IN THE SUPREME *COURT* OF FLORIDA

NO. 78,462

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TIMOTHY CURTIS HUDSON,

Appellant,

v.

THE STATE OF FLORIDA,

Appe1lee.

---

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND *THE* FACTS

In the early morning hours of June 17, 1986, Mollie Ewinga waa atabbad to death in her Tampa home,

Ms. Ewings' roommate, Becky Collins, had recently been living with and was engaged to marry the defendant, Nr. Tim Hudoon. Their relationship broke down over Mr. Hudson's addiction to crack cocaine (PC-R. 145-151). Me. Colline observed that cocaine made Mr. Hudson, normally a courteoue man towards her, hostile and quick to anger (R. 260). The victim knew Mr. Hudson through Me. Collins, and he had often been a guest in her home (PC-R. 914). There were no indications of animoeity between them, but the victim apparently knew of threats which resulted in Ma. Collins spending the night elsewhere (PC-R. 246-252).

On the evening of the murder Mr. Hudeon used cocaine with his cousins, Anthony and Gerald Bembow, who were also heavy drug users. Their residence was a short walk from the victim's home (PC-R. 354). After leaving their residence, he went to the victim's home. Upon hie entering the house, the victim recognized and confronted Mr. Hudaon. She apparently began screaming at him to leave, and Mr. Hudson atabbed her four times in an attempt to quiet her. Hudaon v. State, 538 So. 2d 829 (Fla. 1989). The victim died within two minutes and was likely unconscioue as quickly as 20 seconds after the first wound (R. 290-96, 308). Mr. Hudson placed her body in the trunk of her car, then drove to purchaee and use more crack cocaine (R. 349-50; PC-R. 215). He later disposed of the body and the car.

Mr. Hudson waa arrested the next day. On June 18 and 19, 1986, he gradually confessed hin full involvement with the murder to police, having waived any opportunity to speak to counsel first (R. 646-701). On the 19th he wae induced to confeee through interrogation known am the "Christian burial technique" which this court disapproved. Hudson, 538 So. 2d at 830. Mr. Hudson wae crying, eick to his stomach, and visibly upset when he lead police to the body (R. 349).

On June 25, 1986, Mr. Hudson was indicted for first degree murder, armed burglary, and grand theft (R. 769-770). The public defender waa appointed to represent him on June 27, 1986, (R. 777). Am discovery unfolded the state listed both Anthony and Gerald Bembow am proeeetion witnesses. Gerald Bembow had been represented by the public defender in the recent past (R. 4-8). Based on this conflict trial counsel filed a Motion to Withdraw alleging that they were otherwise placed in a position of violating the Rules of Professional Conduct for attorneys (R. 796). The motion wan heard and denied three days before trial (R. 635-640). The Bembow's testimony was not investigated by trial counsel and neither was called to the stand because of the conflict. The trial was set to begin on January 26, 1987, but counsel did not arrange for a mental health evaluation to begin until January 8, 1987, and failed to provide their psychologist with any significant background material on Mr. Hudeon (PC-R. 229-230, 239 and 246). The circuit court found counsel's performance deficient in this regard and held that the jury wae precluded from hearing mitigation as a result.

Becky Collins, a key state witness and Mr. Hudson's former fiancee with whom he had recently lived, was not deponed by trial counsel until January 12, 1987, two weeks before trial (PC-R. 905-923). In that deposition Me. Collins diecueaed Mr. Hudson's increasing crack addiction and escalating violent behavior under the influence of crack (PC-R. 911-914). Trial counsel failed to utilize this information in any way. Again this was found to be deficient performance.

A0 the trial date approached Mr. Hudeon became increasingly anxious about hi0 attorney's lack of preparation and about a conflict of intereet arising out of the public defender'e representing Gerald Bembow. On December 8, 1986, he executed a pro se motion for reappointment of counsel (R. 794). On the day of trial, January 26, 1987, he finally insisted that he be heard by the trial court:

> THE COURT: All right. Mr. Hudeon, go ahead.
>
> THE DEFENDANT: I would like to state a verbal ineffective assistance of counsel, I feel my present attorney hasn't takeq

enough time to investigate my case properly. Due to the seriousness and my life is in jeopardy in this case, I feel more time is needed to prepare a good defense for me, sir.

THE COURT: What do you base your otatement on, sir?

THE DEFENDANT: I don't feel Mr. Stone is capable enough of handling my trial.

THE COURT: You say, well, in your otatement you said you don't feel like he had spent the time invemtigating your case properly.

THE DEFENDANT: True enough. But --

THE COURT: All right, air. I am aeking YOU, what do you base that on? You must have eome facts that you base that statement an.

THE DEFENDANT: Well, two weeks ago he came by and talked to me, aay he is going to send an investigator out to investigate, you know, more and more on thie caee.

THE COURT: And?

THE DEFENDANT: And it wae never done.

THE COURT: Anything else on which you baee your statements, sir?

THE DEFENDANT: Yea, air. I have filed a motion December 5 €or dismissal of counsel. I haven't heard nothing on it, Your Honor. And I wanted to say something about dismissal of counsel, last Friday. I noticed the Public Defender represented Bembo against me, I mean, represented Bembo in the past. And the state wanta to use him against me, and I wanted to know why the motion for dismiasal of counsel waa denied?

(R. 5-6)(emphasis added). The trial court diomiooed Mr. Hudson's concerns am thooe held by every defendant and refused to either continue the trial or appoint another attorney (R. 7-8).

At his trial Mr. Hudson's counsel told the jury during opening argument what the theory of defense was going to be:

The evidence will show that Timothy Hudeon has mental problem.. Timothy Hudson suffers from paranoid echizophrenia. And he har €or some time. This does not mean that Timothy Hudson is insane. Timothy Hudson is not insane.

What it does mean is that Timothy Hudson ouffera from mental defect that causes him to lose the ability to underetand and reaaon accurately. What it does mean is that Timothy Hudson has a leeeened capability for making rational choicer and directing his own behavior. What it means is that Timothy Hudaon lacked the mental capacity to form the specific infant necessary to be au — of first degree premeditated murder.

The evidence will show that Timothy Hudeon is guilty of second-degree murder. The evidence will show that Timothy Hudeon killed Mollie Ewinga by an act imminently dangeroum to another, wincing a depraved mind regardless of human life. That, ladiee and gentlemen, is eeeond-degree murder.

To be guilty of second-degree murder, one does not have to have tho ability to form a specific intent to kill someone.

Defense Opening Statement (R. 236-237)(emphasis added).

At the conclusion of the guilt phase trial eounael failed to insure that the charge conference was recorded (R. 431-432). There was a discussion on the record about a jury inatruction on voluntary intoxication.

MR. BENITO: I will acquiescence to go that teetimony baaed on the testimony (sic) of Doctor Berland as far aO this man's mental condition. I don' es to ar u intoxication in this particular caee.

I would bring to the Court's attention now that I see no evidence presented either throuah the cross-examination of the state's witnesses or the doctor that thie man, Timothy Hudson, was under the influence of any alcohol or druae at the time he committed thie crime and if Mr. Stone, I believe, were to argue that in hie closing argument, I may have to stand up, which I do not like to do, and object in his cloaing argument that he is arguing facta not in evidence.

THE COURT: Mr. Stone?

MR. STONE: Judge, if I had thought that the evidence was such that I could get an involuntary intoxication inatruction, I would have had one of thoae proposed.

THE COURT: You are not going to be arguing intoxication?

MR. STONE: I will not, I will not be arguing voluntary intoxication. I don't know whether in my cloeing argument I am not going to make any reference to the fact he had a drug problem, but it won't be, I won't be raying that he waa too intoxicated to form the intent.

MR. BENITO: That is fine.

(R. 438-439)(emphasis added).

The jury wae instructed on lesser included offenses which do not require specific intent (R. 473-481) ae well am:

Impairment of the mental faculties does not excuse or justify the commission of a crime. But euch impairment may exist to euch an extent that an individual is incapable of forming an intent to commit a crime, thereby rendering such person incapable of committing a crime of which specific intent is an eaeential element. When the evidence tende to establish such an impairment, the burden is upon the State to eetablieh beyond a reaeonable doubt that the defendant waa able to form and entertain the intent, which is an essential element of the crime.

> Impairment of the mental faculties which does not go to the extend of making a person incapable of forming the intent, which is an essential element of a crime, doea not reduce the gravity of the offrnee.

(R. 482).

Thr trial wae brief and Mr. Hudson was convicted as charged. On February 6, 1987, Mr. Hudson was eentenced to death (R. 725-732).

On direct appeal this court affirmed the convictions. Of the guilt phase claims this court commented only on the denial of a defense motion to suppreee. The opinion expressly disapproved of the "christian burial technique" of interrogation as "a blatantly coercive and deceptive ploy" and "police overreaching or coercive police conduct," but found the confession still voluntary. Hudson, 538 So. 2d at 830.

As to the imposition of the death penalty this court divided 4-3 on a proportionality review, The majority opinion auggeeted Mr. Hudson's situation wae "arguably a cloer call," Hudson, 538 So. 2d at 832. A dissent distinguished Mr. Hudson's eituation from that of the woret offendera deemed worthy of the death penalty:

> BARKETT, Justice, concurring in part and dissenting in part.
>
> I concur as to guilt and dissent as to sentencing. In hie sentencing order, the trial judge made the following findings:
>
> > The facts of the case, as produced by the evidence, indicate that the defendant, TIMOTHY CURTIS HUDSON, was apparently surprised by the victim during the defendant's burglarizing of the home owned by the victim and ehared with the defendant's ex-girlfriend....
> > ....
> > The extenaive testing done by Dr. Berland on the defendant, together with the circumstances of the surprise of the defendant during the burglary when confronted by the victim, convinces the Court that at the time of the killing and €or at leaet a ahort period thereafter, the defendant was unable, to a certain extent, to conform his conduct to the requirements of law....
>
> In light of our prior case law, I cannot conclude that the death penalty is proportionate under these facts. As was stated in the seminal came of State v. Dixon, 283 So.2d 1, 7 (Fla.1973), the death penalty is reserved "to only the most aggravated and unmitigated of most serious crimes." In light of the trial judge's explicit findings, I conclude that the murder in this case is not within the category of crimes described in Dixon.
>
> KOGAN, J., concurs.

Hudson, 538 So. 26 at 832-33.

The United States Supreme Court later denied certiorari. Hudson v. Florida, 110 8. Ct. 212 (1989).

On September 7, 1990, Governor Martinez accelerated Rule 3.850 by signing a death warrant eight month8 early (PC-R. 474). Poet conviction counsel was given until October 19, 1990, to file pleadings, the extension of time in recognition of the extraordinary load placed on the office as a result of multiple death warrants, many triggering the provisions of Rule 3.851. The pleadings laid out eight claims: (I) a conflict of interest based on the public defender's preeentation of both Mr. Hudaon and Gerald Bembow; (II) ineffective assistance of counsel baaed on a failure to develop evidence in support of an involuntary intoxication defense; (III) ineffective assistance of counsel during penalty phase; (IV) ineffective assistance of counsel through a failure to develop a competent mental health evaluation; (V) ineffective aaaietance of couneel through a failure to insure a fair and impartial jury; (VI) the trial court's failure to find and consider mitigation presented at trial; (VII) improper burden shifting by the penalty phase jury inatructiono; and (VIII) the use of unconstitutional automatic aggravating factor8 to arrive at the death sentence (PC-R. 493-594). The trial court atayed execution on October 24, 1990 (PC-R. 599-600). The State filed a response (PC-R. 606-617). An evidentiary hearing waa set for December 12-14, 1990, on the first four claims and any that related to ineffective assistance of couneel.

At the evidentiary hearing Mr. Hudson presented nine witnesses in the following order: trial co-counsel John Conrad; Mr. Hudson's former fiancee Becky Collins; hi0 sister Debra Hudson; trial co-counsel Raybun Stone: forensic psychologist Dr. Bob Berland; Anthony and Gerald Bembow; his father Daniel Hudson; and psychiatrist Dr. Peter Macaluso. Dr. Berland and Daniel Hudson had previously testified ae defense witnesses, while Mr. Collins waa a prosecution witness at trial. The State presented no testimony at the poet conviction hearing

Trial counsel testified, among other things, that they devised a defenae of diminished capacity which aought to avoid a voluntary intoxication defense based on Gurganus v. State, 451 So.2d 817 (Fla. 1984), a voluntary intoxication came (R. 246-237; PC-R. 200, 219, 220-223). They further testified that they coneidered Gerald Bembow brothers to be "a harmful etate witness" (PC-R. 229-230). However, they never depoaed, inveatigated, or took any atepm to determine what the brothers knew about the case (PC-R. 230-232).

Mr. Hudson's former fiancee, Me. Colline, testified that with his growing crack addiction he loet intereet in work, began to exhibit mental problems, became irrational, physically violent, and that him whole pereonality changed €or the worae. She had not been asked to testify to throe things by the defenee at trial. The Be-nbow brothere, neither of whom were aaked to testify at trial, teetified to Mr. Hudson's using crack with them, hie growing need €or crack, and ite severe, long lasting effect on him. Both were with Mr. Hudson the night of the murder and obeerved the eame things at that time. Debra Hudson, hie sister, teatified to her obeerving his growing crack ure in 1986 when he became paranoid and violent, lost all intereet in caring for himself, and left "crack cans" at the residence they ehared. Mr. Hudeon had borrowed money from her the day of the murder to buy more crack. Me. Hudeon had alao not been called to testify at the trial, nor had ehe ever been contacted by hia defenee team.

A defenae peychologist had been retained for trial on January 6, 1987 (PC-R. 201, 260-261) for a trial that began on January 26 where what amounted to a voluntary intoxication defanae wae announced (R. 236-237). The psychologist, Dr. Bob Berland, teatified at tho evidentiary hearing below that he needed more time to do an adequate evaluation (PC-R 260, 262):

> Q. Ie three weeks adequate time in your opinion to put together a capital case and in this came, a guilt phase defense and a penalty phase defenee?
>
> * * *
>
> A. No, that is ineufficient. Cuetomarily, I have needed to do testing and interview with the defendant. I need to look through documents, I need to track down and talk to lay witnesses. Typically need to brief the attorney. And that, unfortunately,

taken a fair amount of time. And three weeks would normally not suffice. I wouldn't take a case normally under thoee kind of constraints.

