IN THE SUPREME COURT OF FLORIDA

TIMOTHY CURTIS HUDSON,

Appellant,

v. Case No. 78,462

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE/CROSS-APPELLANT

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STATEMENT OF THE CASE

On June 20, 1986, Timothy Hudson was indicted by a grand jury for first degree murder. Hudson entered a plea of not guilty. After a trial by jury, Hudson was convicted on January 28, 1987 of first degree murder. The penalty phase was conducted on January 28, 1987. Hudson was sentenced on February 8, 1987, and the judge's sentencing order was entered on March 25, 1987. Hudson appealed his conviction and sentence to this Honorable Court. The following issues were presented to the Court on appeal.

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENTS (AND ALL EVIDENCE DISCOVERED AS A DIRECT RESULT THEREOF), AS THE STATEMENTS WERE NOT VOLUNTARILY MADE, BUT INSTEAD WERE PROCURED PSYCHOLOGICALLY COERCIVE INTERROGATION TECHNIQUES, AND BY DELIBERATE EXPLOITATION OF APPELLANT'S EMOTIONAL CONDITION.

II. IMPOSITION OF THE DEATH PENALTY IS PROPORTIONALLY UNWARRANTED IN THIS CASE.

III. THE TRIAL COURT ERRED IN REFUSING TO FIND STATUTORY AND NONSTATUTORY MITIGATING CIRCUMSTANCES WHICH WERE (a) ESTABLISHED BY THE EVIDENCE AND (b) OF A KIND CAPABLE OF MITIGATING PUNISHMENT.

A. Extreme Mental or Emotional Disturbance.

B. Non-Statutory Mitigating Circumstances

IV. THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO IMPROPER PROSECUTORIAL ARGUMENT.

V. IN HIS PENALTY PHASE JURY INSTRUCTION, THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS NOS. 4, 5, 6, 7, 9 AND 11, AND ERRED IN DIMINISHING THE

IMPORTANCE OF THE JURY'S DEATH RECOMMENDATION.

His conviction and sentence were affirmed. Hudson v. State, 538 So.2d 829 (Fla. 1988). On May 23, 1989, certiorari was denied by the United States Supreme Court. Hudson v. Florida, 110 S.Ct. 212 (1989).

Hudson's petition for clemency was apparently denied when his death warrant was signed on September 7, 1990. The defendant's initial 3.850 motion was filed on October 19, 1990. On December 12, 13, 14, 1990, an evidentiary hearing was held before the circuit court. After hearing all the evidence that court denied the motion as to the conviction, but granted the motion as to the penalty.

STATEMENT OF THE FACTS

The facts as presented herein are as set forth by this Court in its opinion affirming the judgment and sentence in the instant case:

> Two months after breaking up with his girlfriend, Hudson entered her home during the night armed with a knife. The former girlfriend, having received threats from Hudson, spent the night elsewhere. Hex roommate, however, was at home. When she began screaming at him to leave, Hudson stabbed her. He then put the body in the trunk of the victim's car, drove away, and left the body in a drainage ditch at a tomato field. He had been in the victim's car the following morning. The former girlfriend reported her roommate missing and indicated she had been having problems with Hudson. The police interviewed Hudson, who was under a sentence of community control for a prior conviction of sexual battery. After he had admitted having violated the terms of that control, the police arrested him. After being readvised of his Miranda rights in response to later questioning Hudson told the police several stories about the murder and his involvement in it. Hudson v. State, 538 So.2d 829 **(Fla. 1988).**

An evidentiary hearing was held in December of 1990, wherein the defendant presented the following testimony. John Nicolas Conrad testified that **he** represented Hudson in January of 1987. (HR 18 He was appointed to do the penalty phase approximately three weeks before trial. (HR 19) At that time, Dr. Berland had already examined Mr. Hudson and the case had been prepared for trial. (HR 21) Conrad testified that he did not have an independent recollection of how ready for trial they were. (HR 35) Conrad's recollection was that there were two statutory

mitigators as well as nonstatutory mitigators that they sought to prove and that were accepted by the court. (HR 42) Conrad's impression from talking to the defendant was that he did not have a substantial drug problem. (HR 44) Conrad testified that he did not further investigate the drug problem based upon the defendant's representations as well as his family's. Nevertheless, Conrad testified that in his closing argument, he argued to the jury that the defendant's drug problem, his age, as well has his mental problems. (HR 81) In response to questions asked to why he did not call Becky Collins, Conrad stated that he did not believe that it would have been good strategy to call the potential homicide victim to testify on the defendant's behalf. (HR 92) Conrad stated that he had talked to Dr. Berland about the effects of drugs exasperating the defendant's condition and that Dr. Berland testified to that on the stand. (HR 96) He also stated that the defendant's family told him there was no problems in the family that things were not bad at home and that the defendant and his father had a good relationship. (HR 96 - 100)

