in the death of Georgette Sturmfels (premeditated and felony murder), 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. He pled not guilty.

One June 15, 1990, the jury found Mr. Gaskin guilty of two counts of first degree murder, two counts of felony murder one count of attempted first degree murder with a firearm, two counts of armed robbery with a firearm, and two counts of burglary of a dwelling with a firearm. R. 1285-1294. On June 18, 1990, the jury recommended, by a vote of eight to four, that the court impose the death penalty on each count of first degree murder and each count of felony murder. R. 1301-1302.

On June 19, 1990, the court followed the jury's recommendations and imposed death sentences for the premeditated and felony murders. R. 1311-1319. Mr. Gaskin was also sentenced to two terms of 30 years incarceration on the armed robbery with a firearm counts and three terms of life imprisonment on the remaining counts, all to run consecutively. R. 1303-1310.

On December 5, 1991, the Florida Supreme Court affirmed these convictions, reversed the two felony murder convictions that were duplicative of the premeditated murder convictions, and remanded for proceedings consistent with its decision. *See generally Gaskin v. State*, 591 So.2d 917 (Fla. 1991). On June 29, 1992, the United States Supreme Court granted certiorari review, vacated the death sentences, and remanded the case to the Florida Supreme Court for reconsideration in light of *Espinosa v. Florida*, 505 U.S. 1079 , 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). *See Gaskin v. Florida*, 505 U.S. 1216, 112 S.Ct. 3022, 120 L.Ed.2d 894 (1992). On September 4, 1992, the Supreme Court denied rehearing. *Gaskin v. Florida*, 505 U.S. 1244, 113 S.Ct. 22, 120 L.Ed.2d 948 (1992).

On March 18, 1993, the Florida Supreme Court affirmed Mr. Gaskin's convictions and sentences and found that the vagueness challenge to the heinous, atrocious or cruel jury instruction (*Espinosa* error) was not properly preserved for appellate review. *Gaskin v. State*, 615 So.2d 679 (Fla. 1993). On October 12, 1993, the United States Supreme Court denied certiorari review. *Gaskin v. Florida*, 510 U.S. 925, 114 S.Ct. 328, 126 L.Ed.2d 274 (1993).

On March 23, 1995, the Appellant filed his first 3.850 motion. On October 12, 1995, the Appellant filed his amended 3.850 motion. On November 7, 1996, the circuit court held a *Huff* hearing pursuant to *Huff v. State*, 622 So.2d 982 (Fla. 1993). On January 17, 1997, the lower court summarily denied Mr. Gaskin's amended

3.850 motion. PC-R. 1288-1305. On February 4, 1997, Mr. Gaskin filed a motion for rehearing. PC-R. 1377-1446. On February 10, 1997, the lower court denied rehearing. PC-R. 1447.

On March 12, 1997, the Appellant filed his notice of appeal. PC-R. 1448. On July 1, 1999, the Florida Supreme Court affirmed in part, and remanded in part to the lower court to hold an evidentiary hearing on the Appellant's ineffective assistance of counsel claims:

- (1) counsel failed to investigate and present important mitigating evidence, Claims III and V of his amended 3.850 motion;
- (2) counsel failed to provide Dr. Harry Krop, the mental health expert, with sufficient background information to properly assess his mental condition; Claims V and XVIII of his amended 3.850 motion;
- (3) counsel failed to specifically address aggravating and mitigating factors in his closing argument to the jury, Claim III of his amended 3.850 motion; and
- (4) there is an alleged conflict of interest arising from counsel's status as a deputy sheriff, Claim V of his amended 3.850 motion. *Gaskin v. State*, 737 So.2d 509, 513-514 & 517 (Fla. 1999).

On April 13 and 14, 2000, the lower court held an evidentiary hearing on these remanded claims. Thereafter, on August 23, 2000, the lower court denied Mr. Gaskin's 3.850 motion in its entirety PC-R 1500-15. Mr. Gaskin filed his notice of

appeal of the denial of his 3.850 motion on September 20, 2000. PC-R 1569-1570. The denial of relief was affirmed. *Gaskin v. State*, 822 So. 2d 1243, 1246 (Fla. 2002).

Mr. Gaskin filed a petition for a writ of habeas corpus in the federal district court which was denied without hearing. The Eleventh Circuit affirmed. The decision of the district court was affirmed. *Gaskin v. Sec'y, Dep't. of Corr.*, 494 F.3d 997, 999 (11th Cir. 2007).

On August 12, 2014, some 23 years after this Court's appellate directive in *Gaskin v. State*, 591 So.2d 917 (Fla. 1991), the lower court vacated the felony murder adjudications and death sentences set forth in Counts II and IV of the indictment. However, the death sentences for premeditated murder in counts I and III were not vacated. PC2. 56,57. On May 6, 2015, Mr. Gaskin filed, by and through counsel, his First Successive Motion to Vacate Judgement of Conviction and Sentence, alleging that the use of both premeditated murder and felony murder as aggravating circumstances amounted to improper doubling of aggravators by the jury, sentencing judge, and this Court. PC2. 95-102. On August 6, 2015 the lower court denied the successive motion. PC2. 133-135.

