IN THE SUPREME COURT OF FLORIDA

THOMAS LEE GUDINAS,

Appellant,

v. CASE NO. 86,070

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT IN AND
FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

The State does not accept the argumentative Statement of the Case contained in Gudinas' brief.

This is an appeal from Gudinas' convictions and sentences, including a sentence of death, imposed by Orange County Circuit Judge Belvin Perry.

On June 18, 1994, an arrest warrant was issued charging Thomas Gudinas with First Degree Murder, Aggravated Sexual Battery, and Grand Theft Auto. (R199-205) Gudinas waived extradition from North Carolina on those charges on June 21, 1994. (R206) The arrest warrant was executed in Orange County on June 30, 1994. (R207-8) On July 15, 1995, the Orange County Grand Jury returned a five-count indictment charging Gudinas with Attempted Burglary with an Assault, Attempted Sexual Battery, two counts of Sexual Battery, and First Degree Murder. (R209-11) Gudinas was declared insolvent on July 20, 1994, and the Orange County Public Defender was appointed to represent him. (R212) Gudinas entered a plea of not guilty on July 20, 1994. (R220)

On August 15, 1994, the Public Defender's Office moved to withdraw as counsel based upon that office's representation of a

potential State witness. (R227-29) That motion was granted on August 17, 1994, and two private attorneys were appointed. (R230-31)

Discovery began, and various motions were filed (R232 *et seq*), and, on September 16, 1994, Gudinas filed a motion for change of venue based, *inter alia*, on the extensive publicity this case had received. (R331-33) That motion was granted on September 27, 1994, with the transfer to be effective on January 2, 1995. (R334)

On November 10, 1994, Gudinas' lead counsel, Michael Irwin, moved to withdraw as counsel. (R383) After a hearing, the trial court denied that motion. (R384)

On December 15, 1994, this case was reassigned from Judge Dawson (the original judge) to Judge Belvin Perry. (R399; 405) Judge Perry issued a case management order on December 29, 1994, setting the case for trial on May 1, 1995, and establishing various scheduling dates. (R406-7) On January 3, 1995, Judge Perry issued an amended order on the change of venue motion which granted that motion effective April 21, 1995. (R411) The county to which the case would be sent was to be announced later. (Id.) On January 17, 1995, venue was transferred to Collier County effective April 24, 1995. (R415)

On April 19, 1995, the court entered its order on Gudinas'

multiple pre-trial motions. (R454-6) Jury selection began (in Collier County) on May 1, 1995, and was completed that afternoon. (R497) The jury was duly sworn, and trial began on May 2, 1995. (R497-8) The guilt phase of the case was submitted to the jury on May 4, 1995 (R507), and, on that day, the jury returned its verdict finding Gudinas guilty of all counts as charged in the indictment. (R538-42)

A proffer of evidence was presented by the State on May 8, 1995 (R543), and, on May 9, 1995, the penalty phase proceedings began. (R544) The penalty phase deliberations began on May 10, 1995, and, on that day, the jury recommended that Gudinas be sentenced to death by a vote of 10-2. (R562) On May 19, 1995, a sentencing hearing was conducted by Judge Perry, and final sentencing was set for June 16, 1995. (R566-7) On June 16, 1995, the court sentenced Gudinas to death for the First Degree Murder of Michelle McGrath. (R611-23) The court found, as aggravating circumstances, that Gudinas had previously been convicted of a felony involving the use or threat of violence, that the murder was committed during the commission of a sexual battery, and that the murder was especially heinous, atrocious or cruel. (*Id.*) In mitigation, the court found the statutory mitigator of extreme mental or emotional disturbance, and also found various non-

statutory mitigation. (*Id.*)

Notice of appeal was given on July 11, 1995. (R636) The record was transmitted on November 11, 1995. (R655) Gudinas moved to supplement the record, and the supplemental record was transmitted on April 16, 1996. (Supp. R. 35)

STATEMENT OF THE FACTS

The State does not accept the argumentative statement of the facts set out in Gudinas' Initial Brief. The State relies upon the following facts, in addition to such facts as are set out in the argument section of this brief in connection with the specific claims and sub-claims.

The Guilt Phase Facts

Between 11:00 and 11:30 P.M. on May 23, 1994, Rachelle Smith and her fiancé arrived at Barbarellas, a downtown Orlando bar. (TR252-3) They stayed at Barbarellas until about 2:00 A.M. (on the morning of May 24, 1994). (TR253) Ms. Smith left Barbarellas and began walking back to her vehicle, while her fiancé remained inside saying good bye to friends. (TR254) Ms. Smith mistakenly thought that her car was parked in the parking lot across the street, and, while she was looking for her car, she saw a man crouched down hiding behind another car watching her. (TR255-6) Ms. Smith realized that she was looking for her car in the wrong parking lot,

and then walked to the lot where her car was parked. (TR256) Ms. Smith felt that someone was following her, so she got into her car and locked the door. (TR257) When she looked in the mirror, she saw the same man behind her car that she had seen earlier. (TR257) The car parked on one side of Ms. Smith's car was leaving, and the man that she had seen approached her car on the passenger side and tried to open the door. (TR258) When Ms. Smith saw him, the man acted like he was trying to open the door of the car parked in the next parking space. (TR258) The man then crouched down, went behind Ms. Smith's car to the driver's side, and tried to open the door. (TR259) The man screamed at Ms. Smith "I want to fuck you", and then covered his hand with the tail of his shirt and began trying to break out the driver's side window. (TR259) Ms. Smith "laid on the horn", and the man left. (TR260) She was joined by her fiancé about five minutes later, and together they tried unsuccessfully to find the man. (TR260-1) After learning of the murder that occurred in the same area that night, Ms. Smith called law enforcement and gave a description of the man who had assaulted her. (TR262) The parking lot where this incident took place is well lighted, and Ms. Smith had a good view of her assailant. (TR263) She identified that individual as the defendant, Thomas Gudinas. (TR263)

Kevin Kelley operates the parking lot at Scruffy Murphy's, another downtown Orlando bar (which is near Barbarellas). (TR272-3) Kelley was working his usual hours of 7:00 P.M. until 1:00 A.M. on May 23, 1994. (TR273-4) Michelle McGrath was a regular customer who Kelley knew through his employment. (TR275) She parked her car in his parking lot between 10:30 and 11:00 P.M. on May 23, 1994. (TR275) Kelley identified the car that Ms. McGrath owned and was driving at the time he saw her. (TR276) He did not see Ms. McGrath again that evening, nor did he see her leave. (TR277) Ms. McGrath was alone when she arrived, and did not seem to be intoxicated. (TR277; 280)