Conrad testified that they did not present Gerald Bembow because he would have been bad for the defense as he provided evidence of premeditation. Conrad stated that they may not have talked to Gerald Bembow because of information they had already received from talking to Anthony Bembow. (HR 61) Bembow had related that the defendant said he was going to "kick Becky Collins' ass.'' (HR 112 - 113)

Conrad also stated that he was comfortable with the job he did in light of the information that was provided to him by the family. If he had had this new information he could have done better, but he didn't. He did everything that he could with what was available to him at the time. (HR 119) He was assisted in the preparation of the penalty phase by two other lawyers, Donnerly and Chalu, (HR 105, 122) Conrad noted that he effectively excluded the heinous, atrocious and cruel instruction even though the victim had been stabbed four times in her own home in the middle of the night. (HR 123)

Becky Collins, Hudson's intended victim, testified for the defendant. She stated that she had been the defendant's girlfriend at the time of the crime. When she first met him, he was a hard working, considerate individual; but when he got into drugs, he became a different person. He became very abusive to her and they broke up on February or March of 1986. (HR 146 - 150) She though he had a good relationship with his father, but then he started saying that he hated his father and that he was upset about his parents' divorce. Collins also testified that Hudson's mother was an alcoholic and every time she saw her that she was drunk. (HR 150 - 151) When Hudson was in jail, he started making threatening calls telling her that when he got out he was going to kill her because he thought she was seeing another man. (HR 154, 160) She received several messages from the defendant that he had a surprise for her when she got home. Collins then decided not to go home that night. (HR 162 - 164)

She also admitted that she was aware that the defendant had been previously charged with robbery and rape. (HR 167)

The defendant's younger sister, Deborah Hudson, also testified. She stated that they did not have a good home life; that their parents split up when she was seven and the defendant was ten. Their mother lost control when their dad left and began drinking. (HR 171 - 172) Their dad lived down the street and helped out as best he could. (HR 172 - 174) On cross examination, she admitted that her mother had worked hard all of her life, had supported the kids, fed them, clothed them, etc.. She also admitted that she had moved out in 1989. (HR 184) Deborah Hudson also testified that when the defendant didn't like it when people told him what to do, even when he was fifteen he would get mad and hit his mother. He was also in jail most of the time. (HR 185)

Defense counsel Rayburn Stone testified that he had represented the defendant for first degree murder. The defense they presented was for second degree murder/diminished capacity. (HR 200) The Gurganis defense was put forward because he was concerned that the voluntary intoxication instruction had language that if a person used drugs to build up their courage, then the jury couldn't consider that as a defense. Therefore, it was Stone's tactic to put on a diminished capacity defense, but nevertheless ask the questions about drug use without being given the limiting instruction. (HR 209 - 210) Stone remembered contradicting evidence that the defendant did and did not do

drugs; he does not remember what information was given to Dr. Berland. (HR 212) He did however ask Dr. Berland about the effect of cocaine on the defendant's brain. (HR 216) He also acknowledged that Gerald Bembow may have been able to testify that the defendant was high, but he didn't present him because he was trying to negate intent and both Gerald and Anthony Bembow talked about threats the defendant made and the knife he obtained prior to going to Becky Collins' home the night of the murder. (HR 230) While some of this information was in Hudson's confession, the defense team was successful in keeping part of it out. If Stone had called those witnesses and elicited this information, he felt like it would have damaged his case. (HR 231) Stone testified that the defendant never indicated to him that he was so out of his mind at the time of the offense with drugs that he didn't know what he was doing. (HR 238) Further, while he does not remember what he gave Dr. Berland, he did not intentionally keep any reports from him. Stone testified that if he didn't give the information to Dr. Berland, it was because Dr. Berland did not ask for it. He was only interested in the cocaine intoxication to the extent that it effected the mental condition. (HR 240) Stone testified that the problem they had in this case was that the defendant would not admit to him or to the doctor that he had committed the offense, so it was very hard to get him to say that he was high at the time. The defendant did say that he had smoked a few hours before Peabody committed the murder. (HR 248)

Dr. Robert M. Berland testified that he has no first hand memory of interviewing the defendant and that he does not recall what was provided to him by defense counsel and has no record of it. (HR 259 - 262) He testified however, that he apparently had no knowledge of the defendant's drug problem, because if he had had such information, he would have pursued this with lay witnesses because the defendant was denying involvement in the offense. He doesn't remember, but he doesn't think based on trial testimony that he talked to any lay witnesses probably because of lack of time. (HR 267) Dr. Berland described Hudson as manic, energized, restless, no impulse control, acutely paranoid, angry, violent, overreacting to minor comments. The doctor had previously found some brain damage in Hudson and evidence of paranoid schizophrenia. (HR 271 - 273) While he stated that new tests may show something else, he also admitted that he's not sure. New evidence casts more light on the defendant's condition at the time. This evidence was from Mr. Bembow that the defendant was severely intoxicated, strongly suggested that the defendant was under the influence of cocaine at the time of the offense. (HR 275) He testified at trial that he had no evidence that the defendant was under the influence, but if he was it would have exasperated his symptoms. Now Dr. Berland feels that it would have been more persuasive if he have recounted what family members told him about how the defendant acts under cocaine. (HR 276) He states that because the defendant didn't trust him due to the lateness he came into the