(PC-R. 261-262). Dr. Berland was not provided any background materials on Mr. Hudson (PC-R 262-263, 272-273, 276-277). In particular, Dr. Berland was not given materiala about Mr. Hudson's serious cocaine addiction (PC-R 263). Had he been provided anything on this issue, he testified that it would have prompted hie wanting more because psychoactive drugs, particularly cocaine, tend to exacerbate psychotic systems (PC-R 266). At the evidentiary hearing Dr. Berland observed cocaine use by a person with Mr. Hudson's other mental disorders results in "somebody who is going to be eeverely disturbed and with relatively few controls over his behavior" (PC-R 283-284). Having been provided this additional background material Dr. Berland concluded that Mr. Hudaon was "a lot more aeverely mentally disturbed than I had, at thr time of the offense, than I had underatood him to be" (PC-R 287). He saw no evidence the defendant was malingering (PC-R 298).

The last of Mr. Hudson's post-conviction witnesses wan Dr. Peter Macaluso, an expert in addiction medicine (PC-R. 400-402). In his examination and evaluation of Mr. Hudson he relied upon background materials and witness interviews supplied by poat-conviction counsel but neglected by trial counsel. He told the trial court below of Mr. Hudson's severe cocaine intoxication and its effect on hi0 ability to form specific intent:

Q. Mr. Hudson's disease of chemical dependency, how advanced was it by the time of the crime in this case, which would have been June of 19861

A. Mr. Hudson, by the time you mentioned was consuming massive amounts of cocaine along with other drugs, mainly marijuana and alcohol and often times heroin. Hie cocaine addiction was to such a extent where he would use what is termed as a slab per day, which is about a hundred to two hundred hits of cocaine. This is advanced addiction to cocaine, producing toxic affects, toxic peychoais, if you would, meaning that the levele of cocaine was to such an extent where hie ability to perceive and interact with his environment were grossly impaired. His ability to reason, to process information were groaely impaired. And these effecte would produce what we term a toxic psychotic state. Cocaine peychosie. The prolonged effecte produced waa termed organic brain syndrome, inability to remember, to process information.

Q. In layman's term, damage to the brain?

A. Brain damage. That's, that's correct.

(PC-R. 410-411).

After allowing for transcription of post-conviction testimony, post hearing memoranda (PC-R. 636-735), and oral argument the trial court on July 23, 1991, denied guilt phaee relief, granted a new jury sentencing, but refused to impose a life sentence.

Cross appeal8 timely followed.

## SUMMARY OF THE ARGUMENTS

I. Gerald Bembow was listed by the State ae a person with material and relevant information regarding the charged offenes. Mr. Hudson's trial couneel advised the trial court and Mr. Hudeon that couneel had previoumly represented Gerald Bembow and that counsel was burdened with a conflict. Mr. Hudeon did not waive the conflict, and in fact, aeked to have counsel removed. The trial court denied the request. The State then chose not to preaent Gerald Bembow as a witness. However, defense couneel, because of his conflict, never spoke to Gerald Bembow and never learned what relevant information he poaaeeeed. Ae a result, Mr. Hudson wae denied conflict free repreeentation and deprived of the benefit of exculpatory evidence. A new trial must be ordered.

11. Counael unreasonably failed to investigate Mr. Hudson's drug usage and how it could be used as a defense at the guilt phaee of his trial. Ample evidence was available and could have been uaed in an effort to convince the jury to convict of the lesser offense, second degree murder. As a result, Mr. Hudeon was prejudiced by couneel's deficient performance.

III. Trial couneel failed to obtain a timely and adequate mental health evaluation of Mr. Hudson. Had counsel performed reasonably, mental health testimony eupporting a voluntary intoxication defense would have been available. This testimony would have resulted in a eecond degree murder conviction; at the very leaet confidence ie undermined in the reliability of the verdict in the abeence of the available expert opinion. Accordingly, a new trial muet be ordered.

IV. The circuit court ruled that penalty phaee couneel'e performance wae deficient, and that, a0 a result, a wealth of mitigating evidence wae not preeented to the jury nor in the direct appeal record. The circuit court, accordingly, granted a new penalty phaee proceeding. However, the circuit court should have gone further and simply imposed a life sentence. This is becauee, had the additional mitigating evidence been contained in the record on direct appeal, thie Court would have imposed a life eentence in the course of its proportionality review. Accordingly, thie Court should order a life sentence imposed now.

## ARGUMENT I

### MR. HUDSON WAS DENIED HIS FIFTH, SIXTH, EIGHTH *AND* FOURTEENTH AMENDMENT RIGHTS BECAUSE OF THE PUBLIC DEFENDER'S OFFICE'S CONFLICT OF INTEREST.

In summary, the problem was that the public defender's office repreaented Mr. Hudson and in the recent past had represented Gerald Bembow. Mr. Bembow was serving a prison eentence at the time of this trial. The State listed Mr. Bembow a0 a witnese and had him transported back to Tampa for trial. Trial counael filed a motion to withdraw from Mr. Hudson's case based an thie obvioue conflict between clients. It was denied at a motion hearing four days before trial. Mr. Hudeon refused to waive the conflict but it wae repreeented to the court that Mr. Bembow would waive hie rights as to the conflict.

While thia tranepired, trial counael had been placed an notice that Mr. Bembow would be the source of important testimony both ae to voluntary intoxication at the guilt phaee and mitigation at the penalty phase. However, having been paralyzed by the conflict issue, trial counael failed to investigate Mr. Bembow's testimony in that regard. In fact, they were circumspect in avoiding any contact with Mr. Bembow, much to Mr. Hudson's detriment.

Mr. Hudeon is entitled under the sixth and fourteenth amendments to legal repreaentation that Fa free of conflicts of interest. Wood v. Georgia, 450 U.S. 261, 270-271 (1981); Burden v. Zant, 871 F.2d 956, 957 (11th Cir.

1989), and Harich v. State, 542 So. 2d 980, 981 (Fla. 1989). Thie is not possible where the public defender'e office represents both Mr. Hudson and a potentially key government witness. It makee no difference that the government witnesses came had already plead out at the time of Mr. Hudson's trial. Brown v. State, 17 F.L.W. §159, 160 (Fla. March 5, 1992).

> In order for [Mr. Hudson] to prevail on thie claim, he must demonstrate that [trial counsel] actively represented conflicting interests and that an actual conflict of intereat adversely affected [trial couneel'e] performance. Cuvler v. Sullivan, 466 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980); Stevenson v. Neweome, 774 F.2d 1558, 1562 (11th Cir.1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986). "An actual conflict exists if counsel'a introduction of probative evidence or plausible arguments that would significantly benefit onr defendant would damage the defense of another defendant whom the same counsel is representing." Batv v. Balkcom, 661 F.2d 391, 395 (5th Cir.1981)(Unit B), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982). In order to show an actual conflict, [Mr. Hudeon] must demonstrate that [trial counsel] chose between possible alternative courses of action such ae eliciting or failing to elicit evidence helpful to [Mr. Hudeon] but harmful to [Mr. Bembow]. See Stevenson, 774 F.2d at 1562.
>
> In the instant case, [Mr. Hudaon] claims that [trial counsel] owed a continuing duty to [Mr. Bembow] which prevented vigoroue croee-examination without violating the attorney/client privilege. [Mr. Hudson] asserts that [trial counsel] was forced to chooee between discrediting his former client through information learned in confidence, or foregoing vigorous cross-examination in an attempt to preserve [Mr. Bembow'e] attorney/client privilege. If true, theee aesertione would suffice to demonstrate an actual conflict of interest.
>
> In addition to showing an actual conflict of interest, [Mr. Hudson] must also show that the conflict adversely affected hie lawyer's repreeentation. In other words, [Mr. Hudson] must show that another defense etrategy that could have been employed by another lawyer would have benefitted hie defense. See Stevenson, 774 F.2d at 1562; United States v. Mers, 701 F.2d 1321, 1328, 1329-30 (11th Cir.1983), cert. denied, 464 U.S. 991, 104 S.Ct. 482, 78 L.Ed.2d 679 (1983).

Porter V. Wainwright, 805 F.2d 930, 939-940 (11th Cir. 1986).

Trial couneel was aware of the conflict. In the daya before trial they filed a notion to Withdraw And To Appoint Private Counael alleging "(t)hat represeentation of the defendant, TIMOTHY CURTIS HUDSON under the circumstances of thie case would constitute a conflict of intereat and/or a violation of the Rules of Professional Conduct for attorneys" (R. 796). The motion was heard on January 23, 1987:

[The Court:] This is is the matter of the State of Florida versus Timothy C. Hudson, Case 86-8613.

First motion is motion for individual voir dire and sequestration of jurors. You wish to add anything to your motion, sir? Don't repeat any of the allegations of your motion, because I have read all the motion.

**MR. STONE:** No, Your Honor.

**THE COURT:** Do you have anything to add to it?

**MR. STONE:** No, Your Honor.

**THE COURT:** Response from the State?

**MR. BENITO:** Judge, if I can stop you there, I hate to throw a monkey wrench in there. Am you recall, we continued until today Mr, Stone's motion for conflict. He tried to withdraw sometime last week because I waa going to call a witness Gerald Bembow, and he had previously or hie office had previously repreeented Mr. Bembow. We put it off to today to see what the eituation is. If he is still going to make the motion to conflict off, I think we have to decide on that before we get into the other motions.

**THE COURT:** I agree. I had completely forgotten that.

Mr. stone?

MR. **STONE:** Your Honor, the poeition that we are in is that we have a problem if the State chooeee to call Gerald Bembow. I believe it wae continued until today for the State to decida whether they were going to use Gerald Bembow.

THE **COURT:** Waen't the State'e comment at that time you didn't think you were going to use him at all, Mr. Benito?

**MR. BENITO:** That is correct, Judge.

**THE** COURT: Well, what is the State'e poeition now?

**MR. BENITO:** I think I can use him now, Judge.

THE **COURT:** Okay. Now, Mr. Stone?

MR. STONE: Judge, it's our poeition that there is a conflict that is covered by 4-147 of the Rules of Conduct of Lawyers, that being: A lawyer shall not represent a client if the lawyer has exercised independent professional judgment and repreaentation of that client may be limited by the lawyer's responsibilities to another client or to a third person or by tho lawyer's own interest unless:

(1). Lawyer reaeonably belirveo representation will not be adversely affected and,

(2). The client consents after coneultation. I would submit that that client, Your Honor, would be Mr. Hudson. I believe that thie case does €it into that eituation. And I have discussed the case with Mr. Hudson and he does not consent to my continued representation.



a.

* * *

**THE COURT:** What is the State's response to Mr. Stone'. posture that he finds himself in?

MR. BENITO: Well, I don't see where Mr. Stone is going to have under that section he cited from the code, a responsibility to another client after I have conferred with Mr. Bembow. Mr. Bembow will tell the Court under oath that he will waive any prior attorney/client privilege between himaelf and the Public Defender's Office, that he is willing to allow the Public Defender to aek him anything on the witness stand that they want to ask him, that in hie conversatione with me he aaya he does not recall talking to the Public Defender about anything that would lead to any embarrassment to him if he did testify in this particular came.

And with that I don't see why Mr. stone can't effectively cross-examine Mr. Bembow if he is called to testify.

MR. STONE: Your Honor, the issue is more than merely an attorney-client privilege and a waiver: doesn't, a waiver of Mr. Bembow does not solve the problem.

**THE COURT:** Tell me what the problem is.

**MR. STONE:** I am not at liberty to discuss all the new answers end permutations of how this rule affects the situation I find myself in.

**THE COURT:** I tell you what you do. You come up here, approach the bench with the court reporter, without the State being here, you all step back at the first bench.

Mr. Stone, you come up here; put it on the record with me, with only me listening.

MR. **STONE:** Your Honor, I would prefer to decline that offer and stand on the motion.

**THE** COURT: Your motion is denied. then. You will continue to represent him, sir. And I do accept a waiver of the attorney-client privilege from the witness. How do you spell him name?

**MR. BENITO:** Gerald Bembow, B-e-m-b-o-w. I bring to the Court'e attention that does not mean I am going to use Mr. Bembow. I have that option at this time. I have made Mr. stone aware that Mr. Bembow's brother, Anthony Bembow, who will be available any time Mr. Stone wants to take the deposition between now and the time we start this trial, ham the same information that Gerald Bembow hae.

**THE** COURT: If you call Gerald Bembaw.

**MR. BENITO:** Yes, air.

THE **COURT:** He is going to have the opportunity, I don't care what similar information the other guy has, he is going to have the opportunity to depoee him.

**MR. BENITO:** Oh, I underatand that, sir.

THE COURT: All right.

(R. 635-640)(emphasis added). Trial eouneel never deposed, investigated, or took any steps to determine what either of the Bembow brothers know about the case (PC-R. 230-232).

Mr. Hudeon continued to be in fear of thie dual representation of himself and Gerald Bembow. The day him trial began Mr. Hudeon told the court:

> THE DEFENDANT: Yes, sir. I have filed a motion December 5 for dismissal of couneel. I haven't heard nothing on it, Your Honor. And I wanted to say eomething about dismissal of counsel, last Friday. I noticed the Public Defender represented Bembo [sic] against me, I mean, represented Bembo [sic] in the past. And the State wants to use him against me, and I wanted to know why the motion for diemissal of counsel wan denied?

(R. 6)(emphasis added).

Gerald Bembow testified at the December hearing as to hi0 willingness and availability:

> Q. Shortly after Mr. Hudson wae arreeted for this offense, you got in some trouble; is that correct?
>
> A. Yee.
>
> Q. And what was that in relation to, what were the charges?
>
> A. Crack cocaine sales and delivery.
>
> Q. You, in fact, were caught and you recall that you were convicted of poseeeaion and delivery of crack cocaine?
>
> A. Yea.
>
> Q. Is that not correct? When wae that, do you recall, in '86?
>
> A. I think June, June 27th, something like that.
>
> Q. Sometime shortly after this incident?
>
> A. Right.
>
> Q. And, in fact, you were sentenced; is that correct?
>
> A. Yes.
>
> P. Where were you shipped of€ to?
>
> A. Apalachicola Institution.
>
> Q. And as a matter of fact you were later brouaht back here to Tampa in reference to Mr. Hudson's Case, were you not?
>
> A. Yes.

Q. And at any time either prior to being brouaht back or after you were brought back did anyone representing Mr. Hudeon attempt to talk to you or to ask you questions about what you eaw on the Niaht that Miss Ewina was murdered?