Troy Anderson has known Michelle McGrath since high school (which, at the time of trial, was about 11 years). (TR281) Anderson was in downtown Orlando on May 23-24, 1994, at Barbarellas and Skinny Dick's (another downtown bar in the same area). (TR281) Anderson saw Ms. McGrath at both establishments, first at Skinny Dick's between 11:45 P.M. and midnight, and later at Barbarellas at about 1:30 A.M.. (TR282-4) Ms. McGrath and Anderson talked for five to fifteen minutes at Skinny Dick's, and she did not seem intoxicated. (TR282) Anderson saw Ms. McGrath a second time at Barbarellas at about 2:45 A.M.. (TR285) He could not tell if Ms. McGrath was with anyone, but she was alone each time that he saw

her and she did not seem to be with anybody. (TR285)

Jane Brand was employed at the Pace School for Girls in May of 1994. (TR289) That school is located in downtown Orlando. (TR289) On May 24, 1994, Ms. Brand came in to work at about 7:00 A.M., which is her usual time. (TR291) As she unlocked the gate to enter the school premises, she saw a man sitting on the other side of the gate on the steps leading to the door to the school. (TR293) That person was "just sitting there" with his back to Ms. Brand. (TR293) When asked how he had gotten onto school property, the man said that he had jumped or climbed over the fence. (TR293)Throughout this conversation, the man remained seated and did not look at Ms. Brand. (TR293) Ms. Brand told the man, who had short brown hair and looked about 18 years old, to leave, and, when he stood up, he seemed to be either fastening his shorts or tucking in his shirt tail. (TR294) Ms. Brand went up the steps into the building, and the man hopped over the fence, even though the gate was open. (TR295) By jumping the fence, the man ended up in the alley. (TR296)[1] Ms. Brand saw that the man had on shorts and a loose shirt. (TR296) She then went into her office and, a short time later, heard someone walking in the alley, whom she thought might

[1]This is the alley where Ms. McGrath's body was found.

be the man she had seen a short time ago. (TR297) At about 7:30 A.M. (about 10 minutes after the man jumped over the fence), Ms. Brand heard a loud crash from the alley and looked outside to see if the man she had seen earlier was gone. (TR299-300) At that time, she saw a woman's body lying in the alley. (TR300) Ms. Brand called law enforcement and her supervisor, and then was able to flag down a bicycle patrol officer from the Orlando Police Department. (TR301-2) Ms. Brand identified Gudinas as the man that she saw that morning. (TR303)

Culbert Pressley was living in Orlando with his godmother in May of 1994. (TR308-9) At that time, Pressley would look for lost items in downtown Orlando parking lots in hope of getting a reward for returning the lost property. (TR309) Between 4:00 and 5:00 A.M. on May 24, 1994, Pressley found some keys and a bundle of clothes lying beside a car. (TR310-11)[2] The clothes were a pair of cut off jeans and a shirt, and the key ring had a picture on it that had been taken at Howl-at-the-Moon, another downtown bar. (TR312-3) Pressley went to that bar in an unsuccessful attempt to identify the owner of the keys, and then, when he saw a female sheriff's deputy, he asked her for help in identifying the owner.

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[2]The car, as was shown later, was Ms. McGrath's, and the keys were to that car. *See, e.g.*, TR508-9.

(TR313-4) Pressley then "sat around" for about two hours in the hope that the owner of the keys would show up. (TR316) Then, a man walked by and Pressley held up the keys. (TR316) That person said that the keys looked like his and offered Pressley a $50 reward for them. (TR316-7) At about that time, law enforcement officers arrived, and Pressley handed the keys to the man. (TR318) Pressley noticed that the pile of clothes that he had seen earlier was gone, and also noticed that the man to whom he had given the keys had on jeans shorts and a blue shirt, and that his hair looked like it was wet. (TR317; 320-1) The man then got into a red GEO automobile and drove away. (TR321) Pressley wrote down the tag number of the GEO on the back of his hand and gave it to one of the law enforcement officers. (TR322) Pressley identified the man that he saw that morning as the defendant, Thomas Gudinas. (TR325)

Officer John Chisari was an Orlando Police Department bicycle patrol officer on May 24, 1994. (TR336-8) He has eleven years of experience as a homicide detective with the same department. (TR337) Officer Chisari came on duty at about 6:30 A.M. and, shortly thereafter, was approached by a female sheriff's deputy about someone with some lost keys. (TR339) Officer Chisari then rode to the Scruffy Murphy's parking lot, where he found Pressley, who was known to the officer. (TR340-1) Pressley said that he had

found some keys and had given them to "that guy", indicating Gudinas. (TR342) The officer started to ride over to the defendant when he heard a scream from the area of the alley. (TR343) Officer Chisari opened the gate and saw the victim's body. (TR343-4) Because of his experience as a homicide investigator, Officer Chisari realized what he was confronted with, looked for the defendant, and saw a red GEO leaving the parking lot. (TR345) At this point, Officer Chisari heard another scream, saw Jane Brand, and went up the steps to her. (TR346) Officer Chisari told Pressley to get the tag number of the GEO, and called over Orlando Fire Department personnel, who were in the area as a result of an unrelated incident. (TR348) Officer Chisari identified Gudinas as the person that he saw that morning. (TR349-50) There was a black pickup truck parked in the same parking lot, but Officer Chisari knows the owner of that vehicle. (TR351)

On the morning of May 24, 1994, Mary Rutherford was in downtown Orlando on her way to work as an assistant witness coordinator for the county. (TR361-2) She saw Pressley (who is black) standing with his arm around the neck of the defendant (who is white), and, because the situation seemed very odd, she took note of it. (TR362-3) Ms. Rutherford stopped her car, and Gudinas looked over at her and grinned. (TR364) Then Gudinas and Pressley

began walking toward the Scruffy Murphy's parking lot. (TR365) Ms. Rutherford parked her car and, as she was walking to her office, saw Officer Chisari talking to Pressley. (TR366) She described Gudinas as being of slight build with slicked-back hair, wearing a white polo-type shirt and black shorts. (TR368) Additionally, Gudinas appeared "squeaky clean", as if his hair might have been wet. (TR368) Ms. Rutherford identified Gudinas as the person she saw that morning. (TR369)

Barbara Hunt was visiting with her brother's family at his apartment when she saw a red car pull into the parking lot. (TR383-4) The driver parked the car some 10 to 12 feet from her niece's window, and the driver hurriedly got out of the car and ran to the cul-de-sac where he got into another car with two women. (TR385-6)[3] Ms. Hunt described the driver as half white/half Hispanic, but was never able to positively identify anyone. (TR386; 388)

Michelle Snow, who is employed as a forensic technician with the Orange County Medical Examiners' Office, went to high school with Michelle McGrath. (TR396) Ms. Snow identified Ms. McGrath's body on May 24, 1994. (TR397)

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[3]This car was later identified as belonging to Michelle McGrath. (TR508-9)

Dr. Thomas Hegert has been the Medical Examiner for Orange County since 1955. (TR402) Dr. Hegert was accepted as an expert without objection. (TR404)