This appeal follows.

## **II. Statement of the Facts**

### **a. Facts Introduced at Sentencing**



At the penalty phase of Mr. Gaskin's trial, defense counsel failed to present the testimony of a mental health expert. Rather, the defense's presentation was limited to the testimony of two lay witnesses. R. 970-981. Further, defense counsel failed to specifically address aggravating and mitigating factors in closing argument to the jury. R. 993-998.

The jury recommended by a vote of eight to four that the court sentence Mr. Gaskin to death for counts one and two of the indictment. R.1301-1302. The lower court subsequently sentenced Mr. Gaskin to death on counts one and two. R.1303-1310).

**b. Facts Introduced at Evidentiary Hearing**

To prove that his trial counsel had been ineffective at his capital trial, Mr. Gaskin presented the testimony of his trial attorney, Mr. Cass; two experts, Dr. Krop and Dr. Toomer; and several lay witnesses.

Dr. Krop was hired by the defense to test Mr. Gaskin for competence to stand trial. Dr. Krop was also asked to evaluate Mr. Gaskin for issues related to mitigation.

In his testimony at the post-conviction hearing, Dr. Krop testified that he found Mr. Gaskin competent to proceed at trial and he also testified that he could not rule out that sanity was an issue at the time of the event because he did not have enough materials to review. PC-R. 26. Dr. Krop went on to testify that Mr.

Gaskin was a very disturbed individual and he felt that he did not have enough data to address the sanity issue or even mitigation. PC-R.26.

Dr. Krop further stated that he wrote a letter to Mr. Cass requesting additional information and/or requesting the names of individuals that Dr. Krop might interview to verify or more fully develop both the sanity issue and the mitigation issue. PC-R. 26.

Dr. Krop stated that

Certainly the one thing that was very noteworthy from my initial evaluation of Mr. Gaskin was one, from his MMPI he had a profile which suggested possible schizophrenia, and secondly from his own several disclosures, he described extremely sexually deviant propensities and sexually deviant behavior patterns starting at a very early age.

PC-R. 28. Dr. Krop said "I could not rule out that he was psychotic at that time, meaning at the time of the offense." PC-R. 29.

Q: You mentioned some of the things you typically do rely on is school records for background.

A: Yes.

Q: Did Mr. Cass ever provide those to you?

A: No.

PC-R.29.

In explaining the results from the MMPI, Dr. Krop testified that, first of all, he felt that Mr. Gaskin was giving him a fairly accurate presentation of himself. PC-R.

29. The scales that were elevated were the 8-9 scales which basically is a pretty pathological profile. PC-R. 30. Dr. Krop further testified that he asked Mr. Cass for more materials about Mr. Gaskin at the deposition held on June 4, 1990, PC-R. 34, including school records, but that he did not receive any information until the post-conviction lawyers representing Mr. Gaskin provided to him some time in late 1999 or early in 2000. PC-R. 33.

Dr. Krop testified that he did not have the report by Dr. Rotstein. PC-R. 37. That report, which was 27 pages long, was given to him by post-conviction lawyers prior to the evidentiary hearing held in April, 2000. PC-R. 37. From his review of Dr. Rotstein's report, Dr. Krop recalled that Dr. Rotstein had found Mr. Gaskin to be a seriously disturbed individual with sexually deviant propensities and a schizoid type personalty features. PC-R. 37. Dr. Krop found that "Mr. Gaskin was having more and more difficulty controlling those impulses to the point where obviously he was acting out both violently and sexually deviantly and he was struggling in his head." PC-R. 39.

Dr. Krop testified that he communicated at least twice with Mr. Cass in writing and had concluded that Mr. Gaskin was a seriously disturbed individual. PC-R. 40. "I indicated that it was my opinion that when I was deposed by Mr. Nelson, I think the nature of the acts themselves sort of speak for themselves as far as how disturbed Mr. Gaskin was." PC-R. 40.

As a true indicator of the level of ineffectiveness and the failure of Mr. Cass to investigate mitigation evidence, Dr. Krop testified that in his deposition on June 4, 1990, some two weeks before the trial of Mr. Gaskin was to begin, Dr. Krop stated that "I didn't have enough information yet to be able to give an opinion to that degree." PC-R. 41.

Dr. Krop said Dr. Rotstein's report would have "supported mine that is his diagnosis and increase my confidence level. I would say, that my diagnosis was correct." PC-R. 41. Dr. Krop would have testified that he felt that he (Gaskin) had a very severe personality disorder which I consider a very serious emotional disturbance. PC-R. 42.