A. No, sir.

Q. You indicate in your affidavit that surprised you.

A. Yes.

Q. Why is that?

A. Becauee when the detective talked to me and when they bruna me back. I fiaured that eomebodv would talk to me about it, you know. I didn't know.

Q. No one ever attempted to talk to you then?

A. No.

Q. Had Mr. Hudson's attorneye wanted to call you on the stand during this trial in January of '87 and testify to the thing8 you have testified to here today, would you have done that?

A. Yes.

Q. No doubt in your mind?

A. No doubt.

(PC-R. 370-372)(emphasis added).

Trial co-counsel testified he was vaguely aware that Mf. Bembow might have some teetimony as to Mr. Hudson's drug uee:

Q. okay. Other than Miss Colline, do you know if there was any other information that you can recall now that crack cocaine had been mentioned in connection with Mr. Hudeon?

A. I have been told that, well --

Q. If you can remember. If you can't, sir, I mean, we realize it was four years ago.

A. I remember that there was other evidence out there that he had and that he had not used crack cocaine shortly before.

Q. All right.

A. The incident.

Q. Do you recall who had the information that he had uaed it ehortly before?

A. The only name that *comes* to mind is Gerald Bembow but the reason that I remember that, the reason that name comes to mind, is, quite frankly, I read it in your motion.

Q. Okay. Do you recall eeeing that police report that was quoted in our motion prior to trial?

A. No.

(PC-R. 212)(emphasis added). He also testified that there were no defense contact. with Gerald Bembow:

Q. I underatand, sir. Did you talk to Gerald Bembow?

A. I don't remember ever talking to GeraId Bembow or seeing in my notes anywhere where our investigator had talked to Gerald Bembow.

Q. Do you know why?

A. It, I would have to, I would have to gueae. Gerald --

Q. Guessing doesn't help Judge Lazzara, doesn't help me and it doeen't help Mr. Benito.

A. I don't know.

* * *

Q. You know what Gerald Bembow would have aaid, Mr. Stone?

A. Do I know what he would have aaid? No, I don't know what he would have aaid.

Q. Do you always make tactical decisions before investigating what a witneae could say?

A. Do I always make tactical decisions? No. I don't alwave make taetical decisions.

Q. But you did in this case?

A. If the question is, did I decide to not put Gerald Bembow on without personally talking to him, the answer is, yes, I decided not to put Gerald Bembow on without first talking to him. I have no recollection of ever talking to him.

* * *

Q. Sir, let me ask it thie way: Who handled the penalty phaee of Mr. Hudson's case?

A. Mr. Conrad. John Conrad.

Q. You have testified that you choee not to use Mr. Bembow's evidence at the guilt-innocence phaee. Would you have deferred to Mr. Conrad as to a decision whether to use Mr. Bembow on the penalty phase of the trial?

A. Ye..

Q. And just to clarify it, I don't want to belabor the point, you decided not to talk to Mr. Bembow €or tactical reasons; is that my underatanding?

A. I don't, I don't ever remember making a decision not to talk with him. Evidentlv, I didn't talk with him.

(PC-R. 230-232)(emphasis added).

On cross examination, trial co-counsel again spoke of the conflict and suggeeted his concerns were not met by the State's representation to the court that Mr. Bembow would waive hie rights:

> Q. And you made a motion for conflict baaed on Gerald Bembow, but isn't it a fact that we resolved that: when Gerald Bembow, I announced Gerald Bembow wouldn't even testify?
>
> A. My concerns with Gerald Bembow revolved around my having to croee-examine him.
>
> Q. Right. And you recall, if you have read the transcript, the State did not use Gerald Bembow?
>
> A. That is correct.

(PC-R. 241)(emphasis added). It ehould be pointed out that just becauee the State did not call Gerald Bembow does not remove the problem of defenae being effectively paralyzed by hie remaining a potential proeecution witness whom the defense would have to cross-examine until the laet minute. Gerald Bembow had been disclosed as a person who possessed relevant information; yet, defenae counsel never talked to Gerald Bembow.

Trial co-counsel could not recall either defense lawyer having made any effort to determine just what Mr. Bembow would have to say:

> Q. Okay. Do you recall any etafemente given to police by a Gerald Bembow, spelled B-E-M-B-O-W?
>
> A. Without benefit of the police report, I can't aay ye0 or no.
>
> Q. Do you know if you talked or Mr. Stone talked with Mr. Gerald Bembow?
>
> A. I don't believe we talked to Gerald Bembow. I think we interviewed Anthony Bembow.

(PC-R. 53-54)(emphasis added). He could not recall the circumstances of this critical omission (HR. 61-62). He was aware of the conflict between these two public defender clients:

> Q. Sir, do you know what charges Hr. Bembow had been represented on by the PD's Office which caused the initial conflict?
>
> A. Which one?
>
> Q. The one that Mr. Stone raised the conflict issue on? Do you know what charges were involved in Nr. Bembow's case?

A. I think -- as I etated earlier, I think I was just trying to guess, based on my recollection that there was a conflict with one of the Bembow brothere. Which one I do not recall. And I do not recall which charges would have been pending either at the time or in the past that we would have repreeented which one of them on.

I'm not sure which one it was.

(PC-R. 63)(emphasis added). Trial co-counsel had no recollection as to whether they followed through on information disclosed in a deposition that euggeeted Gerald Bembow would be an important witness:

Q. And what doee Me. Roberson indicate her underetanding is of what Mr. Gerald Bembow doee?

A. According to this is ehe believed that Gerald Bembow mold rock cocaine.

Q. All right. And after she states that, what does Mr. Benito say?

A. Well --

Q. On Page 14, I'm sorry, Line 2.

A. Mr. Benito says, "Ray, you need to get ahold of Gerald."

Q. What does Mr. Stone say?

A. "Yes."

Q. Do you know if Mr. Stone ever did that?

A. I have no recollection or knowledge of whether he did or did not.

(PC-R. 67-68)(emphasis added).

Trial co-counsel apparently reaolved the conflict with Mr. Bembow by avoiding any contact with him, thua avoiding knowledge of the potentially valuable testimony he could add to their quasi-voluntary intoxication defense. At the evidentiary hearing below lead trial couneel testified that he could not recall any strategic or tactical reason for not determining what Gerald Bembow might have to say, but added "I coneidered Gerald Bembow a harmful state witness" (PC-R. 229-230). He offered no explanation €or why he would not determine the testimony of "a harmful etate witness" in advance of trial. Trial counsel testified that he undertook no independent investigation of Mr. Hudson's intoxication at the time of the offense, including interviewing Mr.

Bembow (PC-R. 234). This in spite of the fact it was the foundation of his planned defenee. Had Gerald Bembow testlfied at trial, he would have stated:

Q. Let me draw your attention to the time period of 1985, 1986 were you in contact with Mr. Timothy Hudeon?

A. Yes.

Q. And how often would you eay that you saw Mr. Hudeon during that period?

A. Very frequently, probably three, four times a week.

Q. During that time period did you ever have the opportunity to smoke crack cocaine with Mr. Hudoon?

A. Yes.

Q. How often would you eay that you smoked crack cocaine with Mr. Hudaon?

A. Maybe approximately three times a week.

Q. Would it be typical for you two to amoke crack cocaine every time you got together?

A. Yea.

Q. During that period of time you were selling crack cocaine; is that right?

A. Yea.

Q. What kind of reaction did Mr. Hudson have to crack cocaine? What ware your obeervatione?

A. Very, very paranoia. It was, you know, in my experience using the drug, I never seen anyone react the way he did on it. And it was, he was a different weraon.

Q. How so? In your terms what can you tell the Judge about your observations?

A. He was, like, Daranoid and afraid of his surroundinas or someone hurting him or something like that. He just reacted totally different from anybody I ever seen using the druq.

Q. Did you ever see him get argumentative or mad for no reason while under the influence of crack cocaine?

A. Not really mad but upeet if you moved around or something like that. He would like thinge to be quiet and everybody still.

Q. So he would react to movement?

A. Right.

Q. To sound?

A. Right.

Q. How would he react?

A. Jump you. Scared, paranoia, real bad.

Q. Is it safe, you have seen other people use crack cocaine?

A. Yes.

Q. Is it safe to say that; everyone reacts to crack cocaine? Your behavior chansee to some extent?

A. Right. But hia was, his, the way he chanaed was like nothina I ever saw before, you know, in my experience in smoking crack. And I, you know, it waa very, very paranoia. Frightening.

Q. How many different people, approximately, would you say you have smoked crack cocaine with?

A. I can't give a number. Plenty.

Q. Quite a few?

A. Yes.

Q. You noticed a profound difference, though, in the way Mr. Hudeon reacted?

A. Yes.

Q. From your observations how bad wae Mr. Hudson's crack problem during the time frame of June *19861*

A. I think it was aort of bad. He was, he smoked it pretty bad.

Q. In fact, you were interviewed by a Detective Black, were you not?

A. Yes.

Q. As a matter of fact, you told Detective Black that Mr. Hudson had a bad cocaine, crack cocaine problem?

A. Yea.

Q. Do you recall the night that Miss Ewing wan killed?

A. Yes.

Q. Did you see Mr. Hudson an that day?

A. Yea.

Q. You recall when you first saw Mr. Hudson that day?

A. Yes. It was dusk. Dusk dark.

Q. Approximately what time; do you know?

A. I think about 5:00 or 6:00.

Q. Late afternoon?

A. Right.

Q. Was, where did you see Mr. Hudeon at that time?

A. Rembrandt Apartment.

Q. Who was living at that Rembrandt Apartments?

A. Well, I lived there.

Q. And what were your observation of Mr. Hudeon when you maw him during the late afternoon of that day?

A. He was, I could tell he had been getting hiah.

Q. And how could you tell that he was uettina hiah?

A. Because I, I have known him all my life and I knew him when he wasn't hiah and when he was. And I could tell, you know. bv looking at him, he was hiah.

Q. Did you see him use crack cocaine on that occasion?

A. NO.

Q. But you did obeerve that he appeared to be high at that time?

A. Right.

Q. How long was Mr. Hudson with you at that time; do you recall?

A. No, I don't recall. He left.

Q. Did he come back later?

A. Yes, he come back around eleven. 11:30, something like that.

Q. And do you recall what kind of condition Mr. Hudson was in when you saw him at approximately, say, 11:00, 11:30 that niaht?

A. Yes. I could tell he had been emokina more druqs, because he was higher.

Q. What do you mean, emokina more druqs?

A. Crack. I mean, be waa hiah. He was nervous. And his eves were biq and qlassy.

Q. How long wae he with you at that time; do you recall?

A. I think about five minutea, five, ten minutea.

Q. And you indicated to the police, in fact, he asked you to go some place with him; is that correct?

A. I think so. And my ex-girlfriend aeked me to come inside, and that ie when I went inside. I asked him to spend the night, but he told me he was aoing.

Q. Whv did YOU ask him to spend the niaht?

A. Becauee he was high. And I felt like he should have slept it off, try to sleep it off became I observed he wae very high.

Q. In fact, he indicated in the report that he got upset with you when you wouldn't go with him?

A. Yes, he was, he was anarv because he was high and I knew it.

Q. Again, an indication that he got upset far no apparent reason?

A. No.

Q. Do you know a Miss Roberaon?

A. Yes.

Q. Wao she living near you at this time?

A. Yes, two apartments over.

Q. Mr. Hudson apparently left, then, after your girlfriend aeked you to come in3

A. Yea.

Q. And how long was he with you at that time?

A. About five or ten minutes. I think he left it was around 12:00.

Q. When you get high on crack cocaine, there's an initial high; is that correct?

A. Yea.

Q. How long does that last, in your experience?

A. About ten, fifteen minutes.

Q. And are you back to normal, then, after ten or fifteen minutea?

A. Moet people are.

Q. okay.

A. But --

Q. What about Mr. Hudson, as far as your obaervationa?

A. I think the high last longer on him, because my experience around him, it affected him a lot different than other people I know.

Q. Had you ever asked Mr. Hudson to sleep it off before?

A. No.

Q. Why did you that night?

A. Because I could tell he was very high.

(PC-R. 363-370)(emphasis added)(see also PC-R. 377). Gerald Bembow teetified that he waa so etruck by Mr. Hudeon'e reaction to crack that he broke his own habit as a result. "I got to thinking about Tim and I knew him all my life. He is a good person. And I know thie. And I seen how it affected him. And I tried to straighten my life out now, you know, because of what happened with him and his situation." (PC-R. 372).

Gerald Bembow was in prison at the time of Mr. Hudson's trial am a result of the charges on which the public defender has represented him. He was brought back to Tampa for Mr. Hudson's trial, but did not testify. He was surprieed that no one contacted him on behalf of Mr. Hudaon (PC-R. 371).

The defense afforded Mr. Hudson by the Public Defender wae inevitably eroded, much to Nr. Hudson's prejudice, by thie conflict between cliente. "If the defendant or his attorney give the trial court notice of an alleged conflict, and the trial court fails to inquire into the conflict, a reviewing court will presume prejudice upon a showing of possible prejudice." United States v. Horton, 845 F.2d 1414, 1418 (7th Cir. 1988). Even if the conflict only arieea in conjunction with sentencing proceedings, revereal is required if a court is given notice and fails to act to insure that the conflict does not prejudice the defendant. United States v. Ziegenhagen, 890 F.2d 937 (7th Cir. 1989). Here the trial court waa put on notice of the conflict. Even so, nothing was done to inaure that conflict free counsel interviewed the witness and evaluated hi0 story to determine whether it could be ueed on Mr. Hudson'e behalf at either guilt or penalty phases. Prejudice must be preeumed.

It makes no difference whether this situation wae caueed by trial counsel's lack of seneitivity to a very real conflict, or if the situation wae forced on trial counsel by the trial court's refueal to see the conflict and ordering trial counsel to proceed. See United States v. Cronic, 466 U.S. 648

(1984). Mr. Hudson lost hie sixth amendment right to counsel either way. Counsel did not learn what Gerald Bembow might know about the case and did not employ that important information in him defense. A new trial must be ordered.