On the morning of May 24, 1994, Dr. Hegert went to the scene where Michelle McGrath's body had been found.[4] (TR404) He testified that he observed low angle blood spatter patterns, and further testified that sticks had been inserted into the victim's vagina and the area near her rectum. (TR411) Later examination determined that the sticks were originally one piece that had been broken. (Id.) Dr. Hegert observed injuries to the left side of the victim's forehead, as well as a number of blunt force trauma injuries to her head, neck and ear. (TR412-13) All of the injuries were about the same age, and substantial hemorrhaging was associated with them. (TR413-15) Severe cerebral edema was found, indicating that death was not immediate. (TR415) However, because the victim's lungs were not severely congested, Dr. Hegert was able to determine that she died within 30 to 60 minutes of the infliction of the fatal injury, which was a forceful blow to the head. (TR416; 443) That injury was probably inflicted by a stomping-type blow to the head by a person wearing boots. (TR416)

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[4]Ms. McGrath was nude, except for her bra, which had been pushed up above her breasts. (TR441)

At least three separate injuries could be identified, but the injury patterns are so large that it is difficult to identify individual injuries. (TR418) However, it was possible to determine that the victim's earrings had been ripped out; that she had abrasions to her neck, some of which came from fingernails; that she sustained a laceration and associated hemorrhage around her eye; that she had blunt force trauma to her neck; that she had bite marks and sucking-type marks on her breasts; that she had multiple contusions and abrasions to her vaginal area; that she had a contusion to her left arm; that she had a scrape-like injury consistent with the surface of the alley just below the small of her back[5]; that she had defensive wounds to her hand; and that a stick had been inserted about two inches into her vagina, and another stick had been inserted some three inches into the area near her rectum (producing a stab wound). (TR418-438) All of those injuries were inflicted while the victim was alive, as demonstrated by the associated hemorrhage. (TR438) Ms. McGrath had been vaginally and anally penetrated by something other than the sticks that were found in her body, and, in fact, trauma to her cervix was present. (TR439-40; 458-9) The bite marks were inflicted by a

[5]This part of the victim's back would only be in contact with the ground if her legs were raised.

person who was located at the victim's head. (TR429)[6] The blood spatter patterns that were at the scene were consistent with the victim being kicked or stomped (while lying on the ground) after her face was already bloody. (TR443)[7] Only one of the head injuries would have caused loss of consciousness, and that blow is the one that killed the victim by causing a massive brain hemorrhage. (TR443-4) Dr. Hegert placed the time of death at between 3:00 A.M. and 5:00 A.M.. (TR449) At the time of her death, Michelle McGrath had a blood alcohol content of 0.17% and, while she might have lived a little longer without that amount of alcohol in her system, the head injury would have killed her, anyway. (TR444; 456) Finally, Dr. Hegert testified that he saw no drag marks at the scene to indicate that the victim's body had been dragged into the alley. (TR459)

Tracy Armstrong lived in the Inglewood Park suburb of Orlando in May of 1994. (TR462-3) That suburb is close to the Colony Club apartments. (Id.) On May 24, 1994, Ms. Armstrong had been called to come in to work at about 3:00 P.M., and, as she was driving out of the subdivision, she saw a red GEO which was being driven in an

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[6]In other words, the bite marks were upside down.

[7]The mouth and facial injuries would have bled heavily. (TR460)

erratic fashion. (TR463-4) Ms. Armstrong identified a photograph of the car, but, while she noticed the driver, she was not able to positively identify him. (TR465-9)[8]

Jose Martinez is an evidence technician with the Orlando Police Department. (TR474-5) Officer Martinez processed the crime scene and, among other things found a purse strap in the parking lot and a small amount of blood on one of the parking stops. (TR479-82) The purse matching the strap was found in the alley. (TR485) The ground between the gate and the body was covered to preserve any physical evidence--no drag marks were seen in that area. (TR487; 490) Among other things, a pair of blue jeans in size 29/34 were found at the scene--those jeans had blood in the thigh, crotch, upper knee and cuff areas. (TR498-501) Officer Martinez processed the burglar bars and windows for fingerprints, and removed the push bar from the gate (which had blood on it) for processing. (TR502-3)

David Griffin is a homicide investigator with the Orlando Police Department, and was the lead investigator in this case. (TR507) A BOLO was issued for the victim's car and, at 7:00 to 7:30 P.M. on May 25, 1994, the car was located. (TR508) Gudinas had

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[8]This car was subsequently proven to belong to the victim.

been developed as a suspect at that time, and the car was kept under surveillance overnight to see if he returned. (TR509) The car was impounded the next day. (TR508) Investigator Griffin conducted a photographic line up with the various witnesses--Gudinas' picture was included in the lineup. (TR510) The witnesses were told not to watch television or read the paper prior to viewing the lineup so they would not see a photograph of Gudinas. (TR511) The witnesses Smith, Pressley and Rutherford identified Gudinas from the lineup. (TR511) Armstrong identified Gudinas and one other photo, but was unable to decide further. (TR512)

Investigator Griffin interviewed Dewayne and Fred Harris, who were Gudinas' roommates. (TR513) They showed Investigator Griffin Gudinas' clothes, which included a pair of jeans in size 29/34. (TR513) The apartment where Gudinas lived is seven-tenths of a mile from the spot where Armstrong saw the victim's car, and four-tenths of a mile from where the car was found. (TR513)

Amanda Taylor, a latent fingerprint examiner with the Orlando Police Department, was accepted as an expert in fingerprint comparison. (TR551-3) She compared latent fingerprints found on the alley gate pushbar and on the car loan payment book which was found in the victim's car to known exemplars taken from Gudinas. (TR556-60) The latent fingerprint on the pushbar was Gudinas' right

palm, and both of Gudinas' thumbprints were found on the payment book. (TR562)

Frank Wrigley was one of Gudinas' roommates. (TR568; 574)[9] He met up with Gudinas and his cousins at Barbarellas at about 1:00 A.M. on the morning of May 24, 1994. (TR570) Wrigley left the club when it closed at 3:00 A.M.. (TR571) He had ridden to the club with Dewayne Harris, who is Gudinas' cousin and Fred Harris' brother. (TR572) Wrigley looked unsuccessfully for Gudinas when he left the bar at closing time. (TR573) After the group returned to their apartment and found that Gudinas was not there, Todd Gates and Fred Harris went back downtown to look for him. (TR575)[10] Wrigley next saw Gudinas on the afternoon of May 24, 1994. (TR576) Gudinas had blood on his underwear and scratches on his knuckles, which he said were the result of a fight with two black men who had tried to rob him. (TR577-8)

Todd Gates was also one of Gudinas' roommates in May of 1994, and also went to Barbarellas on the night of May 23. (TR606-7) The group did not stay together in the bar, but Gates saw the defendant twice during the evening, with the last time being at

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[9]Wrigley, Gudinas and the other roommates are from Massachusetts, and knew each other from there.