game, he wasn't told anything about how the offense occurred and about how defendant felt during the offense. (HR 277) The defendant, however, has yet to admit that he is responsible for the murder in the instant case. As to the defendant's mental capacity, Dr. Berland felt that it would have made it much stronger, but he admitted the trial court found the factor existed. (HR 279) Dr. Berland testified that a fair number of witnesses described the defendant a3 mellow and calm when he wasn't doing drugs and that the presence of cocaine made a significant difference in his actions. (HR 288) Dr. Berland admitted however, that these witnesses may have a personal stake and that they are friends and family of the defendant. Dr. Berland admitted that his legal opinion wouldn't have been different, only the forcefulness of it. He also admitted that the jails are full of antisocials, that they understand society's norms, and that they use those norms to control others, not themselves. (HR 309 - 313) The defendant's problem is a character disorder rather than a mental disorder. (HR 314)

Anthony Jerome Bembow testified that between 1985 and 1986 he did crack cocaine with the defendant three times a week. (HR 349) Crack cocaine made the defendant paranoid and temperamental. On the day of the murder, the defendant asked Bembow to get high, which was unusual, but which constitutes evidence that the defendant was building up his courage in order to make the attack. (HR 352) He and the defendant smoked two dime lots together at about 5:00 or 6:00 p.m. on the night of the

murder. He was high at the time, but quiet. (HR 352 - 356) There was a stipulation before the court at that time that Molly Ewing was killed at approximately 12:30 p.m., on January 18, 1987. Bembow admitted that he never saw the defendant doing crack before 1984, but when Hudson got out of jail in 1984, they began doing drugs. (HR 360)

Gerald Bembow testified that he and the defendant smoked crack cocaine together three times a week. (HR 363 The defendant was paranoid, he liked everything to be quiet and still. (HR 364 - 366) On the night of the murder, Bembow saw Hudson and could tell that he had been getting high, that he did not see him smoke that day. The defendant left his home and came back at about 11:00 or 11:30 and appeared to be higher. He asked Hudson to spend the night because Hudson was high, but Hudson refused because he was going somewhere and he wanted Bembow to go with him. (HR 367) Bembow also admitted that he never saw the defendant do crack before 1985. (HR 373) When the defendant came over at 5:00 that evening, he was very angry at Becky Collins saying, "The bitch got me put in jail. And I'm going to kick her ass." The defendant then got a knife and wrapped it up in a towel and left. (HR 375) The defendant would stay high about 30 - 40 minutes. (HR 377)

The defendant's father, Daniel M. Hudson, testified that he spoke to Conrad twice about the defendant's growing up. He didn't think that he told Conrad about his wife's drinking problem and he didn't volunteer information about the defendant's

drug problem because he thought it might hurt the defendant. (HR 382 - 384) He stated that he and his wife were migrant farm workers, that he got a job at Westinghouse and that he had a lot more time to spend with his wife and children. (HR 385) Hudson was ten years old when his parents got divorced and his wife began drinking. Mr. Hudson testified that he lived several doors down after they split up. (HR 387) Mrs. Hudson lost control of the children and discipline was up to him. He and his sons went to baseball games together and were very close. (HR 388 - 389) After his wife showed him a crack pipe she found, he talked to the defendant about his drug use. (HR 392) He also admitted that there was no evidence that the defendant was doing drugs prior to going to jail for the first time.

Dr. Peter Macaluso testified that the defendant was drug addict and that crack cocaine would produce the effects of paranoia. (HR 404 - 406) Macaluso felt that the defendant was using a 100 to 200 hits of coke a day. (HR 411) It was his opinion that to a reasonable degree of medical certainty that the cocaine impaired defendant's higher cognitive thinking. (HR 413) The defendant suffered from an extreme mental and emotional disorder and was under extreme emotional and mental distress at the time of the offense. His capacity to conform his conduct was also impaired. (HR 414) Macaluso testified that the defendant told him he went to Becky's to steal money for drugs and took a knife because of her dogs. (HR 420 - 421) He believes that theft was Hudson's intent and that Hudson lacked the capacity to

appreciate the criminality of his conduct. He admitted however, that he did not know that Hudson had threaten Becky Collins. Nevertheless, he still believes that the defendant's primary motive was to steal money to get drugs. (HR 423 - 433) He also stated that he didn't feel that Hudson took the drugs to work up his courage to kill Becky even though the defendant told him that he had gone by the house earlier, then gone and gotten more drugs and went back. (HR 443) He also stated that the fact that Hudson hid the body and disposed of the knife is after the fact, so it has nothing to do with the defendant's ability to appreciate the criminality of his conduct. (HR 446)

At the close of the hearing, the trial court ordered memorandums from the state and the defense. After reviewing these memorandums, the trial court entered an order denying the motion to vacate as to the conviction, but granting the motion as to the sentence.