Dr. Krop recalled that he spoke with Mr. Cass for a total of about one half hour before the trial of Mr. Gaskin. PC-R. 42. Dr. Krop suggested to Mr. Cass, "I believe I mentioned that in the deposition that it might be helpful to have a neuropsychological evaluation done of Mr. Gaskin because one of the things I did learn from the family members is that there was a head injury, I believe he fell off a bike. There may have been another one." PC-R. 45-46.

Based upon information given to Dr. Krop by post-conviction counsel, he concluded that Mr. Gaskin suffered from a learning disability. PC-R. 47. He found that Mr. Gaskin had problems concentrating and paying attention and

maintaining his interest and stated "I believe to this day, he still has some problems in that area." PC-R. 47.

Dr. Krop went on to say "I would say that there was some parenting skills that were lacking in the people that were raising him, but, again, I don't have enough information in terms of his dynamics underlying some of his later bizarre behaviors to suggest that it's a result of any kind of dysfunctional family." PC-R. 50.

Dr. Krop testified that "the two populations I've probably had the most experience with of a specific type of problem are, number one, first degree murder violent cases, and then sexual offenders." PC-R. 52.

Dr. Krop stated "What you have in Mr. Gaskin is a combination of the two. His sexual deviancy, particularly at the age that he started engaging in sexually deviant behavior compared to thousands of sex offenders that I've worked with, it's very, very severe." PC-R. 52.

In response to a question posed about Mr. Gaskin's personality, Dr. Krop testified:

A person doesn't choose behaviors that end up being maladaptive or getting you caught or getting you punished. This is not to say that the behavior doesn't lend itself to some reinforcement at the time it's happening, but I think most of us, if we had to choose, would choose pretty normal behavior that gets reinforced by pretty much mainstream society rather than the criminal element. So he didn't choose it, but he certainly was responsible or else I would have said that he was basically insane.

PC-R. 53.

Dr. Krop told Mr. Cass that he could testify to several things. One was that he could say that Mr. Gaskin was one of the more seriously disturbed individuals he'd ever encountered. PC-R. 54. "I told him that I could provide a diagnosis to a reasonable degree of psychological certainty of a mixed personality disorder." PC-R. 54.

Libby Willis testified following Dr. Krop. PC-R. 127. Ms. Willis identified herself as Mr. Gaskin's eighth grade teacher. PC-R. 129. Ms. Willis described Mr. Gaskin as quiet, but not a great student. PC-R. 127. She said that the Appellant "tried real hard." PC-R. 129. "I had at that time a lower group, and his effort was there, so . . . but he was not real high functioning." PC-R. 129. "He was not a behavior problem." PC-R. 129.

When asked "Did Louis Gaskin's trial attorneys contact you in 1990 for his trial?" She replied "No." PC-R. 130.

The next witness post-conviction called at the evidentiary hearing was Dr. Toomer. PC-R. 141. Dr. Toomer told the court that the post-conviction lawyers for Mr. Gaskin gave him information about Mr. Gaskin before he did his evaluation. PC-R. 144. This information included the school records, information provided by the family members and also reports and/or depositions of Dr. Krop and Dr. Rotstein. PC-R. 144.

Dr. Toomer did a clinical evaluation much like Dr. Krop had done in 1990 which included a clinical interview, psychological history, and several inventories, the bender gestalt design, the MMPI, and the Carlson Psychological Survey. PC-R. 144. Dr. Toomer, using all of the data supplied to him, testified that his diagnosis suggested a schizophrenia paranoid type illness for Mr. Gaskin. PC-R. 145. He went on to say that the totality of the data suggest numerous possible diagnoses. PC-R. 145. He further concluded that Mr. Gaskin suffered from a borderline personality disorder, as well as some features of a schizotypal personality disorder. PC-R. 146. Dr. Toomer also found the presence of indicators of some neurological impairment or what he called neurocognitive disorder. PC-R. 146.

Dr. Toomer described what he characterized as three basic components of a complete psychological evaluation. PC-R. 147. They would include the clinical interview, which is a face-to-face interview including the process of testing and evaluation PC-R. 147; the examination of past records, school records and other data relative to the person's functioning PC-R. 147; and lastly the information to be derived from individuals who have personal knowledge of the particular individual in question during his/her developmental years. PC-R. 147.

Dr. Toomer concluded that based upon a pervasive and long-term pattern of instability in terms of mood, effect and behavior, Mr. Gaskin had been impacted

adversely in terms of his ability to function adequately in terms of thought and behavior. PC-R. 148.

These environmental issues created, in the evaluation done by Dr. Toomer, impairment impacts which had an effect on all aspects of Mr. Gaskin's functioning. PC-R. 148. What Dr. Toomer found in Mr. Gaskin is a person who was moving along, what he described, as a continuum of psychopathology. PC-R. 149. Dr. Toomer found that Mr. Gaskin suffered from mental maladies ranging from schizotypal personality disorder all the way to schizophrenia. PC-R. 149. These again are somewhat consistent with the findings of Dr. Krop and Dr. Rotstein, back in 1990. PC-R. 37-38.