## ARGUMENT II

**MR. HUDSON** WAS **DEPRIVED OF HIS EIGHTH** *AND* **FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF** COUNSEL **BY HIS** ATTORNEY'S **FAILURE TO ADEQUATELY INVESTIGATE,** DEVELOP, *AND* PRESENT **AMPLY AVAILABLE EVIDENCE IN** SUPPORT **OF** A VOLUNTARY **INTOXICATION DEFENSE.**

From the beginning guilt phaee counsel developed a theory of thia caac which required the preeentation of testimony about Mr. Hudson's voluntary ingeetion of crack cocaine and other substances, as well as hie individual response to theae drugs. Because this was a case with "a full-blown confession" (PC-R. 235), an absolute innocence defenee was not considered. Trial counsel, instead, eought to ehow that Mr. Hudeon could not form specific intent. This is obvious from trial counsel's argument to the jury making it clear how important these issues would be to the final outcome. At trial, the theory of defense offered was that:

> The evidence will show that Timothy Hudeon has mental problems. Timothy Hudeon suffers from paranoid schizophrenia. And he has for some time. This does not mean that Timothy Hudaon is insane. Timothy Hudaon is not insane.
>
> What it does mean is that Timothy Hudaon suffere from mental defect that causes him to lose the ability to underetand and reason accurately. What it does mean is that Timothy Hudeon has a leeeened capability for making rational choices and directing his awn behavior. What it meane is that Timothy Hudson lacked thg mental capacity to form the specific intent necessary to be guilty of first-dearee premeditated murder.
>
> The evidence will show that Timothy Hudeon is guilty of eecond-degree murder. The evidence will ehow that Timothy Hudson killed Mollie Ewinge by an act imminently dangerous to another, evincing a depraved mind regardless of human life. That, ladies and gentlemen, is eecond-degree murder.
>
> To be guilty of second-degree murder, one doee not have to have the ability to form a specific intent to kill someone.

Defense Opening Statement (R. 236-237)(emphasis added).

Trial counsel here failed to insure that the guilt phase charge conference was recorded (R. 431-432), but some diecueeion of jury inatruetione does appear on the record. Trial counsel and the court indicated that a

voluntary intoxication instruction would not be sought or given because counsel had not produced sufficient testimony to support it:

> MR. BENITO: I will acquiescence to go that teetimony baeed on the testimony (eic) of Doctor Berland ao far ae this man's mental condition. I don't know if Mr. Stone proposee to argue intoxication in this particular caee.
>
> I would bring to the Court's attention now that I see no evidence Dreeented either throush the cross-examination of the State's witnesses or the doctor that this man, Timothy Hudson, was under the influence of any alcohol or drugs at the time he committed this crime and if Mr. Stone, I believe, were to argue that in hie cloeing argument, I may have to stand up, which I do not like to do, and object in his closing argument that he is arguing facts not in evidence.
>
> THE COURT: Mr. Stone?
>
> MR. STONE: Judge, if I had thought that the evidence was euch that I could get an involuntary intoxication instruction, I would have had one *of* those proposed.
>
> *THE* COURT: You are not going to be arguing intoxication?
>
> MR. STONE: I will not, I will not be arguing voluntary intoxication. I don't know whether in my closing argument I am not going to make any reference to the fact he had a drug problem, but it won't be, I won't be saying that he wae too intoxicated to form the intent.
>
> MR. BENITO: That is fine.

(R. 438-439) (emphasis added). However, the jury wae instructed on Nr. Hudeon'e impairment:

> Impairment of the mental faculties doee not excuse or justify the commission of a crime. But such impairment may exist to such an extent that an individual is incapable of forming an intent to commit a crime, thereby rendering such person incapable of committing a crime of which specific intent is an essential element. When the evidence tends to establish such an impairment, the burden is upon the State to eatablish beyond a reasonable doubt that the defendant was able *to form* and entertain the intent, which is an essential element of the crime.
>
> Impairment of the mental facultiea which doee not go to the extent of making a person incapable *of* forming the intent, which is an essential element of a crime, doea not reduce the gravity of the offense.
>
> Burglary and murder in the firat-degree are both crimes requiting a specific intent.

(R. 482).

Guilt phaoe couneel teetified at the Rule *3.850* hearing that "the defense theory was that it waa second degree murder rather than firet-degree murder.

That him mental impairment prevented him from forming the premeditated deeign to effect the death" (PC-R. 200)(emphasis added). However, trial counsel's testimony at the evidentiary hearing made it clear they did not understand the law on which the defenee was based. under questioning from the court, guilt phaee couneel identified thie ae a "Greganue defense" baeed on Guraanue v. State, 451 So. 2d 817 (Fla. 1984), where "mental impairment that doesn't riee to the level of insanity but doea go to show that he could not have formed the specific intent" (PC-R. 219).

It is clear from his teetimony at the evidentiary hearing that trial counsel was not adequately familiar with Guraanue. His trial preparation and strategy clearly are not grounded in Gurganus. Trial couneel was ignorant of the law in addition to his having failed to adequately investigate and develop the evidence of drug usage which wae readily available. At issue in Gurganus was the use of intoxicants in conjunction with epecific mental deficiencies.

Gurganus wae decided in 1984, more than three years before Mr. Hudson's trial. It concerned a capital murder case where "the defenae gave notice that insanity would be relied upon as a defense," 451 So. 2d at 819. Expert teetimony wae excluded by the trial court and affirmed by thie Court becauee expert witnesses were unable to reach an opinion on the central issues, but still wanted to reach legal conclueion which were held to be for the jury to decide, 451 So. 2d at 821-22. However, thie Court ruled that Gurganus was entitled to have his experts testify as to voluntary intoxication - based on alcohol in combination with a barbiturate compound called Fiornal - which negated his ability to form the specific intent required for premeditated or felony/murder convictions.

> When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a epecific intent, is relevant, Cirack v. State, 201 So. 2d *706* (Fla. 1967); Garner v. state, 28 Fla. 113, 9 so. 835 (1891). As such it is proper for an expert to testify "as to the effect of a given quantity of intoxicants" on the accused's mind when there is sufficient evidence in the record to show or support an inference of consumption of intoxicante. Cirack, 201 So.2d at 709. In this Case, after having been told to presume that Gurganus had ingested Fiorinal and alcohol the paychologiata testified that Gurganue would have a leasened capability for making rational choices and

> directing him own behavior, he would not be in effective control of his behavior, and would have had a mental defect causing him to lose him ability to underatand or reason accurately. We find these responses to be relevant to the issue of Gurganus' ability to form or entertain a specific intent at the time of the offense. Their exclusion from evidence was error.

Gurganus, 451 So. 2d at 822-823. Gurganue won a new trial on that basis.

Gurganus doee not and did not stand for a diminished capacity defenae under Florida law, am auggeeted by trial counsel's opening pronouncement. Chestnut v. State, 538 So. 2d 820 (Fla. 1989). Note aleo: Hall v. State, 568 So. 2d 882, 885 (Fla. 1990); Stephens v. state, 549 so. 2d 187 (Fla. 1989), 513 So. 2d 1275 (3rd DCA 1987); and Zamora v. State, 361 So. 2d 776, 779 (Fla. 3rd DCA 1978), cert. denied, 372 So. 2d 776 (Fla. 1979): "diminished capacity is not recognized am a defense, unlees a defendant's capacity is so diminished that he cannot distinguish right from wrong pureuant to the M'Naghten rule" (citations omitted). Gurganus is limited to the principle that "(t)he (voluntary) intoxication defense is etill allowed *if* it can be shown that the defendant is unable to entertain the requisite intent of premeditation." Occhicone v. Sfate, 570 So. 2d 902, 904, fn. 2 (Fla. 1990).

Trial couneel testified at post-conviction that his Guruanue defenee wae based on a desire to avoid a voluntary intoxication inatsuction. Trial counsel clearly did not know the law. This wae deficient performance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). As a result, a viable defenee wae missed:

> Q. Mr. Stone, now, are you telling the Court that you intentionally decided not to put any direct evidence of intoxication before the jury on the night of the offense so that it would fit within your Gurganus defenee?
>
> Or let me ask it conversely. Would direct evidence that Mr. Hudson wae high on cocaine on the night of the incident in any way atop you from arguing Curaanue? Would it have? If it would have, could you please tell me how?
>
> THE COURT: Wait. Wait. Wait. Let him answer the question, the first question, first.
>
> A. I am not sure I underatand the first quesiton (sic).
>
> MR. BENITO: Could you repeat that?

A. would the very, if I had direct evidence of cocaine intoxication on the night of the offense, would that have prmvented me, and I had --

Q. Let ma make it easier. If you had that evidence, would you have ueed it?

* * *

A. I think it depende on how etrong the evidence was.

* * *

Q. okay. Why?

A. Why? If I had extremely etrong evidence of cocaine intoxication, other than one of hie friends aaying that he was high on cocaine, for inetance, had he been hospitalized for it, we may have been in a whole other level. But the level of evidence that I had at that time, I didn't feel wae enough to use the voluntary intoxication inetruction when I had --

Q. What --

A. -- the Gurganus inetruction, which wag, in eseence, the voluntary intoxication inetruction without the drugs. Just the mental impairment.

* * *

Q. Mr. Stone, in this case if you had evidence that Mr. Hudson was intoxicated on rock cocaine at the time of the offense, would that have required you to have aeked for a voluntary intoxication inetruction to uee that to his benefit, in light of all of Mr. Hudson's other significant impairment and in light of the fact that even Mr. Benito agreed to a Gurganus type inetruction in this case becauee of those mental health problems?

A. I think that I would not have been allowed to argue cocaine intoxication without a voluntary intoxication instruction.

Q. And why do you say that, sir?

A. Because I think that is the law.

Q. Do you know of a case where that law is etated?

A. Do I have the case cite or the case name?

Q. Anything about the caee?

A. NO.

(PC-R. 220-223)(emphasis added).

Counsel failed to inveetigate or secure a mental health evaluation of Mr. Hudson until three weeka before trial. With a trial on January 26, 1987, trial counsel acknowledged he only began the process of securing a mental health evaluation around January 6 (PC-R. 201). This late beginning quickly

put him on notice that he could not be prepared for the scheduled trial date, but his motion to continue waa denied (PC-R.. 205-206).

Trial counmel failed to inform him mental health expert of the information he had indicating drug usage, not to mention that which he ineffectively failed to investigate:

> Q. Okay. Do you recall seeing that police report that was quoted in our motion prior to trial?
>
> A. No.
>
> Q. Do you know if that police report wam provided to Doctor Berland?
>
> A. I don't know. I don't know. I don't remember. I am not sure that we aave him any police reports. I iuat don't remember.
>
> Q. Okay. while we are on that subject, juet to move on, do you recall what you did give Doctor Berland, if anything?
>
> A. My memory is so dim that I am, I am even presuming that I am the one that talked to Doctor Berland. I am assuming that it was, it waa probably a telephone briefing. And I am assuming it was me that called him, but I am not completely sure.
>
> Q. You don't have any independent specific recollection?
>
> A. No.

(PC-R. 212-213).

> Q. Have you ever seen what has been marked Defense Exhibit 10?
>
> A. I have seen some documents with the same heading on it in thie case, but whether I have seen thim exact document I have no recollection. But by the same heading, I mean, Prison Health Services with the same logo.
>
> Q. Do you know where you eaw those documents?
>
> A. I think in our file.
>
> Q. And did you aee that document?
>
> A. I don't recall.
>
> Q. Is that information that vou would have intentionally kept away from Doctor Berland?
>
> A. I don't know.
>
> Q. Ia that information that you feel would have been helpful or may have been helpful to Doctor Berland?
>
> A. I don't know.

(PC-R. 226-227)(emphasis added).

Q. Let me aek you, do you just give your mental health experts things that help? Or do you give him --

A. I guess maybe it'e the way, the question wam, "Would this help Doctor Berland?"

Q. Only Doctor Berland can anewer that. I am asking you whether you should have given that to him in '86, '87 for his determination as to whether it was helpful or not?

A. The way I feel today, the knowledge I have today, the anewer is yes.

Q. And you can't answer as to 1987, '86, '87?

A. How I felt then?

Q. Yes.

A. I can remember at the time that for whatever reason we weren't, at least my recollection is that we weren't giving the experte as much information am we are giving them now, and I think at leaet partially it's becauee today they are asking for more information. I am really not sure how to answer the queetion.

Q. Let me aek it this way: Did you have a tactical or etrategic reason for not providing that document to Doctor Berland?

A. I, the straight anewer is that I don't remember. I don't remember whether I provided the documents to Doctor Berland. So, I don't remember the motive that I may have had for providing it or not providing it.

Q. What about the depoeition of Becky Collins? Did you have a tactical or etrategic reason for not providing that to Doctor Berland?

A. No, I don't, I, really, the anewer is the same. I really don't, if I didn't, I am not sure whether I provided it or not. And I am trying to be as accurate as I can.

Q. I understand, sir. Did you talk to Gerald Bembow?

A. I don't remember ever talking to Gerald Bembow or seeing in my notes anywhere where our investigator had talked to Gerald Bembow.

(PC-R. 229-230)(emphasis added).

Counoel acknowledged his failure to investigate the cocaine use:

Q. And just to clarify it, I don't want to belabor the point, you decided not to talk to Mr. Bembow for tactical reasons; is that my understanding?

A. I don't, I don't ever remember making a decision not to talk with him. Evidently, I didn't talk with him.

* * *

Q. Sir, what if any efforts did you make to investigate whether Mr. Hudeon wae intoxicated at the time of the offense?

A. Intoxicated at tho time of the offense?

Q. At or near the time of the offenee?

A. I am nOt aware of any independent inveetiaation. I have no independent recollection of any inveetiaation we made. There were requests to talk to people to nee what they knew about it, see what they could say about it. But ae to trying to develop hie intoxication at the time, I don't recall anv specific effort

(PC-R. 233-234)(emphasis added).

Had trial couneel conducted a reaeonable inveatigation into Mr. Hudeon'e drug experience he would have found considerable teetimony from willing witnesses. Mr. Hudson's poet conviction couneel located several witneaeee with eaee and preeanted their testimony at the December hearing. They described hie use of cocaine and the striking changes it brought to his ability to think and make reasoned decisions, both historically and on the night of the murder.

Becky Collins was called as a state witness in the guilt phaee of the trial (R. 239-261). She was not called by the defense to develop Mr. Hudson's serious drug problem. This in epite of the fact nhe discussed "hie drug addiction" extensively in a January 12, 1907 depoeition conducted by trial couneel. (See PC-R. 911-914 of the depoeition transcript.) Collins was Mr. Nudson'e former fiancee. The two had lived together €or six monthe while he worked eteadily. He was a coneiderate person and they enjoyed a good relationship. Then Nr. Hudson began spending time with a cocaine user and Collins noticed a dramatic change in him (PC-R. 143-145). she was called at the Rule 3.850 hearing in order to establieh the prejudice which reeulted to Mr. Hudson's case when counsel failed to adequately investigate:

Q. What waa happening? What brought about this change?

A. Oh, when we were living in the apartment complex he became friend. with another tenant there that liked to use cocaine, and this tenant would aek him to go and purchase or take him to where he could get some.