[10]Todd Gates was also living in the apartment.

about 1:00 A.M.. (TR609-10) Gates did not see Gudinas when he (and the others) left for home, and, when Gudinas was not at the apartment when they arrived, Gates and Fred Harris drove back downtown to look for him. (TR611-12) He then returned home, arriving between 3:30 and 4:00 A.M.. (TR613) Gates stayed up for about another hour drinking beer, and then went to sleep. (TR614) Gudinas did not return home before Gates went to sleep, but was at the apartment when Gates woke up around 8:30 or 9:00 A.M.. (TR614) Gudinas said that he had gotten in a fight with a black guy who asked for a cigarette, and had cuts on his knuckles and a scrape across his chest. (TR615) Gudinas had been wearing jeans and a t-shirt when the group went downtown, but, the next morning, he was wearing shorts. (TR615) Gudinas showed Gates the boxer shorts that he had been wearing the night before--those shorts had blood all over the front of them. (TR615-6)

Fred Harris is Gudinas' first cousin and, at the time of the murder, was another of the defendant's roommates. (TR632-4) Gudinas had moved in with Fred about a month before the murder. (TR634) The roommates left for Barbarellas at about 11:00 P.M. on May 23, 1994. (TR635) After arriving at the bar, Fred only saw Gudinas a few times--he looked unsuccessfully for him before leaving for the evening, and never saw the defendant leave the bar.

(TR637-8) Fred thought that Gudinas had just gone off on his own, and, when he could not be found, Fred went back to his apartment. (TR639-40) Gudinas was not at the apartment when Fred arrived, and, when Gates arrived about 30 minutes later without Gudinas, Fred and Todd Gates went back downtown to look for him. (TR641) They did not find Gudinas, and returned home between 4:30 and 5:00 A.M.. (TR642) Fred saw Gudinas when he woke up between 8:30 and 9:00 A.M.. (TR642) Gudinas told Fred that he had been robbed by two black men, and exhibited his boxer shorts, which had blood in the crotch area. (TR643-4) Gudinas said that the robbers had made him take his pants off, and that the blood on the shorts came from his knuckles. (TR645) Gudinas did have scratch marks on his knuckles. (TR645) Fred learned of the murder later that day, and later saw composite sketches of the suspect at a neighborhood store. (TR646) Gudinas was with him at that time, and volunteered the statement that "none of [the sketches] look like me". (TR646) No one had suggested that the sketches looked like Gudinas or otherwise suggested that he had been involved in the murder. (TR648) During conversation with his roommates, Gudinas was asked if the victim was "a good fuck", to which he replied "Yes, and I fucked her while she was dead". (TR654) Gudinas kept his shirt on while he went swimming, and, a day or two after the murder, showed

Fred a scrape or cut on his penis. (TR656) Gudinas habitually wore his jeans longer than would fit, and tucked the extra length into his shoes. (TR670; 692)

Dwayne Harris also shared an apartment with Gudinas during May of 1994. (TR674-6) Dwayne is Fred's brother and Gudinas' cousin (TR676-7), and was part of the group that went to Barbarellas early in the morning of May 24, 1994. (TR677) Dwayne saw Gudinas a couple of times over the course of the evening, with the last time being shortly before 3:00 A.M.. (TR679) The group tried to find Gudinas before they returned home, and, when Gudinas was not at their apartment, Todd and Fred went back to look for him. (TR682-3) Dwayne went to bed at about 5:30 A.M., and Gudinas returned home at about 7:30 A.M. and woke Dwayne up. (TR684) Gudinas looked like he had been in a fight, and had cuts on his knuckles and blood on his shirt. (TR685) Dwayne heard Gudinas say "I killed her then I fucked her". (TR691)

Investigator Griffin was recalled as a witness and testified that he interviewed Gudinas in North Carolina, and that, during that interview, Gudinas said that he did not know Michelle McGrath and had never been in her car. (TR709) Investigator Griffin also authenticated a tape-recorded interview of Fred Harris during which Fred related Gudinas' statements about killing and having sex with

Ms. McGrath. (TR712-3) During that interview, Fred said that he thought Gudinas was serious. (TR713)

Timothy Petrie is a serologist with the Florida Department of Law Enforcement. (TR721) He analyzed the swabs taken from the victim's body and found that semen was present on the vaginal swab as well as on a swab of the victim's thigh. (TR726; 728) He further testified that saliva was possibly present on swabs taken from the vaginal area as well as on those taken from the victim's breasts. (TR727; 730) The jury found Gudinas guilty of all five counts contained in the indictment. (TR883)

The Penalty Phase Facts

The State introduced certified copies of the following Massachusetts convictions: burglary of an automobile; assault; theft; assault with intent to rape; indecent assault and battery; and assault and battery. (TR43-9)

Gudinas presented the testimony of Dr. James Upson, a clinical neuropsychologist. (TR50) Dr. Upson testified that Gudinas has no neuropsychological impairment, and that persons with his personality type usually exhibit a higher degree of impulsivity, sexual confusion and conflict, bizarre ideation and manipulation of others. (TR66) Such people tend to be physically abusive and possess the capacity and ability to be violent. (TR67) Dr. Upson

related two reported instances of child abuse against Gudinas which occurred when he was very young. (TR76) Dr. Upson was of the opinion that Gudinas was seriously emotionally disturbed at the time of the crime, and that the "symbolism" of the crime indicates that he is "quite pathological in his psychological dysfunction". (TR77-8) However, Gudinas' problems have always been behavioral, and he has no real desire to control his behavior, as evidenced by, among other things, his disruptive behavior while in jail awaiting trial. (TR84; 93-6)[11] Dr. Upson believes that Gudinas will be a danger in the future, and stated that the murder of Ms. McGrath is consistent with the behavior of a person of Gudinas' psychological makeup. (TR97-8) To the extent that there is a claim that Gudinas' natural father engaged in cross-dressing, the only information on that subject came from Gudinas' mother, who is divorced from his father. (TR101) Gudinas has engaged in sexually inappropriate behavior in the past, including some sort of encounter with his sister. (TR102)

Dr. James O'Brian, a pharmacologist, testified that Gudinas is unable to control his impulses in an unstructured environment, and

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[11]Gudinas escaped during one of his prior prison terms. (TR96)

opined that the killing in this case was impulsive. (TR111-116)[12] Dr. O'Brian based his opinions about Gudinas' level of intoxication upon what he was told other witnesses would say. (TR133) Even though Dr. O'Brian is not a mental state expert, he testified that, in his expert opinion, Gudinas was unable to control his impulses as his alcohol consumption increased, and that his ability to conform his behavior to the requirements of law was substantially impaired by the alcohol and by his psychological makeup. (TR118-9)

Michelle Gudinas is the defendant's younger sister. (TR146) She testified that when Gudinas was four years old, his father put his hand on the stove because he was playing with matches. (TR147) She also testified that, on one occasion, Gudinas' father made him stand in front of the house in his underwear wearing a sign that said "I will not wet the bed". (TR149) She testified that she and her brother lived with their father for about two and one-half years after their parents divorced, and went back to live with their mother when Gudinas was seven or eight years old. (TR158) Gudinas had a good relationship with his stepfather. (TR158) She also denied that any sexual contact occurred with her brother, and