Dr. Toomer further opined that appearance is hardly an adequate way of making a determination in terms of functioning. PC-R. 151. A person can at times appear very normal but it does not mean that the same person cannot have very severe mental health problems. PC-R. 151. That was and is the situation with Louis Gaskin. PC-R. 151. Dr. Toomer found that Mr. Gaskin was "An individual whose overall development and behavior represents deficits and impulse control diffidence in tolerance for anxiety, a lack of supplementary capacity and an inability to control impulse delayed gratification." PC-R. 152/153.

Dr. Toomer found that Mr. Gaskin fit into the statutory mental health mitigator that he was substantially impaired. PC-R. 153. Dr. Toomer found this



particular diagnosis or definition of a mental health mitigator was not only applicable at the time of the offense but had been applicable to Mr. Gaskin for a good part of his life. PC-R. 154.

A review of Mr. Gaskin's school records show that as early as 1977 Mr. Gaskin was defined as an underachiever. PC-R. 155. Mr. Gaskin was designated as SLD (specific learning disabilities). Additionally, even in SLD classes, Dr. Toomer found that Mr. Gaskin daydreamed, had poor attention span and the visual and auditory processing deficits remained. PC-R. 155. The school records were particularly important as supportive data that goes on in the evaluation process. PC-R. 156.

Dr. Toomer again stated that "There has to be a pattern of predictability, saneness, security and safety during the early years. If that's not there, we can almost guarantee that we're going to have a dysfunctional individual." PC-R. 157.

An individual such as Mr. Gaskin because of the lack of predictability that they have experienced because of the turmoil they are incapable of handling because of it occurring at such a young age, what they tend to do is develop a different aura or personality in order to cope with or address the trauma that they have experienced and the significant and heightened emotionality that they are unable to deal with, the feelings that are engendered by that particular situation.

PC-R. 158.

In completing his testimony, Dr. Toomer testified that had he been contacted in 1990 and, most importantly, supplied with the additional corroborative

information that he was supplied with prior to the evidentiary hearing in 1999/2000, he could have and would have evaluated Mr. Gaskin and presented the data that he presented in the hearing to the jury. PC-R. 160.

Dr. Hafner was called and he identified himself as the head of the exceptional education program in Flagler County. PC-R. 236. Dr. Hafner testified about the different types of special education available in Flagler County and the fact that Mr. Gaskin was placed in the exceptional children's program. PC-R. 237. Dr. Hafner explained that the criteria for getting into the exceptional children's program was that a person have an IQ of over 70 and that there be a discrepancy between his IQ and his achievement scores of 15 points or more. PC-R. 237.

Dr. Hafner told the court that he had reviewed Louis Gaskin's school records and was able to determine that in the third grade Mr. Gaskin was placed in a specific learning disabilities program. PC-R. 238. A continued review of Mr. Gaskin's school records showed that he was in this program until he left school. PC-R. 239.

Dr. Hafner explained the term administrative placement, which meant that Mr. Gaskin was passed along and at some point actually got where it appears that he was in high school before he quit school altogether. PC-R. 239. Administrative placement was a discretionary decision made by the principal of the school – in cases where students grew bigger physically and were much older than the other

children, it was sometimes decided, as it was in Mr. Gaskin's situation, to pass him along. PC-R. 239.

Dr. Hafner also stated that "He consistently had very, very poor scores in reading and language arts. There were even comments about that since kindergarten." PC-R. 240. Mr. Gaskin was retained or held back in the third grade and in the fifth grade. PC-R. 240. Mr. Hafner was not contacted by trial attorneys, and he would have testified had he been contacted. PC-R. 241.

Andrew Williams was called by post-conviction counsel. He identified himself as the brother of Louis Gaskin and first met Louis when Mr. Williams was 13 years old. PC-R. 252. Mr. Williams had a common experience with Louis Gaskin in that they both lived with Mr. Gaskin's great grandparents for a period of time. PC-R. 253. Mr. Williams described Louis' efforts to assist his great grandparents in terms of giving them money to help them pay bills. PC-R. 253. Asked about whether or not the great grandparents assisted Mr. Williams or Louis in their schoolwork, Mr. Williams said "No, I don't think so." PC-R. 253.

Mr. Williams proceeded to explain that his great grandparents could not read and further explained that Louis never lived with his mother although at that time Mr. Gaskin knew who his mother was and that he had a brother and sister. PC-R. 253. Mr. Williams was never contacted by the trial attorney in this case in 1990 and

therefore, again, his testimony was not available to the trial attorney to present to the jury. PC-R. 254.