And he atarted being with thin person more. And I saw a bit of a change in him myself. I didn't know at that time if he was using.

Q. Okay. Did there come -- did there come a time when you did notice that, in fact, Timothy was using cocaine?

A. In him change of moods I know he wae on eomething. I assumed he was on eomething.

Q. Okay.

A. He became more hyper. We couldn't eit still. and he was on the an all the time.

Q. Okay.

A. And he had to leave the house and come back. Just couldn't be still.

Q. Okay. When did you find out that he was uaing crack cocaine?

A. Oh, I found out for sure after I had moved out -- moved out of the apartment.

Q. When waa that approximately, do you know?

A. I believe it wae in December.

Q. December of 19853

A. Of 1985, yes. I moved back to where I was at before.

Q. Okay. How did you find out that he was using crack cocaine?

A. He etarted -- he would aet me to take him to places that I knew they were selling drugs, and he was getting money from me, borrowing money from me.

He quit working, and he wasn't interested in workina anymore.

Q. Did he tell you he was doing crack cocaine?

A. Not right at first.

Q. Eventually?

A. Eventually he did, yea.

Q. Okay. Did you talk to him about that?

A. I tried to many times. I tried to get him to stop. I tried to get him to get help. I even called some places to try to get him help, and they like had a two month waiting list.

Q. Okay. Did you notice that Tim's cocaine use, did it gradually progress to get worse or was he just suddenly doing a lot? Did you have any idea earlier on?

A. It waa -- I would say it gradually aot worse. He probably started with the tenant at the apartment complex, and than ae we moved from there he warn iuet in the street all the time.

Q. What about Tim's chanaee aa he aot more and more involved in usina crack?

A. He would become angry real easy. I had never seen him angry like that before. Even when I would raise my voice it would anger him.

Q. Okay. Did you try to talk to him about it?

A. Yes, I tried to. when he seemed to be real hyper or when he would already be anarv. I couldn't say anything to him too much. It would just anger him more, and he would get more anarv.

* * *

Q. Okay. Did there come a point in time where you felt he was addicted to it just from your observations?

A. Yes.

Q. Why is that?

A. He would call me and want to talk, but before our talk was over with or sometime during that talk he would stop me and want me to go take him some place to pick up some, and want money from me and call me and want money from me, asking me €or money.

Q. Okay.

A. And it wae, you know -- it wasn't every day that he did that, becauee I wouldn't go over there every day, but every week, every other day.

Q. This was even after you two moved out and split-up?

A. Yeah. He called me every day.

Q. Okay.

A. At the house that I was living at.

Q. Okay.

A. And I wouldn't always go over.

Q. Okay. Had he become abueive at times, when he was on cocaine. with you?

A. Yea. He would become anarv. and I would trv to talk with him, and he would hit me and tell me to ahut up. He would take me somewhere and leave me and take my car and stay gone all night or •• a couple incidents he stayed a couple of days.

Q. Had he ever treated you like that in the first couple of months of the relationship?

A. No, he didn't.

Q. Okay. Were you afraid of him when he was on crack?

A. Yes, I was, very much.

Q. Okay. When did you finally tell Tim that you didn't want to have anything to do with him; that the relationship just wasn't going to work?

A. It was, I think February or March of 1986. I had just taken rnough and didn't want to deal with it anymore, and I waa trying to tell him.

You know. I didn't want to see him anymore if he couldn't trv to help himself and aet off *of* drugs, I just couldn't deal with it.

Q. Okay. Did you ever talk to any of hie family about the problem?

A. I finally did. I went to his dad one night and told him what had been going on for a while.

Q. Okay. What did his dad eay to you?

A. He told me ha was aorry and that he wished I had come to him earlier about the problem, and that's about all I remember.

(PC-R. 145-50)(emphasis added). Collins continued to have contact with Mr. Hudaon in the period leading right up to the murder. She recognized that he continued to be heavily drug involved in that period.

Q. Did Tim continue to try to talk to you and contact you to come and aee him?

A. Yea, he would.

Q. Okay. How often?

A. Almoet every day or every other day, at least.

Q. Was he still under the influence of druaa during that period?

A. Yes, because he would call me and sound sincere on the phone and want to talk. and I would go and get him and later on he would have me to go drop him off where I knew the drugs were being sold.

Q. Okay. So there were even times when you agreed to see him in hopes that you two could work aomething out?

A. Yes.

Q. Okay. Ms. Ewing was killed on the night of or the morning of thr 17th, 18th of June 1986, is that correct, the best you can remember?

A. Yes.

Q. Okay. Had you had contact with Tim up through that period?

A. Yes, I had.

Q. What kind of contact?

A. He was calling me on the phone, and I had stopped receiving him calls. I wouldn't pick up the phone.

I had an anawering machine, and I would just let him leave the meeaage, or he wouldn't leave a message. He would just keep saying my name and tell me to pick up the phone. Be knew I was there.

Q. Did he still sound like the Tim strung out on crack cocaine?

A. Yeah. He still friahtened me, hia voice. I didn't want to talk to him anymore.

Q. Didn't sound like the Tim you had first met?

A. No.

(PC-R. 152-154)(emphasis added).

Q. Mr. Benito aeked you if Timothy had been jealous all the way throughout your relationship, and you indicated, no, not at firet?

A. No. I didn't feel like he was. He never eeemed to be to me.

Q. Okay. Is it safe to say that theee chanaee in hie behavior seemed to aet worse as you realized he was doing crack cocaine?

A. Yes. I would say so.

Q. Okay. He became a different person?

A. Yes.

(PC-R. 166)(emphasis added).

Mr. Hudson's sister, Debra Hudson, also had opportunities to closely obeerve hie drug addiction. She also waa not contacted by trial counmel. She testified as to what she saw during the Rule 3.850 hearing:

Q. Okay. Did there come a time when you realized that Tim wae involved in drugs?

A. Yes.

Q. Do you remember when that was?

A. Around 1986.

Q. Okay. What did you notice about Tim that made you realize that he wae into drugs?

A. Because he wouldn't -- he wouldn't bathe €or days. He didn't keep himself up, and he was like paranoid.

His eyes would be real large, and he couldn't eit still. He had to be on the *go* all the time.

Q. Do you know what kind of drugs he wae using at that time?

A. Crack.

Q. How do you know that?

A. Because I wwuld find the crack cans in the bathroom where he had been in there uaing them.

Q. What do you mean by "crack can"?

A. Well, eomebody had -- I took one of the cane to my friend and aaked what it wae, and they told me that they used crack with the holea. It had holes in the top of it.

Q. Just a normal, like soda can?

A. *Any* kind of can.

Q. With holea in it?

A. Yes.

* * *

Q. Okay. What was Tim's mood like when he was on crack? How was it different than it wae when he wasn't?

A. He would get upset about things. He didn't want to be bothered. He didn't talk to us.

Q. Okay. You indicate in your affidavit he wae paranoid. What do you mean by that?

A. Like scared. Like eomebody was after him or watching him or something.

Q. Okay. Was he asking you for money during that time?

A. Yes.

Q. Your mom?

A. Uh–huh.

Q. Your dad?

A. I'm not sure about him, becauee I didn't live with him.

Q. Okay. You indicated in your affidavit that he was a crazy person when he was on cocaine. What do you mean by that?

A. Because anything -- if you would say something to him pnd get him angry, he would try and fight or eomething.

Q. Became violent?

A. Uh–huh.

Q. Do you recall the day before the crime occurred when Ms. Ewing was killed?

A. Yeah.

Q. Do you remember the day iteelf?

A. Uh-huh.

Q. Did you see Tim on that day?

A. Yeah.

Q. When did you see Tim?

A. Well, when he woke up.

Q. Okay.

A. That morning.

Q. That morning?

A. Uh-huh.

Q. Okay. The morning before she was killed?

A. Uh-huh, yeah.

Q. Okay. what, if anything, did you and Tim talk to each other about?

A. Nothing really. Later on that dav he asked me for fen dollars.

Q. Okav. Did he tell you what he was doina with the ten dollars?

A. At first he wouldn't, but I said, "If you don't tell me what you're aoina to do with it, I won't give it to you." And then he raid he waa aoina to buv him a hit.

Q. What's a hit?

A. I guess a hit of crack.

Q. Okav. Did you give it to him?

A. Yes.

(PC-R. 175-179)(emphasis added). She went on to describe Mr. Hudson's return to her home tho morning after the murder, still showing the effects of the cocaine:

Q. Okay. Did you aee him when he came in?

A. Yes.

Q. Was he high?

A. I would assume.

Q. It appeared to you he was?

A. Yeah. His eyee were all stretched out. He wae like acting like he wae paranoid.

(PC-R. 180). Debra Hudeon waa never contacted by Mr. Hudson's lawyers, but she would have been willing to cooperate had they done so (PC-R. 181).

Two of the most ueeful witneesee on Mr. Hudson's drug addiction were, Anthony and Gerald Bembow. Gerald Bembow was the source of trial counsel's conflict discussed in Argument I. They are brothers who were also Mr. Hudson's cousins and who grew up with him. They lived near Mr. Hudeon. They sold and also ueed crack cocaine extensively with him in 1985 and 1986 (PC-R. 349, 353-55, 363). They were listed ae witnesses by the State, but were not interviewed by defenme counsel. Anthony Bembow first saw Mr. Hudaon use crack in 1986 (PC-R. 360). He testified at the Rule 3,850 hearing am to hie observations of Mr. Hudson while on cocaine:

Q. Let me draw your attention to the time frame of 1985-86. Were you in contact with Mr. Hudeon during that period?

A. I was.

Q. During that period did you have occasion to use crack cocaine with Mr. Hudson?

A. Yes.

Q. How often during that period would you say you ueed crack cocaine with Mr. Hudson?

A. Just about every time we run acrose one another, we would get high.

Q. How many times would that be? Once a month? Once a week? Approximately, you know?

A. As many times as we see one another. Frequently.

Q. I mean, what in your mind, what is frequently?

A. Maybe three, three times a week. Just whenever we see gne another.

Q. Have you ever smoked crack cocaine with other people?

A. Yes, I have.

Q. Other than Mr. Hudeon?

A. Yes, I have.

Q. What affects did you obeerve that cocaine. crack cocaine, had on Mr. Hudson?

A. Paranoia, that he would, wants you to be quiet, not say nothing. Listen. Think aomebodv is after him. vou Know. That is about the best I could put that;.

Q. Would you say that in your obaervations his reaction to cocaine wae any different than the reactions you would see in yourself?

A. No, it wasn't normal as to where it would be with me or anybody else. It would be a little bit worser.

Q. Why do you say that?

A. By the actions from when we smoked together. The way that he would act as far as, you know, looking out, wanting everybody to be quiet or what not.

Q. Any change in his mood when he wae on crack cocaine?

A. Yes, it was.

Q. How so?

A. From being normal to, like, just the only way I could put that is paranoia, not acting normal like normal people would act after amokina crack.

Q. Wall, wae he quicker to anger under cocaine?

A. Yes.

* * *

A. A0 far as getting upset, yes.

Q. Okay. upset over things that wouldn't upeet you?

A. Minor things. Minor things that as to where we would smoke, aa to where it would be normal, it would be exceedingly further with him.

* * *

Q. Do You recall the night that Mollie Ewina was killed?

A. I do.

Q. Had Mr. Hudson's crack cocaine problem gotten any worse during that time frame, from your observations?

A. I would say, ves.

Q. Why would you say that?

A. Because at the time, the dav that I seen him. Tim never had ever approached me and asked to get high. And that Darticular dav he had asked to get high when ha had first seen me. That wasn't, you know, normally he would wait and let me offer or something like that.

Q. He came out and aeked for it that day?

A. Yes.

Q. Do you recall when it was during that day that you maw Mr. Hudson?

A. It was earlier during the day, around maybe 5:00, 6:00.

Q. In the afternoon?

A. Yes.

Q. Where did you see Mr. Hudeon at?

A. He wae on the front porch of hia brother's house.

Q. Your brother's name is?

A. Gerald.

Q. Okay. Did YOU see Mr. Hudson use cocaine?

A. Yes.

Q. At that time? And who used cocaine with Mr. Hudson?

A. I did.

Q. Crack cocaine?

A. Crack cocaine.

Q. Do you know how much you two used at that time?

A. Approximately total in dollars probably twenty dollars worth, two dime lote.

Q. Juet the two of you smoking it?

A. Yes.

Q. How long was Mr. Hudson with you during that period?

A. Not very long. Maybe an hour at the moet.

* * *

Q. Was he high when you left him?

A. Yes, he wae.

(PC-R. 349-355)(emphasis added).

Q. What was he doing? What wae him reaction at the time?

A. Quiet at the time. We wasn't talking very much. Just getting high, to get it over with.

Q. And you left?

A. And I left.

Q. There was, you may, around six o'clock in the evening?

A. Yes.

Q. When I aeked you to describe Mr. Hudson's reaction to cocaine, you maid it was different than normal people. Did you mean different than most people that you saw emoking crack cocaine?

A. That is true. That is correct.

(PC-R. 356). Anthony Bembow was not contacted by Mr. Hudson's lawyers, but had they done so he would have been willing to testify to these matters (PC-R. 356).

Gerald Bembow aleo teatified at the 3.850 hearing:

Q. Let me draw your attention to the time period of 1985, 1986 were you in contact with Mr. Timothy Hudaon?

A. Yea.

Q. And how often would you eay that you saw Mr. Hudson during that period?

A. Very frequently, probably three, four times a week.

Q. During that time period did you ever have the opportunity to smoke crack cocaine with Mr. Hudaon?

A. Yee.

Q. How often would you eay that you smoked crack cocaine with Mr. Hudson?

A. Maybe approximately three times a week.

Q. Would it be typical €or you two to smoke crack cocaine every time you got together?

A. Yes.

Q. During that period of time you were selling crack cocaine; is that right?

A. Yea.

Q. What kind of reaction did Mr. Hudson have to crack cocaine? What were your observations?

A. Very, very paranoia. It was, you know, in my experience using the drug, I never seen anyone react the way he did on it. And it was, he was a different person.