SUMMARY OF THE ARGUMENT

ISSUE I-Hudson alleges the existence of a conflict of interest between the Public Defender's Office who represented him at the trial, and a non-testifying witness to the defendant's actions on the day of the crime (Gerald Bembow). Counsel testified that he knew what Bembow was going to say and that he felt his testimony would do more harm than good. Thus, it was a tactical decision on defense counsel's part that kept him from presenting Gerald Bembow.

ISSUE 11-In this claim of ineffective assistance, the defendant asserts that trial counsel was ineffective for failing to present a voluntary intoxication defense. Defense counsel testified that it was a tactical decision on his part not to present the voluntary intoxication defense because he had a valid diminished capacity defense that would be supplemented by evidence of intoxication without the limitations of the voluntary intoxication defense instruction.

ISSUE 111-The defendant argues herein that he was denied a competent mental health examination and that his counsel was ineffective for failing to secure an adequate examination. This argument totally ignores the facts of this case. The facts are defense counsel did secure a thorough examination of the defendant prior to trial and in fact put on a diminished capacity defense. Further, given that the defendant has been reexamined without any discernible difference in the final analysis, the

defendant has failed to show that counsel's performance was deficient and that he was prejudiced by this deficiency.

ISSUE IV- A review of this Court's decisions and the Florida Rules of Criminal Procedure supports the lower court's determination that, having vacated the sentence, the only remedy available to the circuit court is to order a new penalty phase.

CROSS APPEAL

ISSUE V - The trial court erred in finding that counsel's performance during the penalty phase of the trial was deficient and that this deficiency prejudiced the defendant in the outcome of the penalty phase. The evidence presented below shows that even with additional investigation, the evidence of mitigation was insubstantial. Therefore, Hudson was not prejudiced by counsel's failure to further investigate.

ISSUE I

WHETHER HUDSON WAS DENIED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE OF THE PUBLIC DEFENDER'S OFFICE'S PRIOR REPRESENTATION OF GERALD BEMBOW.

Hudson alleges the existence of a conflict of interest between the Public Defender's Office who represented him at the trial, and a non-testifying witness to the defendant's actions on the day of the crime (Gerald Bembow). In order to establish a showing of ineffective assistance of counsel, the defendant must demonstrate that both an actual conflict of interest existed and that such a conflict adversely affected the adequacy of representation. Strickland v. Washington, 466 U.S. 668 (1984); Cuyler v. Sullivan, 446 U.S. 335 (1980); Smith v. White, 815 F.2d 1401 (11th Cir. 1987); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). A mere possibility of conflict of interest does not rise to the level of a Sixth Amendment violation. Cuyler v. Sullivan, supra. In Smith v. White, supra, the Eleventh Circuit cited the test adopted to distinguish actual from potential conflict as previously stated in Barham v. State, 724 F.2d (11th Cir.), cert. denied, 467 U.S. 1230 (1984):

> "We will not find an actual conflict [of interest] unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interest . . . . Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client, harmful to the other. If he did not make such a choice, the conflict remained hypothetical. (815 F.2d at 1404).

Gerald Bembow was serving a prison sentence at the time of Hudson's trial. The state listed Mr. Bembow as a witness and had him transported back to Tampa for trial. When trial counsel filed a motion to withdraw from Mr. Hudson's case based on a conflict of interest between the clients, the state represented to the court that it would not call Mr. Bembow as a witness. The motion was withdrawn based on this representation. (R 9, HR 241) Hudson now contends, however, that his counsel was paralyzed by the conflict issue and, therefore, failed to investigate Mr. Bembow as a source af important testimony both as to voluntary intoxication at the guilt phase and mitigation at the penalty phase. This assertion by collateral counsel was wholly contradicted by defense counsel at the hearing below.

Penalty phase counsel John Nicholas Conrad testified at the evidentiary hearing that after interviewing the defendant and the defendant's family members and friends, Conrad's impression was that the defendant did not have a substantial drug problem. (HR 44) Further investigation into a potential drug problem was not done based on their representations. (HR 45) Conrad also testified that he did not remember not talking to Gerald Bembow but he may not have done so because of the information they received from Anthony Bembow. (HR 61) At no time did Conrad testify he failed to investigate because of any potential conflict.