The next witness called was Janet Smith, who did testify at the penalty phase in 1990. Ms. Smith described her relationship with Mr. Gaskin as first cousins. PC-R. 256. She further testified that she moved in with the great grandparents also when she was about 11 years old. PC-R. 256. She described the discipline in the house as being very, very strict and confirmed that the great grandparents could not read. PC-R. 256.

Ms. Smith went to the same school that Louis went to and described the treatment of Louis by his fellow students. PC-R. 257. That description included that they abused him as well as made fun of him because, according to Ms. Smith, "we were kind of on the poor side and we didn't get new clothes like everybody else and that even in his teen years, he was sucking his thumb." PC-R. 258.

She also described behavior which was related to Mr. Gaskin getting mad about something and that he "would go off by himself and even sometimes rock, you know just sit somewhere and constantly rock." PC-R. 258. Ms. Smith described an incident where Mr. Gaskin fell off his bicycle and hit his head and had a hole up there, as she characterized it. PC-R. 259.

Ms. Smith testified about the relationship between Mr. Gaskin and his mother. Ms. Smith was asked:

Q: How did she treat Louis?

A: Not like he was her child.

PC-R. 259.

Ms. Smith was then asked to give an example.

Well, like, I could go to her and ask her, you know, Auntie, can I have five dollars? And she'll say, Well, I don't have it, baby. Or she'll give it to me.

But if he asked her, excuse me, but she would say, I don't have no mother fucking money.

PC-R. 260.

The next witness called in the post-conviction hearing was Edward Stark.

PC-R. 272. He identified himself as someone who had met Mr. Gaskin when he was four or five years old and had known Mr. Gaskin off and on for many, many years. He described a situation where "We were pretty small in stature and you know we got bullied around a lot because we were smaller than the other guys."

PC-R. 272. Mr. Stark also confirmed information that Louis' mother was using both crack cocaine and marijuana. PC-R. 275. Mr. Stark also witnessed Mr. Gaskin fall off his bike several times and was aware that Mr. Gaskin had received stitches in his head. PC-R. 275-276.

The next witness called at the evidentiary hearing was Pamela Williams, Louis Gaskin's sister. PC-R. 285. She testified that she first met Louis when he

was 13 or 14 and was unaware until that meeting that she even had a brother named Louis Gaskin. PC-R. 285. She described in some detail what living with the great grandmother was like -"She was like a mean witch." PC-R. 286. Ms. Williams went on to describe living with the great grandmother in the following way, "She kept you hostage like a prison to me. That's how I feel." PC-R. 286.

Ms. Williams described the house that Louis was brought up in as not being a clean house and a house full of what she described as junk, junk that would be picked up periodically by the grandmother and brought home and put in the house. PC-R. 288. She also confirmed that the grandparents could not read and therefore could not help Louis in any way with his school work. PC-R. 290.

Ms. Williams stated that Mr. Gaskin had few, if any, friends and he often hid from people where he lived with his great grandparents. PC-R. 291. Ms. Williams corroborated the treatment given Louis by his mother. Mr. Gaskin was abandoned by his mother as an infant. PC-R. 292. Ms. Williams confirmed that her mother, the mother of Louis Gaskin, used both marijuana and crack cocaine in her presence. PC-R. 292. The trial attorney for Mr. Gaskin in 1990 had no contact with the sister and brother of Mr. Gaskin nor did he have any contact with the mother of Mr. Gaskin. PC-R. 301.

The next witness to testify was Elsie Chappel. Ms. Chappel identified herself as a school teacher who had Mr. Gaskin in her class in the fourth grade.

PC-R. 320. Ms. Chappel described Louis as being withdrawn and a person who, according to her quote, "Would fall through the cracks in any classroom." PC-R. 320. She further testified that it was about this time that Louis Gaskin was enrolled in the program for person with specific learning disabilities (SLD). PC-R. 321. Ms. Chappel told the court that she would have been available to testify in 1990 but was never contacted by attorney Cass in regards to doing that. PC-R. 322.

Under cross-examination, the State brought up questions about Mr. Gaskin's absenteeism and was told that he, in fact, was not missing that much school. PC-R. 322. Then the State inquired of Ms. Chappel about his IQ but she did not know his IQ. Under cross examination, Ms. Chappel testified that she felt that Mr. Gaskin was deficient in his reading ability to do the word problems associated with math. PC-R. 233.

The next witness was Kenneth Gordon who identified himself as Mr. Gaskin's fifth grade social studies teacher. PC-R. 325. As with other teachers, Mr. Gordon described Mr. Gaskin as a loner, a child who hid in the classroom. PC-R. 326. Mr. Gordon also had information from a fellow teacher by the name of Annie Gaskin, no relation to the defendant, that Mr. Gordon related to the court. PC-R. 328. Mr. Gordon testified that Ms. Gaskin told him about some of the beatings that Louis was subjected to by his great grandmother. PC-R. 329.