Q. How so? In your terms what can you tell the Judae about your observations?

A. He was, like. paranoid and afraid of his surroundings or; someone hurting him or something like that. He just reacted totally different from anybody I ever seen using the drug.

Q. Did you ever see him get argumentative or mad for no reason while under the influence of crack cocaine?

A. Not really mad but upeet if you moved around or something like that. He would like things to be quiet and everybody still.

Q. So he would react to movement?

A. Right.

Q. To sound?

A. Right.

Q. How would he react?

A. Jump you. Scared, paranoia, real bad.

Q. Is it safe, you have seen other people use crack cocaine?

A. Yes.

Q. Is it eafs to say that everyone reacts to crack cocaine? Your behavior changes to some extent?

A. Right. But his was. hie, the wav he chanaed wae like nothing I ever aaw before. you know. in my experience in smoking crack. And I. you know, it was very, very paranoia. Frightening.

Q. How many different people, approximately, would you say you have smoked crack cocaine with?

A. I can't give a number. Plenty.

Q. Quite a few?

A. Yea.

Q. You noticed a profound difference, though, in the way Mr. Hudaon reacted?

A. Yea.

Q. From your observations how bad was Mr. Hudson's crack problem during the time frame of June 19867

A. I think it was sort of bad. He was, he smoked it pretty bad.

Q. In fact, you were interviewed by a Detective Black, were you not?

A. Yes.

Q. As a matter of fact, you told Detective Black that Mr. Hudeon had a bad cocaine, crack cocaine problem?

A. Yea.

Q. Do you recall the night that Miss Ewing wae killed?

A. Yes.

Q. Did you see Mr. Hudson on that day?

A. Yes.

Q. You recall when you first saw Mr. Hudson that day?

A. Yes. It waa duak. Duek dark.

Q. Approximately what time; do you know?

A. I think about 5:00 or 6:00.

Q. Late afternoon?

A. Right.

Q. Was, where did you see Mr. Hudeon at that time?

A. Rembrant Apartment.

Q. Who was living at that Rembrant Apartments?

A. Well, I lived there.

Q. And what were your obeervation of Mr. Hudeon when you maw him during the late afternoon of that day?

A. He was, I could tell he had been aetting hiah.

Q. And how could YOU tell that; he was aettina high?

A. Because I, I have known him all my life and I knew him when he wasn't high and when he was. And I could tell, you know, by looking at him, he was hiah.

Q. Did you see him use crack cocaine on that occasion?

A. No.

Q. But you did obaerve that he appeared to be high at that time?

A. Right.

Q. How long was Mr. Hudeon with you at that *time;* do you recall?

A. No, I don't recall. He left.

Q. Did he come back later?

A. Yes, he come back around eleven, 11:30, something like that.

Q. And do you recall what kind of condition Mr. Hudson was in when YOU saw him at approximately, say, 11:00, 11:30 that night?

A. Yes, I could tell he had been smoking more druaa. becauee he waa hiaher.

Q. What do you mean, smoking more drugs?

A. Crack. I mean, he was high. He wae nervous. And hie eyes were big and glassy.

Q. How long was he with you at that time; do you recall?

A. I think about five minutes, five, ten minutes.

Q. And you indicated to the police, in fact, he asked you to go some place with him; is that correct?

A. I think so. And my ex-girlfriend asked ma to come inside, and that is when I went inside. I asked him to spend the night, but he told me he wae going.

Q. Why did you aek him to spend the night?

A. Becauee he was high. And I felt like he should have slept it off, try to sleep it off because I observed he waa very high.

Q. In fact, he indicated in the report that he got upeet with you when you wouldn't go with him?

A. Yes, he was, he waa angry because he was high and I knew it.

Q. Again, an indication that he got upset for no apparent reason?

A. No.

Q. Do you know a Miss Robereon?

A. Yes.

Q. Was she living near you at thie time?

A. Yea, two apartments over.

Q. Mr. Hudson apparently left, then, after your girlfriend aeked you to come in?

A. Yes.

Q. And how long was he with you at that time?

A. About five, or ten minutes. I think he left it waa around 12:00.

Q. When you get high on crack cocaine, there's an initial high; is that correct?

A. Yes.

Q. How long does that last, in your experience?

A. About ten, fifteen minutes.

Q. And are you back to normal, then, after ten or fifteen minutae?

A. Most people are.

Q. Okay.

A. But --

Q. What about Mr. Hudeon, as far as your obeervations?

A. I think the high last longer on him, because my experience around him, it affected him a lot different than other people I know.

Q. Had you ever asked Mr. Hudson to sleep it off before?

A. No.

Q. Why did you that night?

A. Becauoe I could tell he wae very high.

(PC-R. 363-370)(emphasis added)(see also PC-R. 377). Gerald Bembow testified that he was so etruck by Mr. Hudson's reaction to crack that he broke his own habit as a result. "I got to thinking about Tim and I knew him all my life. He is a good person. And I know thie. And I seen how it affected him. And I tried to etraighten my life out now, you know, because of what happened with him and hi0 situation." (PC-R. 372).

Gerald Bembow was in prison at the time of Mr. Hudson's trial. He wae brought back to Tampa for it, but did not testify. He waa surprised that no one contacted him on behalf of Mr. Hudaon (PC-R. 371). As a reault of counsel's failure to interview Gerald, a wealth of evidence supporting an intoxication defense was not heard by the jury.

Mr. Hudson's father, Daniel M. Hudson, was approached by counsel and did testify at trial. However, trial counsel failed to develop the drug addiction issue with him. The father testified at the Rule 3.850 hearing:

Q. Now, Mr. Conrad talked to you about testifying for Timothy; is that correct?

A. Yee.

Q. And do you recall what he asked you about Timothy?

A. It was just like I said, vaguely, way back there, I can't remember word for word. But he asked me things, you know, about how wae he when he wae coming up different things like that. Then he even told me to just talk about Tim. And I atarted talking and, you know, saying the things that I can remember about him coming up, what he liked to do and, you know, places we went. Things that we done together.

Q. What kind of thinge did you tell Mr. Conrad?

A. Things like what?

Q. What did you tell him? I mean, do you recall any of the convereation, any information you gave Mr. Conrad? Did you talk to Mr. Conrad about your divorce with your wife?

A. Just like I say, I can't recollect that far back. I don't know whether ha aeked me those queetione or not. I can't really remember.

Q. Do you know if you ever talked to him about your wife's drinking problem?

A. I don't think I had that much talk with him, for to get that deeply in.

Q. What was your impression of what he wanted from you at that time, if that is easier for you?

A. Okay. My impression wae that I wae supposed to be a character witness. And he wanted to better part of Tim's life.

Q. And did you tell him what you could about that?

A. Yea, I did.

Q. Did you, as far as your recollection goes, get into the, maybe not the better parts, the problems at home and that kind of atuff?

A. I don't think so.

Q. Did you ever mention to him the fact that you became aware that Tim was havina a drug aroblem?

A. No, I don't think it even got that: far.

Q. Did you not mention that because you didn't want to cooperate with Mr. Conrad?

A. No, it wasn't the idea I didn't want to cooperate with him. I just never was asked the question of that nature.

Q. Were you aware that that kind of information may have been relevant to Mr., to your son's trial?

A. I am not good at the word "relevant."

Q. At that time did you --

THE COURT: Did you think it might be important to his trial?

* * *

A. I was thinking it might hurt.

Q. You didn't volunteer that?

A. I didn't volunteer it.

Q. Had Mr. Conrad asked you about that stuff, would you have hesitated to tell him about it?

A. Just what he wanted to know, I told him.

Q. You had no reason to withhold that from him, did you?

A. NO.

(PC-R. 381-384)(emphasis added).

Couneel simply failed to investigate the matter and as a consequence failed to inform his mental health expert, Dr. Bob Berland, on the topic. Had he conducted an adequate investigation he would have found a wealth of evidence supporting a voluntary intoxication defenee. Trial counesl'e complete failure to determine what the Bembow brothera, as well as other witnesses, might have to eay wae unreasonable and ineffective. Decisions made in ignorance, without invertigation, are not reaeonable. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

"The adequacy of a pretrial inveetigation turns on the complexity of tho case and trial strategy," Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986). Here counsel had elected a complex defenee requiring expert testimony supported by that of lay witnesses. Trial couneel'e failure to investigate was not reasonable under the circumstances. Futch v. Dugger, 874 F.2d 14831 1486 (11th Cir. 1989). See also: Kenley v. Armontrout, 937 F.2d 1298, 1303 (8th Cir. 1991); Chambers v. Armontrout, 885 F.2d 1318, 1320-1322 (8th Cir. 1989); Goodwin v. Balkcom, 684 F.2d 794, 817 (11th Cir. 1982); and Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976).

Furthermore, Mr. Hudson had a right to expect his lawyers to know the law they were relying upon. Their failure to understand Gurganus, supposedly the foundation of their theory of defenee, was grossly unreasonable. Vela v. Estelle, 708 F.2d 954, 965-966 (5th Cir. 1983) and Harrison v. Jones, 880 F.2d 1279, 1281 (11th Cir. 1989). This obligation to know the law attaches even as it evolves with recent decisions. Lewandwski v. Makel, 949 F.2d 884, 887-889 (6th Cir. 1991); Fretwell v. Lockhart, 946 F.2d 571 (8th Cir. 1991).

Subetantial and valuable lay testimony as to Mr. Hudeon'a cocaine addiction and intoxication was available. It was presented at the Rule 3.850

hearing by poet conviction counsel. This important teetimony wae not developed for the jury or for consideration by tha mental health expert. Confidence is undermined in the outcome by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668 (1984). Here trial couneel'a "identified acts or omissions were outside the wide range of professionally competent assistance," 466 U.S. at 690. Because of the deficient performance, a wealth of evidence supporting a voluntary intoxication defenae wae not presented to the jury. Had it been preeented, there exists a reasonable probability of a conviction of the lesser included offense of second degree murder. Mr. Hudson met his burden and 3.850 relief was required. This Court must order a new trial.

## ARGUMENT IIT

**MR. HUDSON WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION IN VIOLATION OF HIS SIXTH, EIGHTH *AND* FOURTEENTH AMENDMENT RIGHTS, *AND* DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THEIR FAILURE *TO* SECURE A MINIMALLY ADEQUATE AND TIMELY MENTAL HEALTH EVALUATION.**

This murder took place the night of June 17-18, 1986 (R. 782). Mr. Hudeon waa arrested for violation of probation and charged with the murder on June 19, 1986. He is and was indigent, and the public defender was appointed shortly after hie arreet. Witneseee were not depoaed until October 1986 and January 1987. Trial counsel had very little contact with Mr. Hudeon until day8 before trial. It is not surprising in the general neglect of hie defenee that a mental health expert was not contemplated until the last minute, that the evaluation process did not begin until days before trial, and that the expert wae provided almost no background information on Mr. Hudson. The mental health expert waa appointed on January 6, 1987 (PC-R 201, 260-61). He evaluated Mr. Hudeon on January 8, 9, and 22, 1987 (PC-R. 259). Trial couneel filed a motion to continue just before trial and told the Court Dr. Berland needed more time to prepare hi0 evaluation. Trial couneel also volunteered to the Court that Dr. Berland's testimony would go to Mr. Hudson's ability to form intent, recognizing that thie was not an insanity defenee. The motion was denied (R. 7-8). Given the dofenee theory of voluntary intoxication and

Mr. Hudson's severe cocaine addiction which went uninveatigated, this wan clearly ineffective assistance of counoel. The circuit court in fact found deficient performance as to the failure to timely obtain the assistance of a mental health expert.

As argued elsewhere in this brief in detail, trial counsel almost completely failed to investigate important aspecte of Mr. Hudson's background relating to his ability to form specific intent at the time of the murder, in particular his crack addiction. Their testimony at the evidentiary hearing is set out in the preceding argument.

Thr expert at trial, forensic poyehologiot Dr. Bob Berland, also testified at the Rule 3.850 hearing. He did not recall being provided any background matorialo on Mr. Hudson's drug problems and a review of his trial testimony ouggeeted he had none to rely upon:

> Q. Specifically, and let me aek you if you have any recollection of receiving any materials from either Mr. Stone or Mr. Conrad which in any way documented Mr. Hudson's drug abuse prob1em?
>
> A. Again, I have no direct memory at this time. Based on my responses in testimony, and knowing how I thouaht about thinar then, I apparently had no evidence, because I made a comment to the effect that I had no evidence in either direction.

(PC-R. 262-263). When shown an exhibit in thin case (Defenae Exhibit 10), a 1986 jail intake report indicating Mr. Hudson's cocaine use, Dr. Berland maid this would have triggered a deeire to know more in order to perform a thorough evaluation:

> A. Well, if I underetand the nature of your question, the issue is, would I have pureued information which suggested the presence of cocaine as a factor in the offense. And because poychoactive drugs, including cocaine, particularly cocaine, will tend to gravely exacerbate or intensify psychotic symptoms, they are very relevant to an understanding of what his mental health condition is at a particular time in my opinion.
>
> So that had I had direct evidence, the way I have done this since the early '80's, I would have been very intersated in that and needed to pureue it am part of the mental health evaluation.

(PC-R. 266-267).

Dr. Berland had not been given anything at the time of the trial on Mr. Hudson's cocaine addiction:

Q. Did you have sufficient information at the time of your original evaluation, which allowed you to develop either from Mr. Hudson or from lay witnesses the relevant information concerning his cocaine problem and specifically the use of cocaine at or near the time of the offense?

A. To the extent: that I was unaware of the lay witnesses or was unable to gain access to them, no, I didn't have.

(PC-R. 293).

He epecifically did not recall being given any information on Mr. Hudson's use of cocaine shortly before the offenae and teetified as to its importance:

Q. At the time of the original trial did Mr. Stone ever report to you that, in fact, Mr. Hudson had told him that he had used cocaine ehortly prior to the offense?

A. I have no direct memory of that. I would have to infer from my reactions at the time that I did not have that knowledge, simply becauee my reaetiona would be, normally, under those circumstances that I have information from the defendant but I have no outside corroboration of it.

But my indication at the time of that trial was that I had no information either way.

(PC-R. 277-278).