Guilt phase counsel Rayburn Stone testified that he did not want to present a voluntary intoxication defense because of

language in the voluntary intoxication instruction that if a person used drugs to build up their courage, then the jury wasn't to consider that as a defense to the crime. (HR 209 - 210) Accordingly, Stone testified that he asked the questions about drugs but didn't want the instruction given. In his words, he "wanted to have [his] cake and eat it too." (HR 214) He further testified that he would have only gone for the involuntary intoxication instruction if he had had strong evidence of severe intoxication rather than just a friend saying that Hudson had done coke before the murder. (HR 221) Stone testified that he considered Gerald Bembow to be a harmful state witness because Stone was trying to negate intent and both Gerald and Anthony reported threats the defendant made against Becky Collins shortly before the murder. (HR 230) Stone felt that if he had called those witnesses and elicited this information it would have damaged his case. (HR 231) Additionally, Stone testified that Anthony Bembow had told him that the defendant didn't seem high. (HR 232) Accordingly, it was his decision that using either of the Bembows would have done more harm than good. (HR 232) On cross examination, Stone reiterated that he made a tactical decision to not get into the voluntary intoxication defense because of the instruction language concerning' building up courage.' He was afraid that it would be against his client's interest for the jury to think that they could dismiss the defense because the defendant may have gotten high to work up his

courage. (HR 237)[1] Stone further testified that he knew from the police reports what Gerald Bembow was going to say. (HR 243) Thus, it was a tactical decision on defense counsel's part that kept him from presenting Gerald Bembow. There was absolutely no representation by defense counsel at the evidentiary hearing below or at the original trial that he was kept from calling Gerald Bembow based upon an alleged conflict of interest. There was never an assertion by either counsel that this alleged conflict of interest kept them from pursuing an active defense.

Based on the foregoing, it is clear that the defendant has failed to establish the existence of an actual conflict of interest or that such a conflict adversely affected the adequacy of representation.

It should also be noted that review of the merits of this claim is procedurally barred, as it is an issue that could have been and should have been raised on direct appeal.

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[1] Indeed, the evidence seems to support such a conclusion. Anthony Bembow testified at the evidentiary hearing that at 5:00 or 6:00 p.m. on the day of the murder the defendant came to him and asked to get high. Anthony testified that this was unusual that the defendant usually waited until Anthony offered. (HR 352 - 353) Further Dr. Peter Macaluso testified that the defendant told him that he had gone by Becky's house around 10:00 o'clock. Instead of stopping, Hudson went for more cocaine. After that he had the courage to return to Becky's house to fulfill his threats.

ISSUE II

WHETHER MR. HUDSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO PRESENT A VOLUNTARY INTOXICATION DEFENSE.

This Court has repeatedly recognized that under the principles established in Strickland v. Washington, 466 U.S. 668 (1984), a defendant alleging ineffective assistance of counsel must demonstrate that counsel's performance was deficient and that the deficient performance affected the outcome of the trial proceedings. Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990); Tompkins v. State, 549 So.2d 1370 (Fla. 1989).

In this claim of ineffective assistance, the defendant asserts that trial counsel was ineffective for failing to present a voluntary intoxication defense. As explained in ISSUE I, defense counsel testified that it was a tactical decision on his part not to present the voluntary intoxication defense because he had a valid diminished capacity defense that would be supplemented by evidence of intoxication without the limitations of the voluntary intoxication defense instruction. (HR 209 - 210) Clearly, this is a tactical decision by defense counsel that is not subject to collateral counsel's second guessing. As the voluntary intoxication defense is not popular with juries and as the evidence presented at the evidentiary hearing as to the defendant's level of intoxication was not substantial, trial counsel's decision not to present the defense is a reasonable tactical decision. See, Koon v. State, 17 FLW S -- (Fla. June 4,

1992) (decision not to pursue a voluntary intoxication defense was a reasonable tactical decision).

Instead of presenting a voluntary intoxication defense, counsel chose to present a 'diminished capacity defense' as outlined by this Court in Gurqanus, infra.. Hudson contends that counsel was not adequately familiar with this Court's decision in Gurqanus v. State, **451** So.2d 817 (Fla. 1984) and, therefore, his presentation of a 'diminished capacity defense' was somehow flawed.

In Gurqanus this Court stated that "evidence of any condition relating to the accused's ability to perform a specific intent" is relevant. Until five years later when Chestnut v. State, **538** So.2d 820 (Fla. 1989), was decided, the question of whether evidence of an abnormal condition not constituting legal insanity was admissible remained open to debate. See, Chestnut v. State, **505 So.2d 1352** (Fla. **1** DCA 1987). Thus, rather than being evidence of counsel's ineffectiveness, the fact that counsel was able to convince the trial court that this was a viable and admissible defense stands **as** a testament to counsel's skill as an advocate. The record shows that counsel had a clear understanding of the law as it stood at the time of Hudson's trial and used that law effectively for his client. Counsel is not responsible for subsequent refinements and retractions made by this Court with regard to the diminished capacity defense.