The focus of the cross-examination by the State was on the knowledge by Mr. Gordon of any illegal activities that Mr. Gaskin might have been involved with at the school. PC-R. 329. Mr. Gordon was not really aware of those activities and asked the State to keep in mind that Louis was in the fifth grade. PC-R. 330.

Mr. Cass, Mr. Gaskin's trial attorney, testified that the office where he worked as an Assistant Public Defender had tried, during the period of time that Mr. Gaskin went to trial, to use a two-person team on capital cases but they had too many cases to really cover them properly. PC-R. 338. Mr. Cass stated that at the time he was representing Mr. Gaskin, he was working on 14 to 16 capital cases. PC-R. 339. He stated that he had no investigator assigned to this particular case or to capital cases at all. PC-R. 339. The office during this time also had no mitigation specialist or person specifically assigned to assist trial attorneys in preparing their cases for penalty phase in the event that a client was, in fact, convicted of first degree murder. PC-R. 340.

Mr. Cass stated that he felt he had a weak case on guilt/innocence. PC-R. 341. He also stated that he hired two persons to assist him in the mental health area, but made a decision not to use either one of them. PC-R. 342.

With respect to Mr. Gaskin's allegation that trial counsel was ineffective during the penalty phase of his trial, Mr. Cass made specific reference to Dr. Krop but maintained that he was not of sufficient help and did not call him. PC-R. 342.



During most of the direct examination of Mr. Cass, it was quite apparent that he had not reviewed material in preparation for his testimony. He gave many answers of "I don't know," "I think so," or "I don't think so." PC-R. 343-346, 365-366. One of the questions asked was "Do you remember Dr. Krop asking for school records and medical records and depositions?" PC-R. 343. The answer by Mr. Cass was "I think so." Mr. Cass testified that he didn't think he got any school records for Dr. Krop, despite two written requests for them. PC-R. 344.

Mr. Cass could not recall the date he was assigned Mr. Gaskin's case. PC-R. 345. He testified that he thought he received the case in 1988 when in fact the date of the offense was December 20, 1989. PC-R. 345. Cass did not remember having any discussions with Dr. Krop and was unaware of the information that Mr. Gaskin was a seriously disturbed individual. PC-R. 346. Cass was unaware that Mr. Gaskin had a problem with sexual deviancy. PC-R. 347.

At the conclusion of the guilt phase, when Mr. Gaskin was found guilty of two counts of first degree murder, and just before beginning the penalty phase, Mr. Cass requested time from the court to discuss certain matters with Mr. Gaskin. R. 967. This conversation took place in the holding cell at the courthouse and Mr. Cass chose to have a court reporter present during this discussion. PC-R. 367.

During the evidentiary hearing, Mr. Cass was asked about this procedure. Mr. Cass had no explanation as to why he felt it was necessary to have a court

reporter present when he was informing Mr. Gaskin of what he would later characterize as a strategy decision on his part. PC-R. 354. Mr. Cass discussed the circumstances of using a court reporter to record what would appear to be a privileged conversation with his client:

Q: Did you have some concerns about protecting your professional reputation down the line, as to why you would call a court reporter in?

A: I think that's probably the most logical answer for it but it's not something I would normally do.

PC-R. 354.

An additional question asked of Mr. Cass about the mental health experts was the following:

Q: Do you think that's a legal decision as to whether or not you should call that mental health expert for mitigation?

A: Are you asking me, sir, whether or not I think it's proper to put the question to him and the decision to him?

Q: Right. Do you think that should be a decision a lawyer makes?

A: If you're asking me right now, I think it is yes, it should be a decision for the attorney. As for advising the client, if he says no, then probably my attitude would have been to move to withdraw because I don't think the average client is prepared to make that decision competently.

PC-R. 358.

Mr. Cass had no memory at all of Dr. Rotstein and, in fact, at one point asked the inquiring attorney "Did I employ Rotstein?" PC-R. 352. Mr. Cass also had no explanation as to why he did not call Dr. Rotstein as a witness, given the fact that Dr. Rotstein had found at least one statutory mental health mitigator present in Mr. Gaskin. PC-R. 365.

Asked if he took Dr. Rotstein's deposition, Cass replied "I don't think so." PC-R. 365. Asked "Did you provide Dr. Rotstein's reports to Dr. Krop?" Mr. Cass' response was "I don't think so." PC-R. 365. Mr. Cass was asked if he tried to consult with other public defender offices to find other mental health experts who might have been able to evaluate Mr. Gaskin and come up with statutory mental health mitigators as Dr. Rotstein did. His response was "No sir I didn't." PC-R. 367.

Mr. Cass then stated that there was not a great deal of contact between the various offices and it probably didn't occur to him. PC-R. 366. Yet later on in this same series of questions, he admitted that he had gone to Life Over Death seminars which are sponsored by the Florida Public Defender's Association and in fact had met other attorneys from other circuits who were doing capital litigation. PC-R. 366.