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[12]Dr. O'Brian said, "I'm not a psychiatrist" before he began offering psychiatric opinions about such things as impulsivity. (TR114)

denied telling any investigator that it did. (TR152) However, Emmitt Browning, an Orlando Police Department investigator, testified (in rebuttal) that Michelle Gudinas stated that she was at a party and went into a bedroom with her brother. (TR166) The next thing that she recalled was her brother lying on top of her and her swim suit being torn off. (TR166) Some of their cousins came in and caught them and pulled Gudinas off her. (TR166-7)

Karen Goldthwaite is Gudinas' mother. (TR170) She married Gudinas father in 1972, and Gudinas was born in 1974. (TR170) She divorced his father in 1977 or 1978, and has since remarried. (TR171) Ms. Goldthwaite had a difficult pregnancy and delivery with Gudinas, and he had some health problems during the first six months of his life. (TR173-5)[13] Ms. Goldthwaite testified that she first noticed violent behavior on the part of the defendant when he was nine years old, and that she constantly tried to get help for him from the State of Massachusetts. (TR187; 216) However, she also testified that she never saw Gudinas act aggressively toward her, his father (or stepfather), or any other person. (TR209-10)

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[13]Appellate counsel asserts that Gudinas was a "SIDS baby" because he stopped breathing on occasion during the first few months of his life and had to be taken to the hospital. Inasmuch as there is no evidence that Gudinas has any sort of brain impairment, it is unlikely that he was deprived of oxygen for any length of time.

Ms. Goldthwaite also testified that the woman Gudinas tried to rape (in Massachusetts) was known to him. (TR208) Finally, she testified that every time Gudinas got into trouble, he promised that he would behave himself from then on. (TR220-21)

The jury recommended that Gudinas be sentenced to death by a vote of 10-2. (TR341)

SUMMARY OF THE ARGUMENT

The trial Court properly denied Gudinas' motion to sever the attempted burglary and attempted sexual battery charges. Those two offenses were "connected" within the meaning of *Fla.R.Crim.P.* 3.150(a) to the first degree murder and sexual battery of Michelle McGrath. The crimes at issue in this case took place in substantially the same location, and were committed within a short span of time. Moreover, both victims were female patrons of the same club who were assaulted in the same parking lot as they returned to their cars. Rape was the objective in both offenses, and the fact that Gudinas failed to accomplish his ultimate goal in his first attempt is not a sufficient reason to require severance. Even if the charges should have been severed for trial, any error was harmless because the facts of the first offense would have been admissible in the murder trial because that evidence was relevant to establish a common scheme and identity, as well as to establish

the context of the entire criminal episode.

Gudinas' claim that he was improperly excluded from various pre-trial proceedings is procedurally barred because no objection to the claimed exclusion was made below. Moreover, even if the procedural bars are ignored, any error (assuming Gudinas was in fact excluded) is harmless because his presence in the proceedings at issue would not have assisted the defense in any way. Of course, the fact that trial counsel never objected, even though they obviously "knew" that Gudinas had not been present during the proceedings at issue is most likely explained by the fact that nothing improper occurred.

Gudinas' claim that his motion for a judgement of acquittal as to the attempted sexual battery of Rachelle Smith was improperly denied because there was insufficient evidence of intent is not a basis for reversal. Gudinas made his intent perfectly clear when he shouted at Ms. Smith "I want to fuck you", covered his hand with his shirt, and attempted to break out the window on the driver's side of her car. Gudinas' statement, coupled with his efforts to obtain access to Ms. Smith by breaking out the window of her car leave no doubt about his intent.

Gudinas' claim that the trial court improperly denied the motion to withdraw filed by one of his attorneys is not a claim

that *Faretta* error occurred. Gudinas never asserted any right to self-representation. Moreover, Gudinas never claimed that his attorney was not rendering effective assistance of counsel, nor did **Gudinas** express a desire, at the hearing on the motion, that counsel be allowed to withdraw. The most that is shown by the record is a generalized lack of trust in one of the attorneys, and that is not a sufficient basis to support granting a motion to withdraw. Gudinas was expressly invited by the court to bring any subsequent problems to the court's attention in writing, but he never took advantage of that offer. In fact, at the conclusion of the guilt phase of Gudinas' trial, he stated that his attorneys "did a wonderful job".

Gudinas' claim concerning the admission of photographs of his victim is in two parts. The first component of that claim is that it was error to allow six photographs of the victim's body into evidence during the guilt phase of the trial. The trial court did not abuse its discretion in admitting those photographs because they were relevant (and necessary) to the medical examiner's testimony which explained the injuries shown in those photographs. The victim had sustained multiple injuries, and the photographs were necessary to allow the jury to understand the location and the extent of those injuries. However unpleasant the photographs may

claim that they are inaccurate or cumulative, nor does Gudinas claim that they became a feature of the trial. Regardless of how horrific those photographs may be, they accurately depict Gudinas' handiwork when he murdered his victim, and, for that reason, they are relevant. That is the standard by which the admission of photographs is evaluated, and it is clearly met in this case. Even if the photographs should have been reproduced in a black-and-white format, any error in not doing that was harmless under the facts of this case. To the extent that Gudinas claims that the State should not have been allowed to refer to the guilt phase photographs during the penalty phase closing argument, that claim is meritless. Those photographs were properly in evidence, and, moreover, the injuries depicted in them are relevant to the heinous, atrocious, or cruel aggravating circumstance.

Gudinas also argues that it was error to allow testimony concerning a prior statement made by a state witness when that statement was inconsistent with the trial testimony of that witness. The issue was not preserved by a timely and proper specific objection, and is procedurally barred under settled Florida law. Moreover, while Gudinas attempts to present this claim as the admission of a *prior consistent* statement, the record does not bear that claim out. Instead, the record establishes that

the statement at issue was admitted in the context of impeachment of a witness through the admission of his **prior inconsistent** statement. That is not improper under settled Florida law--it is proper impeachment. Alternatively and secondarily, any error was harmless beyond a reasonable doubt.

The trial court did not abuse its discretion in denying Gudinas' motion for a mistrial which was made in connection with the testimony of two witnesses. The first claimed error was not preserved by a timely objection, and nothing is preserved for appellate review. Assuming *arguendo* that the issue was preserved, the curative instruction given to the jury was more than sufficient. Insofar as the second instance of claimed error is concerned, the jury was, once again, given a clear curative instruction which was sufficient. The trial judge was in the best position to observe the effect of the complained of statement and denial of the motion for a mistrial was not an abuse of discretion.

Gudinas' claims that it was error for the trial court to deny his motion precluding prosecutorial argument and jury instructions on first-degree felony-murder because the offense charged in the indictment was premeditated murder, and that he cannot be convicted of both felony-murder and the underlying felony, are foreclosed by binding precedent.

Gudinas' claim that his ability to present a defense was restricted when the trial court sustained "numerous relevance objections" interposed by the state during the defense case-in-chief has no factual basis, and, for that reason, is wholly without merit. In fact, the state only made one relevance objection during the testimony at issue, and that objection was overruled.