Appellant suggests that had counsel understood Gurganus he would have known he could also present a voluntary intoxication

defense. This claim is not supported by the record. Counsel presented the best defense available at that time. He never suggested that he thought the presentation of a 'diminished capacity defense' precluded the presentation of a voluntary intoxication defense.

The three witnesses that collateral counsel now suggests defense counsel should have presented are Gerald and Anthony Bembow and Becky Collins. As defense counsel testified, Becky Collins was the intended victim in the instant case and he felt it was not in his best interest to put the intended victim on the stand. He further testified that both Anthony and Gerald Bembow could supply evidence of intent and statements made by the defendant, many of which he had been successful in getting suppressed. And, further, neither of these three witnesses testified that the defendant was at any unusual level of intoxication. In fact, Dr. Macaluso, the defendant's addictionologist presented at the evidentiary hearing, testified that he based his analysis of the defendant upon the defendant's own representations as to the amount of cocaine he had ingested. (HR 411) Neither Anthony nor Gerald Bembow's testimony at the evidentiary hearing supports Dr. Macaluso's statement that the defendant was doing a 100 to 200 hits of cocaine a day. Both of the Bembows' testified that they usually did cocaine with the defendant maybe three times a week. (HR 349, 363) And, on the night of the crime, Anthony Bembow testified that they only did two hits together. (HR 354) Thus, Dr. Macaluso's conclusions

are suspect when based merely upon the self-serving statements of the defendant who is now sitting on death row. Further, Dr. Berland testified that now having received the information of the defendant's substantial drug problem, that the only difference that it would have made to his testimony is that it would have made it more forceful in that he would have been able to recount what lay witnesses had told him. (HR 309) While it is true that in penalty phase hearings hearsay testimony is admissible, Dr. Berland's opportunity to relate what these lay witnesses had told him would have been limited in the guilt phase. The bottom line is that his analysis was still the same. The degree of forcefulness of his testimony does not make defense counsel's performance deficient and would not have changed the outcome of the proceeding.

Further, it cannot be overlooked that the record shows the defendant's family intentionally kept the evidence of the defendant's drug use from defense counsel. The defendant's father testified that he did not tell defense counsel about the defendant's drug problem because he thought it would hurt the defendant. (HR 384) Whether the testimony concerning the defendant's drug problem at this time is colored by the defendant's presence on death row or whether it actually existed, the fact remains that defense counsel did a thorough job of investigating and even the evidence now presented does not rise to a level to make this investigation insufficient.

ISSUE III

WHETHER HUDSON WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION AND WHETHER DEFENSE COUNSEL WAS INEFFECTIVE IN SECURING A MENTAL HEALTH EXAMINATION.

The defendant argues herein that he was denied a competent mental health examination and that his counsel was ineffective for failing to secure an adequate examination. This argument totally ignores the facts of this case. The facts are defense counsel did secure a thorough examination of the defendant prior to trial and in fact put on a diminished capacity defense. Ake v. Oklahoma, 470 U.S. 68 (1985), merely requires the state to provide psychiatric assistance where there is a demonstrated need therefore and a defendant cannot afford to hire his own experts. See, Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987); Bertolotti v. State, 883 F.2d 1503 (11th Cir. 1989). Thus, there is no violation of Ake v. Oklahoma under the current circumstances.

Nevertheless, capital collateral counsel now asserts that trial counsel was ineffective for failing to secure a more thorough mental health examination. While trial counsel did note to the court that the expert had suggested that more time would be useful, there is no evidence in the record that would support the defendant's claim that his mental health examination was below constitutional standards. Thus, counsel's decision to go forward with the trial is a reasonable, tactical decision which will not support an ineffective assistance of counsel claim. Fuller v. Wainwright, 238 So.2d 65 (Fla. 1970).

There was no evidence presented at the evidentiary hearing that supports Hudson's claim that he was prejudiced during the guilt phase of his trial. All of the experts agreed that their ultimate conclusions remained the same. It was only their confidence in their original opinions that changed.

Accordingly, given that the defendant has been reexamined without any discernible difference in the final analysis, the defendant has failed to show that counsel's performance was deficient and that he was prejudiced by this deficiency. Further, to the extent that the defendant challenges the competency of his examination, this is an issue that could have been and should have been raised on direct appeal and is therefore waived.

ISSUE IV

WHETHER THE CIRCUIT COURT SHOULD HAVE GRANTED HUDSON'S MOTION FOR SUMMARY JUDGMENT AND ENTERED A SENTENCE OF LIFE IN PRISON.\

Appellant contends that the circuit court should have imposed a life sentence without the benefit of a new sentencing hearing because this Court may, upon review of a death sentence, find the sentence violates the proportionality standards set forth in State v. Dixon, 283 So.2d 1 (Fla. 1973). Appellant, however, cites no authority for the trial court to summarily enter a life sentence nor can the state find any support for Appellant's position. To the contrary a review of this Court's decisions and the Florida Rules of Criminal Procedure supports the lower court's determination that, having vacated the sentence, the only remedy available to the circuit court is to conduct a new penalty phase.