In re-evaluating Mr. Hudeon for the hearing, Dr. Berland was able to interview lay witnesses he had not previously been given access to by trial counsel:

A. The lav witnessea were interesting and aa is typically the caee, helpful in that, one, they corroborated symptom information I got from the defendant, and each of these interviewe was done independently. Of course, I tried to aek the questions in a nonleading fashion as much as poeeible.

They had a similar picture of the defendant among the witneesee. Many of them eaw the same kind of eymptoma.

They appeared to be fairly genuine reports in all but one of the witnesses whoae information I did not use in reaching my current conclusions, in that all but this one witness admitted to some aymptome about which I aeked them and denied othera in a fashion that is fairly typical when people are being genuine. NO one person can have all the eymptome you are inquiring about.

Several of the witnesses indicated the presence of aymptome without benefit of drugs but in much milder forms, which is consistent with what I obaorved and with what I would expect from the teat findings with the defendant.

One witness indicated that the defendant seemed to react fairly extreme and was able to deecribe some aymptoma that he ehowed with marijuana. All of them indicated that there was an

extreme difference in the defendant's behavior when he was under the influence of cocaine. That he had what would be calls4 in my field a idiosyncratic response to cocaine. And they pretty much universally described his responses, including two important factors:

1. ic ver ene ze ve restless, unable to control hie impulses or to sit still, and he would become acutely paranoid to the point where a lot of them described his eyes as getting very bia when he waa on cocaine.

He got extremely angry and violent over-reactina to thinas that would normally not create a reaction. Minor jokee, seemingly innocent comments. Things that would not normally provoke anger or a phyeical reaction. Thing6 that would normally provoke anger he would overreact to in a way that made him threatening to at least some of the witnesses. He would look around a8 if he were frightened.

There is in their apontaneoue descriptions that he checked the windows frequently because he thought people were out there looking at him. Thought people were out to get him. A number of the witnesses indicated that when they were using cocaine he would hueh them, say,

"Did you hear something? Did you hoar something? I hear something outside. People are out there."

There was a consistent description of "Acutely paranoid and disturbed individual." A number of the witnesses, three of them, also noted that the defendant appeared to show unusually long reactions to the cocaine, so that the affects on him wouldn't last the normal duration of a high, which as she described it would be anywhere from, say, ten to twenty minutes. He could go on for as much as several hours of reacting.

That's the primary information that I got from them, that he was not out of control when ha wasn't high, but when he was, he appeared to be a verv, very different person, to function differently, to act differently, and to have fewer control8 over hi8 thinking and hie behavior.

Q. Doctor was any information of that nature provided to you prior to your testimony at Mr. Hudson's trial in 1987?

A. Well, I didn't talk to any of these witnesses, so I didn't have access to that information at that time.

Q. None was provided to you as best you can recall in any other form, information of that nature?

A. That he had this extreme idiosyncratic reaction to cocaine?

Q. Yes, sir.

A. No, not that I can recall.

(PC-R. 269-273)(emphasis added).

Dr. Berland teetified at the Rule 3.850 hearing that his not having these important background aourcee considerably diminished him as a witneee at the original trial:

> Q. Wow would that have been important to your testimony before Mr. Hudson's jury and judge in his case?
>
> A. Well, it's a judgment call in part, on my part, having presented evidence to juries over the years. It seems to me from my experience that it would have been a more persuasive and more clearly underatandable preeentation had I been able to go through the kinds of detailed information that I have now from the lay witnesses which give direct information about what he does when he is under the influence of cocaine and how it affects his mental health condition.
>
> Certainly, the problems that he had would have appeared to be a lot more serious than I wae aware of at the time I testified in the past. And of couree, what complicates all of it is that since the defendant didn't trust me at the time of that evaluation, by him report at leaet, because of the lateneee into which, with which I came into the game, I had no information from him about his perceptions or his actions or anything regarding what was going on with him at the time of the offenae.

(PC-R. 276-277). In particular, he felt not having this information diminished hie testimony as to Mr. Hudson's ability to form apecific intent:

> Q. How, if in any way does your opinion change based upon the new information that has been provided to you by our office and the lay witnessee you have talked to?
>
> A. That is a very difficult question to answer. Strictly on the baeia of the new information that I have from the lay witnesses ,and from the defendant and from your office, the inereaaed seriousness of his disturbance at that time would certainly have an impact insofar as making my opinion firmer in that regard. The problem, of course, is that there is no clear guideline in the law as to how aeverely disturbed someone has to be before they cannot form specific intent.
>
> * * *
>
> Q. How would it have been relevant in the way that you explained the ieeue to the jury?
>
> A. How would this added information --
>
> Q. Yea.
>
> A. Well, of couree, if I had had direct information about him being intoxicated, and about the offense, I would have been able to provide more direct information about his condition at the time of the offenae. That certainly would have reinforced the arguments about mitigation.
>
> The information that I had wae simply less potent than it is with the evidence about him reaction to cocaine. It's less clear that he, I mean, there is plenty of evidence juet from

sitting in, watching him, that he can sit calmly. He is not somebody that in enraged and out of control.

And it seems to me that it's harder for juries to accept the severity of someone's disturbance when they eee them sitting calmly in court. Not to say that somebody can't sit calmly in court and be very disturbed. But I think it's harder for a jury, in my observation, at leaet, to accept. However, if I am able to bring to the iurv a lot of information from people who have no personal stake in the outcome of the trial that, in fact, hie behavior is radicallv different when he is under the influence of cocaine, then I am making a very different argument to the jurv in a more forceful argument.

(PC-R. 279-280)(emphasis added). Dr. Berland concluded that Mr. Hudeon waa "a lot more eeverely mentally disturbed" than he previously found:

Q. In thia case what did the information from the lay witneeeee do concerning your original opinion that Mr. Hudeon war not malingering these symptoms?

A. Well, in hie case he had withheld enough information that the lay witnesses made him to appear to be a lot more v e of t offense, than I had understood him to be.

(PC-R. 287)(emphasis added).

Post conviction counsel had Mr. Hudaon reevaluated by a mental health professional who wae given adequate background material. At the Rule 3.850 hearing, Dr. Peter Macalueo testified as to hie evaluation ae an expert witness and addictionologiet:

Q. What is addictionwlwgiat?

A. An addictionologiet is a physician who apecializee in addiction medicine, which is the diagnoaie, treatment and management of addictive disorders, mainly alcohol and drug addiction.

Q. And are you currently in private practice, Doctor?

A. Yes, I am.

Q. Can you just briefly describe for the Court what your practice involvee at this time?

A. My practice mainly at this time involves treating patients that are addicted to drugs and alcohol. That is about neventy or mighty percent of my time. I also work aa a coneultant for the Joint Commission on Accreditation of Health Care Organizations. I am the only addictionologiet that the Joint Commission haa. And it's in that capacity that I utilize my, of caurme, expertise in addiction medicine but also quality assurance and utilization review.

(PC-R. 400-401).

Dt. Macaluso testified ae to hie evaluation of Mr. Hudeon, and described the physical and mental health effects of cocaine abuse. It should be noted how closely his descriptions of tho effects of the drug match lay testimony preaented elsewhere in the hearing, describing Mr. Hudeon at the time of the crime.

Q. In your evaluation of Mr. Hudson, Doctor, did you determine that there had been a history of drug and/or alcohol abuse?

A. Yea, I did. Mr. Hudeon has a fairly significant family history of chemical dependency. It's found in hie mother, aleo in a brother and sister. We uaually begin with family history. It's extremely important because we know now that chemical dependency is basically a biogenetic dieeaee.

Q. Doctor, did you make an ultimate conclueion concerning whether Mr. Hudson euffere from the dieeaae of chemical dependency?

A. Oh, yes there is no question in my mind that Mr. Hudson suffers from the disease of chemical dependency. It's fairly in an advanced form at this time.

Q. Just briefly €or the Court could you explain what is the disease of chemical dependency?

A. Yes. The disease of chemical dependency ie, as I said earlier, it's a biogenetic dieeaee with various psychosocial components to it that result in a person obsessively and compulsively uging mood altering drugs despite adverse life consequences.

Q. Drawing your attention to the time frame of 1985 and 1986 wae Mr. Hudeon addicted to any eubetancee?

A. Mr. Hudson was very addicted at that time frame. His addiction began around the time he wae twelve, thirteen or fourteen when he first began using drugs and escalated throughout hie teen years and early twentiea. During the time frame that you mentioned he became severely addicted to the crack form of cocaine, often coneumina four or five hundred dollars of cocaine per day.

Q. What is crack cocaine?

A. Crack cocaine is a form of cocaine that can be amoked or inhaled: therefore, get a much higher euphoria, much hiaher intoxicated etate.

Q. How does it affect a person?

A. Well, cocaine is basically a narcotic drug. When I try to teach, say, my patients what cocaine is and what it does, I uaually start of€ with, it's a drug that's a narcotic drug. What that means is that it paralyzee nerve endings. We use, "we" meaning physicians, use cocaine in medicine and have €or a long time, especially eye specialists, opthamologists, or ENT

specialists, if momeone hae a piece of steel in their eye, say, a physician can put a drop of cocaine on your Bye, the nerve endings would be paralyzed, you won't feel anything. You can go in with an instrument and take out the metal mliver or foreign body. Could almo go in and remove cataract or do cataract eurgery. With a couple of droge of cocaine if someone breaks their nose you could place cocaine up in the naeal passages, break thr bone of the nose and set it.

So what it does on a physiological biochemical level is that it paralyzee nervee, it paralyzes the proper functioning of nerves. And with that point of reference, very eimilarly, when aomeone smokes cocaine, injects it, or enorts it, the primary sffect of the cocaine as we know is on the brain. People use cocaine for the effect it hae on the person's brain. What it does to the brain is basically what it does in the eye or in the nose. It, it paralyzes brain tieaue, nerve tissue, it beains by impairing or paralyzing those parts of the brain that are. that are Concerned with what we term ae higher brain functioning.

Q. What are those?

A. Ueaning?

Q. Higher brain functioning?

A. That means those functions that make us different from other animale, ability to reason, ability to form judgments, the ability to have insight. Those higher brain functioning, that higher cognitive behavior, is the first areas that are affected with cocaine or other drugs. If aomeone takes more cocaine or other druge, the other centere are affected.

we are all familiar with motor impairment, aay, with alcohol. As aomeone conaumee more drugs, their eensory centers may be impaired, their perception, how they perceive their environment, then their motor functioning, the ability to walk, talk, as one should. And, then, finally, with very higher levels of cocaine or other drugs, the centere that control vital life functioning, blood pressure, heart beat, reepiration, those are impaired. And then it's at that stage that someone entere into a coma and may possibly die.

Q. You have explained some of the results of a person uaing cocaine. Doctor, if I can aak you a hypothetical, you have had an opportunity to review the testimony and findings of Doctor Berland at the original trial, did you not?

A. Yea, I have.

Q. Assuming that aomeone such as Mr. Hudson is Buffering from mental defects as Doctor Berland testified at trial, probleme with some organic impairment and paranoid schizophrenia, how would cocaine effect a person euffering from those mental defects, as opposed to someone without thoee mental defecte?

A. Well, with that etrata already preeent, if that is your hypothetical, which, I guess it is, with that ayndrome or that condition present, and then you add cocaine and other druge to that, what one would expect and what would happen would be an exacerbation of the normal effects of the drugs, exacerbating the symptomotology of what is underlying it.

As a concrete example, if eomeone, say, is paranoid schizophrenic, that means that they have a major mental illness, a major illneee involved in a person's thinking, which is also characterized by a lot of free flowing paranoia. So paranoid schizophrenic. Cocaine, crack, the chronic use of cocaine, will also produce paranoia. It's very rare to see a cocaine addict who is not paranoid. If then you have chronic uee of cocaine and very high amounts of it, in this case, added to a situation where someone ham underlined paranoid and underlying impairment of his thinking, well, then, that would be exacerbated.

Q. Mr. Hudson's disease of chemical dependency, how advanced was it by the time of the crime in thia case, which would have been June of 1986?

A. Mr. Hudson, by the time that you mentioned waa coneuming massive amounts of cocaine along with other druae, mainly marijuana and alcohol and often times heroin. Hie Cocaine addiction was to such an extent where he would uae what is termed as a slab per day, which is about a hundred to two hundred hits of cocaine. This is advanced addiction to cocaine, producing toxic affecte, toxic paychoeie, if you would meaning that the levels of ine was to such an extent where hie ability to perceive and interact with his environment were grossly impaired. Hie ability to reason, to process information were grossly impaired. And theee effect6 would produce what we term a toxic psychotic state. Cocaine peychoaia. The vrolonaed effecte produced was termed organic brain syndrome, inability to remember, to process information.

Q. In layman's term, damage to the brain?

A. Brain damage. That's, that's correct.

Q. The affects of prolonged use of crack cocaine, this brain damage, could thie will be regenerated? Is that something that someone can recover from?

A. It depends, depends on the individual, it depends on the druge.

Q. Let's etay in thie case, just with crack cocaine.

A. In thia case where we are talking about a young healthy individual and we are talking about cocaine. cocaine as opposed to alcohol, normally doesn't produce permanent brain damage. I say normally because it dependa on how you are taking it. If you are injecting it, if it's mixed with talcum powder, that can often produce brain damage.

But aa a general rule, chronic cocaine use doesn't produce permanent brain damage. However, chronic use producee organic brain syndrome, organic brain ayndrome or brain damage, and this damage can exist for quite prolonged periods of time. That is why it's termed chronic.

As an example, I think it'e important for the Court to realize that, as I said earlier, these druge are toxic. You put a drop of cocaine in your eye, and the surgeon may have a half hour, forty-five minutes to do whatever he hae to do. It'e very similar to the analogy of someone doing some carpentry work with a hammer and naila. Someone misses the nail and hits their thumb, well,

the time frame that the hammer is in contact with the thumb may be a few milliseconds where it's actually in contact with the thumb. But depending upon the size of the hammer, the force of the awing and so on, the thumb, your thumb may be impaired from, anywhere from a few minutes to eeveral hours. Or if you hit yourself so neverely and ehattered eome bones, your thumb may be impaired forever.

Normally, with cocaine, in a healthy individual, the brain recovers over a period of time.

Q. It does take a period of time?

A. It takes a period of time.

Q. What are we talking about, approximately?

A. Usually a month, if not a year or two for some of the higher functions to return.

Q. Doctor, based upon your evaluation in thin caee, did you reach a decision to a reasonable degrea of medical certainty that the prolonged and acute toxic affects of crack cocaine on Mr. Hudson caused gross abnormal cognitive impairment along with diminution of judgment, perception, and insight in thie case?