Gudinas' jury instruction claims are procedurally barred because they were not raised at trial, are without merit under controlling precedent, and, alternatively, even if there was error, it was harmless beyond a reasonable doubt. To the extent that Gudinas claims that his special requested jury instructions were improperly denied, that claim fails because the standard jury instruction, which has been repeatedly approved, was given in this case. Alternatively and secondarily, any error was harmless beyond a reasonable doubt because this murder is especially heinous, atrocious, or cruel under any possible definition of that aggravating circumstance. To the extent that Gudinas attempts to raise a prosecutorial argument claim, that claim is, as Gudinas concedes, procedurally barred because there was no contemporaneous objection at trial. In any event, even if there had been an objection, there is no error.

Gudinas' claim that the trial court should not have found the

heinous, atrocious, or cruel aggravating circumstance is without merit. Apparently, Gudinas predicates this claim upon his belief that the victim was rendered unconscious early in the sequence of events. However, the physical evidence does not support that conclusion and, because there is no factual support for his claim, he is entitled to no relief. Alternatively and secondarily, even if the heinous, atrocious, or cruel aggravating circumstance should not have been found, the death sentence is still supported by two strong aggravating circumstances which are more than sufficient to support a death sentence.

Gudinas' claim that the sentencing court improperly weighed the aggravators and mitigators, and that the aggravating circumstances do not outweigh the mitigating circumstances, is foreclosed by binding president. The sentencing court's order clearly reflects the weighing process conducted by that court and, of course, the relative weight given each mitigating circumstance is within the province of the sentencing court. That court properly conducted its analysis and found that death was the only proper sentence. That determination should not be disturbed.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED GUDINAS' MOTION TO SEVER

On pp. 27-34 of his brief, Gudinas argues that the trial court abused its discretion in denying his motion to sever counts I and II of the indictment. A fair consideration of the facts and the law does not support that conclusion.

As set out at p. 1, above, counts I and II of the indictment charged Gudinas with attempted burglary and attempted sexual battery of Rachelle Smith. (R209) Counts III, IV and V charged Gudinas with two counts of sexual battery and the first degree murder of Michelle McGrath. (R210) All of those offenses occurred during the early morning hours of May 24, 1994, in the same downtown Orlando parking lot. The offenses against Rachelle Smith took place shortly after 2:00 A.M. (TR254-56), and Michelle McGrath was killed between 3:00 A.M. and 5:00 A.M. (TR449). Michelle McGrath was last seen alive at about 2:45 A.M. (TR285), and, according to the testimony of the Medical Examiner, she lived between 30 minutes and one hour after receiving the injury that caused her death (TR416). Michelle McGrath's car keys were found between 4:00 A.M. and 5:00 A.M., lying beside her car. (TR309-11) Assuming *arguendo* that the victim died within 30 minutes of the

fatal injury, and further assuming that the car keys were found at 5:00 A.M., the murder still took place no more than two and one-half hours after Rachelle Smith was assaulted. Further, the other non-fatal injuries, which included two sexual batteries, obviously took some period of time to inflict, and, when that fact is coupled with the fact that Gudinas was last seen shortly before 3:00 A.M. (TR679), the likely course of events separates the conclusion of the assault on Rachelle Smith from the beginning of the attack on Michelle McGrath by less than one hour.[14] Under even the most favorable scenario, the offenses are, without a doubt, part of a spree of crimes committed by the defendant.

Florida law is settled that two offenses are properly joined for trial if those offenses are based "on two or more connected acts or transactions". *Fla.R.Crim.P.* 3.150(a). Acts are "connected" for purposes of the Rule if they are "connected in an episodic sense." *Fotopoulos v. State*, 608 So.2d 784, 790 (Fla. 1992), *citing, Livingston v. State*, 565 So.2d 1288, 1290 (Fla 1988). Appropriate factors that should be considered in passing on the propriety of consolidation are "the temporal and geographical

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[14]The club attended by Gudinas, as well as both victims, closed at 3:00. (TR571) Gudinas and Michelle McGrath were both seen inside the club shortly before closing.

association, the nature of the crimes, and the manner in which they were committed." *Bundy v. State*, 455 So.2d 330, 345 (Fla. 1984). The facts of this case are indistinguishable from *Bundy*, and, if anything, amount to an even stronger case for consolidation.

In this case, the two crimes took place in substantially the same location, and were committed within a two-hour span of time. Both victims were female patrons of the same club who were assaulted in the same parking lot as they returned to their cars. Both crimes were similar in that they both involved an attack on the victims with rape as the objective.[15] The fact that Rachelle Smith was lucky enough (or fast enough) to avoid Gudinas' clutches does not mean that denial of the motion to sever was an abuse of discretion. The crimes committed by Gudinas are unquestionably connected, and those crimes were properly consolidated for trial. There was no error.

To the extent that Gudinas complains, on pp.31-32 of his brief, that the State's closing argument began by addressing the crimes committed against Rachelle Smith, that order of argument should come as a surprise to no one. Evidence concerning those

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[15]Rape was Gudinas' objective in assaulting Rachelle Smith by his own words to her--what he did to Michelle McGrath speaks for itself more loudly than words.

crimes was presented first during the trial, and, moreover, those crimes were Gudinas' first of the evening. (TR251 *et seq*) Those offenses were the logical ones to argue first, and there is no basis for complaint.[16]

To the extent that Gudinas complains that the identification of him by Rachelle Smith as her attacker was prejudicial because it did not identify him as the person who attacked Michelle McGrath, that argument carries its inductive reasoning one step too far. Rachelle Smith never claimed to be able to identify the person who raped and murdered Michelle McGrath, but she was unquestionably able to identify the person who attacked her. That was the extent of her testimony. The fact that that testimony placed Gudinas in the same parking lot where Michelle McGrath was attacked is not prejudicial--it is a fact that Gudinas cannot change and would not have been able to keep from the jury. The crimes against Rachelle Smith were not improperly used to bolster the murder case against Gudinas--those crimes were part and parcel of a continuing criminal transaction which were properly tried together. The trial court did not abuse its discretion in refusing to sever the charges.

Alternatively, even if the charges should have been severed

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[16]Ironically, Gudinas' Initial Brief also addresses those crimes first.

for trial, any error was harmless. Under any possible view of the evidence, the facts of the attack on Rachelle Smith would have been admissible in the murder trial because that evidence was relevant to establishing a common scheme and identity, as well as to establish the context of the entire criminal episode.[17] *Foster (Jermaine) v. State*, No. 84,228 ms.op at 10 (Fla., July 18, 1996); *Hunter v. State*, 660 So. 2d 244 (Fla. 1995); *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed. 2d 86 (1959); *see also, Bundy, supra*, at 345; *Fotopoulous, supra*, at 790; *Craig v. State*, 510 So.2d 857 (Fla. 1987); *Heiney v. State*, 447 So.2d 210 (Fla. 1984). Because evidence of both crimes would have been properly admitted at trial of either offense, Gudinas, like Bundy, cannot demonstrate that a severance was necessary for him to receive a fair trial. Even if the cases should have been tried separately, and the State does not concede that that is so, any error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1985). Gudinas' convictions and sentences should be affirmed in all respects.