Mr. Cass testified that he faced procedural resistance which caused him to fail to seek additional experts:

Q: Instead of using Dr. Davis, who you knew never found anyone sane or competent, why not try to find one of these other doctors who often testified and made these findings and also could testify to statutory mental health mitigation.

A: There was pressure on the employment of experts for the use of the defense and probably because of the war we were having on that, particularly on forensic psychology, I probably just laid down and let it roll over me.

PC-R. 369.

Addressing the issue of strategy directly at this point, the post-conviction counsel asked Mr. Cass the following question:

Q: Let me go back. When we were talking about the conversation with the court reporter present, when you were talking to Louis, you advised of one of the things that you didn't want to get into was prior crimes yet when you called . . . .

A: I'm sorry, I don't understand.

Q: You advised him that one of the reasons you didn't want to call Dr. Rotstein was because you didn't want his prior crimes to come out. You didn't think that would come out, yet it did come out with a witness, through the witness Janet Morris.

A: Who was it?

Q: Janet Morris. They were able to bring out the prior burglaries. Did you advise Louis that they could have potentially brought that out through the lay witnesses?

A: I don't think so. I mean, I don't think I did advise him of that.

PC-R. 381.

**c. Facts introduced during successive motion**

The jury in Mr. Gaskin's case found him guilty of two counts of first degree murder in the death of Robert Sturmfels (premeditated and felony murder) and two counts of first degree murder in the death of Georgette Sturmfels (premeditated and felony murder). R.1285-94.

On direct appeal, the Florida Supreme Court found that the trial court erred in adjudicating Mr. Gaskin guilty of both premeditated and felony murder for each of the two deaths for a total of four convictions. *Gaskin v. State*, 591 So.2d 917, 920 (Fla. 1991). The Court ordered that one adjudication for each first degree murder be vacated.

On August 12, 2014, the circuit court judge vacated the felony murder adjudications and resultant death sentences set forth in Counts II and IV of the indictment. However, the death sentences for premeditated murder in counts I and III were not vacated. PC2. 81-82.

In Mr. Gaskin's case the jury was instructed that one aggravating circumstance they could consider was whether the defendant had been previously convicted of another capital offense or of a felony involving the use of threat of violence to some person. R. 1297.

## SUMMARY OF ARGUMENT

Because the jury was improperly instructed they could find Mr. Gaskin guilty of both felony and premeditated murder, their consideration of both felony murder and first degree murder as aggravators for each victim in the penalty phase was an improper "doubling" of aggravating circumstances. In fact, the trial judge supported the prior violent felony aggravator in Robert Sturmfels' death with the contemporaneous convictions for the offenses involving the Rectors and Georgette Sturmfels; and in Georgette Sturmfels death, with the contemporaneous convictions involving the Rectors and Robert Sturmfels. *Gaskin v. State*, 591So.2d at 919.

## ARGUMENT

### THE LOWER COURT ERRED IN DENYING THE SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF

The consideration of two aggravating circumstances ("doubling") is improper when they refer to the same aspect of the crime. *See Banks v. State*, 700 So.2d 363, 367 (Fla.1997). For instance, the aggravating factors of murder committed to avoid lawful arrest and murder committed to disrupt or hinder law enforcement can present the improper doubling problem because when the murder is committed to avoid an arrest, such an act more often than not also hinders law enforcement efforts to apprehend and prosecute the perpetrators. *See Bello v. State*, 547 So.2d 914 (1989) (improper doubling found where the defendant was shooting at officers to prevent them from taking him into custody and the shooting also prevented the officers from coming to the assistance of a wounded detective).

The Florida Supreme Court's review of the death sentences in this case violated the settled constitutional protections recognized in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). The Court failed to apply a constitutional standard of harmless error review when it declined to remand for resentencing after striking two of the aggravating circumstances found by the trial court. In *Clemons*, the Court held that a state appellate court may constitutionally uphold a death sentence that is based in part on an invalid or improperly defined aggravating circumstance, provided that the decision is reached "either by

reweighing of the aggravating and mitigating evidence or by harmless error review." 494 U.S. at 741, 110 S.Ct. at 1444.

Two years after *Clemons*, the Supreme court gave its holding further form in a Florida capital case, *Sochor v. Florida*, 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). In *Sochor*, the Court held that the Florida Supreme Court's consideration of a death sentence did not cure the trial court's erroneous consideration of an aggravating factor since the appellate court "did not explain or even "declare a belief that" this error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained."

Vacating Mr. Gaskin's two remaining death sentences in this case is mandated because two aggravating circumstances were improperly considered and the Florida Supreme Court did not cure the error by declaring the error was harmless beyond a reasonable doubt.