* * *

A. I certainly agree with that. I think it's well within more than a reaaonable degree of medical probability that these amounts of cocaine haa, had impaired Mr. Hudson's higher cognitive function. That is what cocaine does, you know.

(PC-R. 405-415)(emphasis added).

Dr. Macaluso noted that it was important that Mr. Hudson was in jail the 30 days immediately preceding the murder and him apparently intensive use of crack:

Q. You know where he was approximately six daya prior to the incident, Doctor?

A. Six days I think he would have been in jail.

Q. Do you know how long he had been in jail at that time?

A. I believe thirty daye.

Q. Is that unusual for someone with Mr. Hudson's advanced disease of chemical dependency, especially in crack cocaine, to get out of jail and going on, as you say, a binge?

A. Not unusual. It's actually typical, someone who ha8 been removed, incarcerated, therefore, removed from their druge that they have to have, the moment they get out, they will start a binge. That is normal, typical, for that.

(PC-R. 417).

It was Dr. Macaluso's experience as an expert treating addicted persons that they did not take druge to screw up their courage. On cross-examination the doctor testified:

> Q. Would you agree that alcohol and druge are also used in many instances to build up someone's courage to do eomething they would not normally have the courage to do?
>
> A. People do things under the influence of alcohol and drugs that they normally wouldn't do otherwise €or a variety of reasons. One is decreased inhibition. Whether, I don't think someone takea drugs primarily to build up one's courage, no.

(PC-R. 440-441).

Tho doctor also though it wae significant that after the murder and disposal of the body Mr. Hudson "goes out and etarte using cocaine again" (PC-R. 449). "...I think it shows impairment for someone then to go back to the drug Section of town, start using druge continually and then go back home" (PC-R. 450). This established that Mr. Hudson's intent was simply to get druge:

> Q. Doctor, how important is it in your opinion that according to the detectives that Mr. Hudson confessed to them that after he disposed of the body, he went and bought some more cocaine?
>
> A. I think it's extremely important, sir, becauee this is what I have been trying to say in my testimony, that <u>his primary intent was to obtain cocaine that evening</u>.
>
> Q. In fact, Doctor, if you were to accept Mr. Benito's hypothesis, Mr. Hudson's statemente to Me. Roberson after he left Mr. Gerald Bembow's house minutes after the murder would be very irrational, would they not?
>
> A. Extremely, in my opinion.

(PC-R. 453-454)(emphasis added).

A criminal defendant is entitled to expert peychiatric aseietanca when the State makee his or her mental etate relevant sentencing. <u>Ake v. Oklahoma</u>, 470 U.S. 68 (1985). What is required is an "adequate peychiatric evaluation of [the defendant's] state of mind." <u>Blake v. Kemg</u>, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective repreeentation of counsel." <u>United States v. Fessel</u>, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct

proper investigation into his or her client's mental health background, see, _____ v _____, 461 So. 2d 1354, 1355 (Fla. 1984), and to aesure that the client in not denied a profeasional and profesaionallv conducted mental health evaluation. See Feaael; Mason v. State, 498 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The fourteenth amendment mandates that an indigent criminal defendant be provided with an expert who undertake his or her task, and who undertakee that task in a professional manner. Cowley v. Stricklin, 929 F.2d 690 (11th Cir. 1991). An appointed psychologist must render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider am being acceptable under similar conditions and circumstances." Fla. Stat. sec. 768.45(1) (1983). In his or her diagnosis, an expert is required to exercise a professionally recognized "level of care, skill, and treatment." The expert is required to adhere to procedures that experts in the field deem necessary to render an accurate diagnoeis. Olschefsky v. Fischer, 123 So. 2d 751 (Fla. 3d DCA 1960). Dr. Berland did not exercise, nor even approximate, the requisite profeeeional level of care, ekill or treatment because he had inadequate time. The eituation is akin to circumstantial ineffective aeeietance of counsel. See United States v. Cronic, 466 U.S. 648 (1984).

Florida law also providee for a right to profaasionally adequate mental health assistance. See, e.g., Mason; cf. Fla. R. Crim. P. 3.210, 3.211, 3.216; State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Once eatabliehed, the state law interest ie protected against arbitrary deprivation by the federal due process clause. Cf. Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980); Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Meachum v. Fano, 427 U.S. at 223-27. In thie case, both the state law interest and the federal right were arbitrarily denied.

The duty to protect the client's right to professianally adequate mental health assistance does not reet solely with the mental health profeeeional. Trial counsel muet discharge significant responsibilities as well. See Blake;

Fessel; O'Callaghan, Here, couneel failed in that duty. He failed to obtain the expert's appointment in a timely fashion. This is especially shocking in light of the six or seven months in which he failed to act. He neither obtained nor provided the expert with any of the wealth of available information regarding Tim Hudson's background. No recorde were obtained or provided; no first-hand accounts from those who had come into contact with Mr. Hudmon were made known to the expert. Trial counsel failed to take any of the steps necessary to aeeure that his client would receive the expert mental health aeeietance to which ha was entitled to further a defense relying on it.

Mr. Hudeon was denied hie fifth, sixth, eighth, and fourteenth amendment righte. Consequently, Mr. Hudson wae tried without the wealth of mental health testimony eupporting a voluntary intoxication defense. Trial counsel's hurried, laet minute uee of a mental health professional, including their complete failure to provide neceseary background information, negated the value of an evaluation. In a case where Mr. Hudson's mental condition was central to the defense this waa critical ineffectiveness. Couneel failed to investigate and prepare. Had a reaeonable investigation been conducted, a wealth of evidence regarding Mr. Hudson's drug usage wae available. This evidence wam critical evidence for the mental health examiner to know, coneider, and use in his teetimony. Had it been preeented, the reeult of the proceedings would have been different; a eecond degree murder conviction would have been returned. Rule 3.850 relief should have been given by the trial court and must be ordered by thin Court. A new trial is called for.

## ARGUMENT IV

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

On direct appeal thim court divided 4-3 as to whether a death eentence wae legally supported by facte preeented at trial. As thie Court noted on direct appeal, "'Our function in reviewing a death mentence is to consider the circumstances in light of our other decisions and determine whether the death penalty ie appropriate.' Menendez v. State, 419 so. 2d 312, 315 (Fla. 1982)," Hudson, 530 So. 2d at 831. The opinion noted Mr. Hudeon'e situation was

"arguably a close call," 538 So. 2d at 832. A dissent distinguished Mr. Hudson's situation from that of the worst offendere deemed worthy of the death penalty:

> BARKETT, Justice, concurring in part and dissenting in part.
>
> I concur ae to guilt and dieeent as to sentencing. In hie sentencing order, the trial judge made the following findings:
>
> > The facta of the case, an produced by the evidence, indicate that the defendant, TIMOTHY CURTIS HUDSON, waa apparently surprised by the victim during the defendant's burglarizing of the home owned by the victim and ehared with tho defendant's ex-girlfriend ....
> > ....
> > The extensive teeting done by Dr. Berland on the defendant, together with the circumetancee of the surprise of the defendant during the burglary when confronted by the victim, convinces the Court that at the time of tho killing and far at least a ehort period thereafter, the defendant was unable, to a certain extent, to conform him conduct to the requirements of law....
>
> In light of our prior case law, I cannot conclude that the death penalty is proportionate under these facts. Ae was etated in the seminal case of State v. Dixon, 283 So.2d 1, 7 (Fla.1973), the death penalty is reeerved "to only the moet aggravated and unmitigated of moat serious crimes." In light of the trial judge's explicit findings, I conclude that the murder in this case is not within the category of crimes described in Dixon.
>
> KOGAN, J., concurs.

Hudson, 538 So. 2d at 832-33.

In granting Mr. Hudson a new penalty phaae the trial court found:

> The Court cannot draw the same conclusion as to trial counsel who represented the Defendant at the penalty phase. It in inexplicable to this Court why the office of the public defender which had been representing tho Defendant for five to six months waited until three weeks before the Defendant's trial to assign an attorney with no previous capital murder experience to start preparing for the penalty phase. (EH 19-20). Further exacerbating this situation is the fact that a mental health expert was not retained to assist couneel until about the same time. (EH 23-24)
>
> Baeed on this sequence of evente penalty phase couneel was clearly "hurried" in hie preparation and was "uncomfortable with the time constraints, considering the magnitude of the case." (EH 33) (emphaeie eupplied) Indeed, penalty phase couneel had never been confronted with such a limited period of time to prepare any type of felony caee, "much less a first-degree murder." (EH 33) The gravity of this situation is beet summed up by penalty phase counsel's testimony at the evidentiary hearing. Although he testified he wae as prepared as ha could have been under the circumstances, he stated:

In reflecting back on the case and the way the case was presented to me, I certainly felt uncomfortable professionally with proceeding with the penalty phase, baaed on the limited amount of time that I had to prepare. (EH 41) (emphasis oupplied)

As a result, a significant and uubatantial amount of time was not spent on investigating the Defendant's background am to drug addiction. (EH 45) While it is true that penalty phase counsel's utatement in that regard was predicated on what the Dofendant and his parente told him, it is clear to thia Court based on the record that there wag other independent evidence v o tin to ' ' g evidence which he did not pursue. (EH 54-74) And, had he discovered thie available evidence, it warn the type of information he would have "definitely" prementod to the mental health expert. (EH 74) Accord, State V. Lara, 16 FLW S306 (May 9, 1991)

But even more egregious is penalty whsae counsel's testimony that he "did not actively . . . pursue any evidence or witnesses concerning the [Defendant's] drug problem" outside of talking to the Defendant. Indeed, he relied "primarily" on evidence developed during the milt-innocence phase relating to the Defendant's "mental capacity or incapacity." (EH 88)

Accordingly, the Court finds and concludes that the Defendant wae rendered ineffective assistance of couneel at the penalty phase of his trial.

The issue now presented is whether there is a reaeonabla probability that, abeent the deficiencies of counsel, the eentencer, which includes the Florida Supreme Court, would have concluded after an evaluation of the aggravating and mitigating circumstances, that death wae not warranted in thie caee. The Court concludem that there is euch a reasonable probability predicated in part on the opinion of the Florida Supreme Court which affirmed the defendant's sentence of death by the narrowest of margins - 4 to 3. Hudson V. State, 538 So.2d 029 (1989).

At the Defendant'e trial, the mental health expert who examined the defendant teetified on cross examination that he had no evidence or information based on him research or review of report8 that the Defendant either wae or wae not under the influence of cocaine at the time he committed thie murder. (R 419) At the evidentiary hearing he testified that baeed on that lack of evidence he warn not in a position to intelligently convey to the jury what effect cocaine may have had on the Defendant at the time of the offenee but that he now had significant information to be able to do so. (EH 340)

More significant is his testimony that had he poeeeeeed the information which waa available through certain witnoeees prior to the first trial, him testimony a0 to the mental health condition of the Defendant at the time of the offenee would have been "substantially" more forceful, convincing, pereuaeive, underetandable, and compreheneible with regard to how the Defendant would react while under the influence of cocaine as oppomed to the epeculative opinion he gave at trial. As he noted, thie evidence convinced him that the Defendant "was a lot more severely dieturbed than I realized at the time of this offenee." (EH 309-311 and 315)

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

But, even assuming the sentencing judge would have still imposed the death penalty in the face of the omitted evidence, the Court finds there is a reasonable probability that the Florida Supreme Court's ultimate decision to affirm the death sentence would have been different. As is noted in that Court's opinion, it undertook a comprehensive proportionality review to determine whether the death penalty was appropriate in the Defendant's case. In ultimately rejecting the Defendant's position, the Court found one case to be "arguably close call" - Fitzpatrick v. State, 527 So.2d 809 (1988). However, the Court found that "Hudson's mitigating evidence is not as compelling as that presented by Fitzpatrick." Hudson, pg. 832 (emphasis supplied)

This Court finds that had the omitted evidence been part of the record in this case, there is a reasonable probability that the Florida Supreme Court would have found that the Defendant's mitigating evidence would have been just as compelling as Fitzpatrick's and would have found his death sentence to have been disproportionate in terms of Fitzpatrick. As noted, the Florida Supreme Court affirmed the Defendant's death sentence by the narrowest of margins - 4 to 3. Given that fact, this Court cannot be certain that had the omitted evidence been part of the record, one additional justice would not have voted to reverse the death sentence. cf. Way v. Dugger, 568 So.2d 1263, 1267 (Fla.1990).

Therefore, for the reasons expressed, it is ORDERED and ADJUDGED as follows:

1. The Defendant's Motion to Vacate his judgments of conviction is denied.

2. The Defendant's Motion to Vacate his sentences of death is granted, his sentence of death is vacated, and he is awarded a new sentencing before a jury.

IT IS FURTHER ORDERED and ADJUDGED that the Court will conduct a status conference in this case on Tuesday, July 30, 1991, at 1:30 p.m., to either schedule a penalty phase trial or to stay these proceedings pending an appeal by either party.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, on this the 23rd day of July, 1991.

/s/ RICHARD A. LAZZARA
RICHARD A. LAZZARA
CIRCUIT JUDGE

(PC-R. 807-810)(emphasis added)(footnotes omitted).

Thm State called no witnesses in rebuttal during post conviction and was prepared to stipulate to testimony of Mr. Hudson's crack use and addiction (PC-R. 343-48). The mubotance of Mr. Hudson's post conviction evidence of undeveloped mitigation was not denied by the State.

Knowing the compelling additional testimony preeented at post conviction which was not presented at trial, and having the benefit of careful, extensive briefing and argument, the trial court ehould have simply imposed a life sentence. On this record a eentence of death violates the proportionality standards oet out by thie Court in State v. Dixon, 283 So. 2d 1 (Fla. 1973) and the many cases that flow from it. The circuit court believed that thie court may have imposed a life eentence had counsel preeented the additional mitigation. However, the circuit court obviouely felt constrained in the relief that it could grant. This Court is not so constrained. On this record, thie Court rhould find that, had the additional mitigation been present in the direct appeal record, a life eentence would have been ordered pureuant to a mandatory proportionality review.

## CONCLUSION

Appellant, Timothy Curtis Hudson, baeed on the foregoing, respectfully urgee that the Court vacate hie unconstitutional capital conviction and grant all other relief which the Court deeme just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing motion hae been furniehed by United States Mail, first class postage prepaid, to all couneel of record on April 30, 1992.

Respectfully submitted,

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