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[17]To the extent that Gudinas complains about the portion of the State's closing argument set out on p. 33 of his brief, that argument is certainly a reasonable inference from the evidence that Gudinas stalked his victims from the club to the parking lot. There is no basis for complaint.

II. GUDINAS WAS NOT IMPROPERLY EXCLUDED FROM ANY PRE-TRIAL PROCEEDINGS

On pp. 35-39 of his brief, Gudinas argues that he was improperly excluded from certain pre-trial conferences. As far as two of those conferences are concerned, Gudinas presumes error from the fact that the record does not affirmatively reflect his presence. As to the third proceeding at issue, while it is true that Gudinas was not present, that proceeding was not one at which the defendant's presence was necessary.

Rule 3.180(a)(3) of the *Florida Rules of Criminal Procedure* requires that the defendant be present "at any pretrial conference, unless waived by the defendant in writing".[18] However, when the presence of the defendant would not have assisted the defense in any way, any error is harmless. *See, e.g., Garcia v. State*, 492 So.2d 360 (Fla. 1986); *see also, Coney v. State*, 653 So.2d 1009 (Fla. 1995).[19] Each discrete claim is procedurally barred because no objection was made below. *See, e.g., Steinhorst v State*, 636

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[18]Whether the in-chambers proceeding that took place during the hearing on the motion to withdraw is a "pre-trial conference" is certainly open to question.

[19]The *Coney* opinion was concerned with the presence of the defendant "at the immediate site where pretrial juror challenges are exercised". That opinion is only relevant to this case for the harmless error analysis contained therein.

So. 2d 33 (Fla. 1994). Even ignoring the procedural bars, each claim is meritless for the reasons set out below.

Gudinas' first complaint concerns his absence from an in-chambers discussion between the Court and counsel that occurred during the course of the hearing on the motion to withdraw filed by one of his attorneys.[20] There is no dispute that an off-the-record discussion took place during a recess in that motion hearing (TR52), but to argue that reversal is warranted because of that discussion is a leap of logic that this Court should not adopt. Based upon a fair reading of the record, it is readily apparent that nothing took place during that discussion that touched upon any matter about which Gudinas would have had any basis for input. Instead, there is nothing to even suggest that anything other than purely legal matters were addressed. The trial court obviously felt that it was preferable to deal with what was indisputably a sensitive matter in that fashion. It would make no sense to find that it was error for the trial court to mention the practical problems associated with the motion to withdraw during a private discussion with counsel rather than on the record in front of the

[20]Gudinas was represented by two private attorneys who were appointed to represent him after the Public Defender withdrew because of a conflict of interest.

defendant. The matters which concerned the trial court were apparently of such a nature that the court believed that they should be handled in a delicate fashion--that court was in the best position to make that decision, and should not be second-guessed at this time. In any event, none of those practicalities were the sort of thing that Gudinas would have any knowledge about, and the lower court should not be placed in error for dealing with this matter in this way.

As the record demonstrates, the trial court informed Gudinas of the fact that the discussion at issue occurred, and of the nature of the matters discussed. (TR52-54) At no time did Gudinas' attorneys complain, and, by failing to object to the events, have failed to preserve any issue for appellate review. *See, e.g., Steinhorst v. State*, 636 So.2d 33 (Fla. 1994). Trial counsel was, obviously, in the best position to know whether any inappropriate discussions took place in the defendant's absence, and the fact that no objection was raised speaks volumes about this issue's lack of merit.[21]

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[21]The fact that the trial court went to such great lengths to explain the in-chambers discussion to Gudinas on the record also indicates that nothing improper occurred. A contrary conclusion can only be reached by assuming that the trial court would commit error off the record and then painstakingly put the existence of that error on the record.

When the trial court told Gudinas about the in-chambers discussion, the court also instructed Gudinas that if, at any subsequent time, he became concerned about the performance of his attorneys, he should inform the court of that fact directly. The fact that Gudinas never again complained about the performance of his counsel, and in fact later stated that they did an excellent job (TR794-95), indicates that whatever differences precipitated the motion to withdraw were resolved. To the extent that Gudinas complains that during that discussion the court indicated concerns about finding another lawyer to replace the withdrawing lawyer, there is no evidence to support that claim. Even if there was some evidence, there is still no basis for reversal. That is not the sort of issue about which Gudinas would have had any knowledge, and is, in fact, a matter which would concern any court handling a case in the posture of this one. There is no basis for reversal.

Gudinas also argues that he is entitled to reversal because the record "does not reflect Appellant's presence" at hearings conducted on August 23, 1994, and September 1, 1994. *Initial brief* at 38. Gudinas is correct that the record does not affirmatively show that he was present at those hearings. However, the same can be said for all of the hearings conducted before Judge Dawson. *See, e.g.*, TR1; TR8; TR18; TR33; TR65. Each of those hearings

begins with the case being called and proceeds to the substance of the hearing without any recitation by the court concerning who is present in the courtroom.[22] While that is perhaps not the preferred practice, it is what happened in this case. This Court should not presume error from a silent record, particularly when Gudinas' attorneys never objected based upon his absence from the proceedings. This issue is not preserved for review because there is no contemporaneous objection. The absence of an objection is most likely explained by the absence of a basis for such an objection in the first place.

Insofar as the August 23, 1994, hearing is concerned, the record contains a document which was signed by Gudinas in open court. (R236) Obviously, Gudinas could not have signed that document in open court unless he was present in the courtroom. Moreover, even assuming that Gudinas was not present at the hearing on the State's motion for blood, hair, saliva, and dental impressions, that hearing concerned purely legal matters as to which the defendant could have had no input. No evidence was presented at that hearing, and, but for the dental impressions, the

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[22]From the context of the other proceedings, it is clear that Gudinas was present in the courtroom because he either spoke or was spoken to.

defense did not oppose the motion, anyway. (TR2-3) Under Rule 3.220 of the *Florida Rules of Criminal Procedure*, Gudinas could not have had a reasonable basis for opposing the motion--his presence or absence in the courtroom simply does not matter. There was no error.[23] Finally, none of that evidence was used against Gudinas at trial. Because none of the evidence obtained from the defendant as a result of an order that was entered at a hearing from which he claims to have been excluded was used in the first place, Gudinas cannot have suffered any prejudice. If there was any error at all, that error was harmless. *See, e.g., State v. DiGuilio, supra.*

To the extent that Gudinas claims to have been absent from the September 1, 1994, hearing, that component of this claim does not state a basis for reversal, either. First, this claim is procedurally barred because Gudinas raised no objection at trial. Second, that hearing, as characterized by Gudinas, "involved the appointment of an investigator and a motion for a mental health assessment". *Initial brief at 38.* As Gudinas concedes, that hearing merely involved legal argument. *Id.* Because there is no dispute that that hearing did not involve matters about which

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[23]To the extent that Gudinas complains, on p. 38 of his brief, about the taking of the samples, that discussion is mere surplusage that has no relevance to the issue argued in the brief.