In regard to the harmless error analysis Mr. Gaskin asks this court to consider the following:

The jury recommendations for the death penalty for the deaths of Georgette Sturmfels and Robert Sturmfels were both by a vote of 8-4. R. 1301,1302. That four of the twelve jurors did not believe that the cases warranted death speaks to the fact that this is not one of the most aggravating and least mitigated capital felonies which warrant the death penalty. Only two votes stood in the way of a life recommendation



by the jury. Therefore, the fact that the jury and judge considered legally impermissible aggravating circumstances put an extra thumb on the aggravator side of the scale in weighing the aggravation and mitigation, which undermines confidence in the outcome in what was a very close case.

Additionally, although Mr. Gaskin had other prior violent felony convictions, none were for the charge of murder, as the two improperly considered convictions were. A prior felony conviction for murder would necessarily carry more weight as an aggravator than a lesser offense would.

Additionally, the court found two significant mitigating circumstances in Mr. Gaskin's case: (1) the murders were committed while he was under the influence of extreme mental or emotional disturbance; and (2) Mr. Gaskin had a deprived childhood. *Gaskin v. State*, 591 So.2d 917, 920 (Fla. 1991).

Although no mental health expert was presented to the jury in the penalty phase, the state did introduce a report of Dr. Rotstein which stated that Mr. Gaskin's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired because he suffered from a schizotypal personality disorder. Dr. Rotstein's explained in the report that once Mr. Gaskin was dressed in his ninja suit his profound preoccupation became a delusion in which he sees himself as a ninja and then commits some horrible crime.

Dr. Rotstein noted he discovered evidence of near hallucinatory experiences with feelings of derealization and depersonalization. He specifically stated that at that moment Mr. Gaskin was unable to conform his conduct to normal human behavior. R. at 40. That type of testimony, dealing directly with the defendant's lack of a grasp of reality at the time of the homicide, is of the weightiest order as a mitigating circumstance. Thus, consideration of two improper aggravating circumstances cannot be considered harmless in the weighing process required in Florida before the death penalty may be imposed.

Lastly, the United States Supreme Court has accepted a Florida case concerning Florida's non-unanimous jury death recommendation procedures in *Hurst v. Florida*, 135 S.Ct. 1531, 191 L.Ed.2d 558 (2015). At the original trial, Hurst was convicted of first degree murder and sentenced to death. *Hurst v. State*, 147 So.3d 435, 437 (Fla. 2014). His conviction and death sentence were originally affirmed by the Florida Supreme Court. *Hurst v. State*, 819 So.2d 689 (Fla. 2002). Hurst was denied post-conviction relief by the circuit court. 147 So.3d at 439.

On appeal the Florida Supreme Court affirmed all but one of his post-conviction claims and remanded Hurst's case for a new penalty phase proceeding. *Id.* at 439-440. After the new penalty phase, the jury returned a recommendation of death by a 7 to 5 vote. *Id.* The trial court sentenced Hurst to death finding two aggravating factors: (1) the murder was especially heinous,

atrocious or cruel (HAC); and (2) the murder was committed while Hurst was engaged in the commission of a robbery. *Id.* Both of the factors were assigned great weight. *Id.*

Hurst appealed and raised, among other issues, that constitutional error occurred in his case because the advisory jury in the penalty phase was not required to find specific facts as to the aggravating factors, and that the jury was not required to make a unanimous recommendation as to the sentence. *Id.* at 445.

The jury recommended death by a vote of 8-4 in both of Mr. Gaskin's cases. However, an additional component of constitutional irregularity is present in Mr. Gaskin's case as compared to Hurst's because the jury was allowed to consider two aggravating felony murder convictions which have been overturned as improper by the Florida Supreme Court. Therefore, not only was Gaskin's penalty phase jury not asked to make specific findings of which aggravating circumstances they were relying upon in recommending death, but may have relied upon improper aggravating circumstances. This cannot be harmless error.

## **CONCLUSION AND RELIEF SOUGHT**

Based on the foregoing, the lower court improperly denied Mr. Gaskin's Successive 3.851 motion. This Court should order that his sentence be vacated and remand the case for a new sentencing, new evidentiary hearing, or for such relief as the Court deems proper.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Initial Brief** has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Scott Browne, Assistant Attorney General scott.browne@myfloridalegal.com, capapp@myfloridalegal.com; Rosemary Calhoun, Assistant State Attorney, calhounr@sao5.org eservicemarion@sao5.org, the Honorable Judge J. David Walsh, dwalsh@circuit5.org , rvanvoorhees@circuit7.org , ddukehart@circuit7.org and by U.S. Mail to Louis Gaskin, DOC# 751166, Union Correctional Institution, 7819 NW 228<sup>th</sup> Street, Raiford, FL 32026 on this 30<sup>th</sup> day of November, 2015.

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that a true copy of the foregoing Initial Brief, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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