Rule 3.850 Florida Rules of Criminal Procedure provides in pertinent part:

> . . . If the court finds , . . that the sentence imposed was not authorized by law or is otherwise open to collateral attack . . . the court shall . . . resentence him or . . . correct the sentence as may be appropriate,

Thus, the trial court's authority is limited to correcting the sentence or resentencing the defendant. The sentence was vacated because of the court was concerned that the additional evidence may have increased the weight the trial court gave to the mental mitigators found by the court. It was not vacated because it was illegal or otherwise incorrect. Accordingly, the

only appropriate relief was to resentence Hudson. In order to sentence a capital defendant the law requires the court to conduct a penalty phase.

If the trial court had the option of summarily entering a life sentence, the state would necessarily be limited to the evidence and arguments presented at the original penalty phase. This Court has consistently rejected similar arguments. Preston v. State, 17 FLW 5252, 253 (Fla. April 16 1992); King v. Dugger, 555 So.2d 355, 358 (Fla. 1990). A resentencing is a completely new proceeding and, therefore, the "clean slate" rule applies to resentencing proceedings. As the jury recommended death during Hudson's original penalty phase, the State is entitled to a "clean slate" and the opportunity to present any additional evidence or arguments available to support the finding of additional aggravating factors, as well as the opportunity to rebut the evidence presented in mitigation. The state also has the right to have a sentencing jury review the evidence now presented and determine if it is truly mitigating in nature'[2] Preston

As the trial court determined that Hudson was entitled to be resentenced because of a question concerning the sufficiency of

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[2]The law is clear that absent a waiver by both the State and the defendant the trial court is required to conduct a penalty phase before a sentencing jury and receive a sentencing recommendation. Williams v. State, 17 FLW S92 (Fla. February 6, 1992); Brown v. State, 521 So2d 110 (Fla.), cert. denied, 488 U.S. 912 (1988); State v. Ferguson, 556 So.2d 462 (Fla. 2 DCA 1990), rev. den. 564 1085 (Fla. 1990).

the evidence and as there has been no waiver by the state of the penalty proceeding, the court correctly ordered a new sentencing hearing.

CROSS-APPEAL

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL.

In support of his imposing a sentence of death on Appellant, Circuit Judge John P. Griffin found two aggravating factors which were upheld by this Court in Hudson v. State, 538 So.2d 829 (Fla. 1989). The two aggravating circumstances were;

> 1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> 2. The capital felony was committed while the defendant was engaged in the commission of an armed burglary. (R **883)**

In contrast the trial court found three mitigating circumstances.

> 1. The crime for which the defendant (Timothy Curtis Hudson) is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.
>
> 2. The capacity of the defendant . . . to conform his conduct to the requirements of law were substantially impaired.
>
> 3. The age of the defendant at the time of the crime.
>
> **(R 883 - 884)**

The trial court gave little or no weight to the existence of the influence of extreme mental ok emotional disturbance in light of the facts which showed that Hudson entered the home in a

planned manner and after the killing he attempted to dispose of the body and soiled bed clothes in a planned and devious manner. Slight weight was also given to the defendant's age at the time of the crime which was twenty-two years of age. The trial court accepted, however, Dr. Berland's expert opinion that the capacity of the defendant to conform his conduct to the requirements of law was substantially impaired. The trial court also rejected any other aspect of the defendant's character or record as mitigation of the sentence..

In support of this mitigation counsel presented several family members, friends and mental health experts. Dr. Berland's testimony established a statutory mitigating factor that the defendant did not have the capacity to conform his conduct to the requirements of the law. (R 727) Penalty phase counsel also presented during the penalty phase the defendant's mother and father, the defendant's teacher at the correctional institute, Littleton Long, the defendant's Little League coach, Charles Bedford, Mitchell Walker, the employer of the defendant, and another friend of the family, Freddie White. (R 513, 518, 522, 526, 560, 562, 573)

In his Motion to vacate Hudson alleged that counsel was ineffective during the penalty phase of the trial in failing to present and investigate evidence of the defendant's drug problem as well as his dysfunctional family problem. At the evidentiary hearing Hudson presented evidence that he had a drug habit, that his mother was an alcoholic and that his parents divorced when he

was ten. Hudson also presented the testimony of Dr. Berland, who testified that having reexamined the defendant and having been given all of the information that collateral counsel asserts was not given to him previously,[3] his presentation would have been more forceful. (HR 309)

Based on the foregoing, the circuit court found that there was a reasonable probability that the outcome of the sentencing phase would have been different had counsel pursued and presented evidence concerning the defendant's drug problem. The court predicated this opinion in part on the opinion of this Court in Hudson v. State, 538 So.2d 829 (Fla. 1989), which affirmed Hudson's sentence of death by a vote of 4 to 3. The court also found that:

> Had penalty phase counsel presented the available evidence relating to the Defendant's addiction to cocaine and its effect on his mental state and had penalty phase counsel given this information to the mental health expert thus allowing the expert to render a substantially more comprehensive and persuasive opinion, there is a reasonable probability that the sentencing judge would have given more weight to the two mitigating circumstances relating to the mental health of the Defendant which he considered. (R 883 - 884) Had this been the case the sentencing judge, in undertaking his weighing process, may have found that these mitigating factors outweighed the two aggravating circumstances and may have sentenced the

[3] Dr. Berland testified that he did not remember what information was given to him and his files in the instant case were not complete. (HR 262 - 263)

Defendant to life imprisonment thereby rejecting the jury's recommendation of death.

(HR 805)

To establish ineffective assistance of penalty phase counsel the defendant must show that counsel's performance was deficient and the deficient performance affected the outcome of the proceedings. Strickland v. Washington, supra.

It is the State's position that the court below erred in finding that counsel's performance was deficient and that this deficient performance prejudiced the defendant. Accordingly, the state urges this Court to reverse the order of the court below and reinstate the death sentence.

First, Dr. Berland's testimony as presented at the evidentiary hearing does not support the finding of any mitigating factors that were not already found by the trial court. Nevertheless, the circuit court found counsel's performance was deficient and prejudiced the defendant because the trial court may have given the mitigating factor more weight, which may have swayed this Court in it's proportionality analysis. This finding is erroneous for two reasons. The trial court gave little or no weight to the mitigating factor of 'extreme emotional disturbance' not because there was a failure of proof, but because the "facts showed Hudson entered the home in a planned manner and after the killing he attempted to dispose of the body and soiled bed clothes in a planned and devious manner.'' (R 883-884) Further, as this Court has consistently

stated, the proportionality review is not a reweighing of aggravating and mitigating circumstances, but rather is a consideration of the circumstances in light of other decisions. Hudson, at 831; Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988).

The only additional facts now presented by the defendant are that his mother was an alcoholic and that he had a drug problem at the time of the offense. The addition of these two minor factors does not support the trial court's conclusion that there was a reasonable probability that this Court would have found it as compelling as the mitigating evidence presented in Fitzpatrick.. The evidence in Fitzpatrick established that Fitzpatrick did not initially plan to harm anyone, whereas Hudson entered Ewkngs home armed with a knife and with the intent to kill. Fitzpatrick also had an emotional age of 9 to 12 years-old, whereas Hudson was of average intelligence. (R 400, 403) Fitzpatrick was 'crazy as a loon,' whereas Hudson's problem was a character disorder rather than the result of any mental problem. Furthermore, Hudson was drug addict under legal constraint at the time of the crime. The cases are readily distinguishable and the call is not made any closer by the additional evidence of the defendant's drug abuse.

Further, as this Court recently noted in Mills v. State, Case No. 77,367 (Fla. June 4, 1992), the fact that counsel, through hindsight would now do things differently is not the test for ineffectiveness. Penalty phase counsel Conrad testified that he was comfortable with the job he did in light of the

information that was provided to him by the family, although he felt he may have been able to do a better job if he'd had this new information. (HR 814) Again, this hindsight analysis is not the test for ineffectiveness and the court below erred in finding counsel's performance deficient based on this hindsight.

The facts remain that penalty phase counsel was able to keep out a jury instruction on heinous, atrocious, or cruel even though the victim was stabbed four times, she was helpless, the attack was unprovoked, and she was in her own home asleep in the middle of the night. Conrad also presented extensive evidence in support of the mitigating factors and was able to convince the trial court to find same.

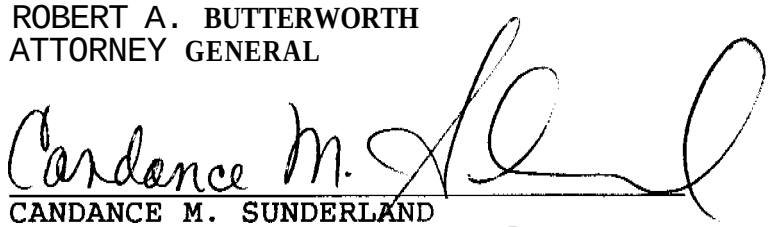
Accordingly, penalty phase counsel was not deficient in his performance, nor was the defendant prejudiced by any alleged deficiency. Tompkins v. State, 549 So.2d 1370 (Fla. 1989). Therefore, the state urges this Court to reverse the portion of the court's order vacating the death sentence and reinstate same.

CONCLUSION

Based on the foregoing arguments and citations to authority, the state urges this Court to affirm the portion of the court's order denying relief as to the judgment and reverse the court's order as to the sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 11 day of June, 1992.

OF COUNSEL FOR APPELLEE.