Gudinas could have had any input, there can be no error even if Gudinas was in fact absent.[24] However, it is difficult to imagine how Gudinas could have been prejudiced in any way because those motions were not opposed by the state, and were granted essentially as filed. Because Gudinas received exactly what he asked for (TR2-3; 9), his rights to a fair trial cannot have been affected in any way. If there was error, and the State does not concede that fact, that error was harmless beyond a reasonable doubt. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1985).

III. THE EVIDENCE SUPPORTS THE CONVICTION FOR ATTEMPTED SEXUAL BATTERY

On pp. 40-46 of his brief, Gudinas argues that his motion for judgment of acquittal as to attempted sexual battery was improperly denied. Specifically, Gudinas argues that there was insufficient evidence of intent, and that there was no overt act to support the attempted sexual battery charge. That interpretation of the evidence is possible only through a strained reading of the facts.

The evidence, which is uncontroverted, establishes that Gudinas hid behind a parked car and stalked Rachelle Smith to the place where she had parked her car. (TR255-57) When the people

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[24]The State does not concede that Gudinas was not present at this hearing--however, there is no contrary evidence to which the State can point.

parked next to Rachelle Smith left, Gudinas came up to the passenger side of her car and tried to open the door. (TR258) When Ms. Smith saw him, Gudinas acted as if he was trying to open the door of the car next to hers. (TR258) Next, Gudinas crouched down (presumably so that Ms. Smith could not see him in the mirror), went behind Ms. Smith's car, and attempted to open the driver's side door. (TR258-9) Gudinas screamed "I want to fuck you" to Ms. Smith, covered his hand with his shirt, and attempted to break out the window on the driver's side of the car. (TR259)[25] Ms. Smith began blowing the car horn, and Gudinas fled. (TR260) Ms. Smith positively identified Gudinas as her assailant. (TR263)[26]

While Gudinas goes to great lengths to present his actions as nothing more than a minor social indiscretion, no amount of creative sanitization can disguise his obvious and clearly stated intent. Gudinas' own statement, coupled with his overt (and repeated) attempts to gain access to Ms. Smith's car, leave no doubt that his intent was to sexually batter Rachelle Smith. The facts of this case are virtually indistinguishable from those of

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[25]Ms. Smith had locked the car doors as soon as she got into her car because Gudinas was following her.

[26]Ms. Smith had an opportunity to observe Gudinas at close range in a lighted parking lot. There is no dispute about the accuracy of her identification.

Smith v. State, 632 So.2d 644 (Fla. 1st DCA 1994), which held the statement "Honey, let me have some pussy" to be sufficient to supply a direct act in furtherance of the specific intent to support a conviction for attempt to commit lewd and lascivious assault. While the precise phrase used by Gudinas was not the one used in *Smith*, the meaning is the same. Gudinas' statement, coupled with his efforts to gain access to Ms. Smith by breaking the window of her car, leave no doubt that his intent was, in fact, rape. Any argument to the contrary is wholly incredible. When all of the facts are fairly considered, the only possible conclusion is that Gudinas intended to sexually batter Rachelle Smith, that he committed at least three overt acts in furtherance of that intent[27], and that he failed to complete that sexual battery because Ms. Smith was able to frighten him away by blowing the horn. The requisite overt act was established beyond a reasonable doubt, as was the specific intent to commit sexual battery.[28] That is sufficient to establish the crime, and is sufficient to support the

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[27]As set out at pp. 4-5, above, Gudinas attempted to gain entry into Ms. Smith's car three separate times: twice by trying to open a locked door and once by trying to break out a window.

[28]The cause that prevented Gudinas from carrying out his specific intent is a combination of a car horn and a strong car window.

conviction. *See, e.g., Adams v. Murphy*, 394 So.2d 411 (Fla. 1981); *see also, L.J. v. State*, 421 So.2d 198 (Fla. 1982).

To the extent that Gudinas attempts, in footnote 16 of his brief, to bring this case within the reach of *Grinage v. State*, 641 So.2d 1362 (Fla. 5th DCA 1994), that argument fails for several reasons. First of all, the *Grinage* case was decided in the context of a prosecution for attempted felony murder, not in the context that is presented by this case. *Grinage* does not speak to the situation present in this case, and does not provide a basis for reversal.

Under the facts, there is no doubt, as Gudinas concedes, that at least three overt acts support the charge of attempted burglary. However, under the facts of this case, the attempted sexual battery is intertwined to an unusual degree with the attempted burglary. Of course, if Rachelle Smith had *not* been inside the car when Gudinas attempted to break into it, there would be no serious argument against the existence of the "intent to commit an offense" element of the crime of burglary. *See, e.g.*, § 810.07(2), *Fla. Stat.* (Attempt to enter stealthily and without consent is prima facie evidence of intent to commit an offense). Ms. Smith's presence inside the car does nothing other than add the offense--sexual battery--which was the object of the attempted burglary

rather than relying upon the statutory presumption. Gudinas committed at least three overt acts in furtherance of the burglary, and, because there was direct evidence of the crime that he intended to commit had he completed the burglary, he was properly convicted of that crime as well. In other words, the attempted burglary is an antecedent offense to the attempted sexual battery. Those offenses involve proof of different elements, and there is no error. *See, e.g., U.S. v. Stearns,* 707 F.2d 391, 393 (9th Cir. 1983); *U.S. v. Boldin,* 772 F.2d 719, 732 (11th Cir. 1985). If Gudinas had completed the burglary and had then sexually battered Rachelle Smith, there would be no doubt that conviction for both offenses would be proper. *Fla. Stat.*, § 775.021 (1995). The result under the particular facts of this case should be no different. The convictions should be affirmed in all respects.

IV. THE TRIAL COURT PROPERLY DENIED THE MOTION TO WITHDRAW FILED BY ONE OF GUDINAS' ATTORNEYS

On pp. 47-49 of his brief, Gudinas argues that he is entitled to relief because the trial court denied the motion to withdraw filed by one of his court-appointed attorneys.[29] That motion was

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[29]As set out above, Gudinas was not represented by the Public Defender. Instead, he was represented by two private attorneys (from different firms) who had been appointed by the court.

denied after a hearing and, for the reasons set out below, was correctly decided.

The issue contained in Gudinas' brief is best analyzed in terms of what it is not. Gudinas never asserted any right to self-representation, and, for that reason, there is no *Faretta v. California*, 422 U. S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), issue. Further, there is no claim that co-counsel should have been allowed to withdraw--that representation was never at issue. Gudinas never claimed that counsel was not rendering effective assistance of counsel--only that he and his attorney did not see "eye to eye".[30] The motion to withdraw stated that Gudinas wished to discharge counsel "for reasons which must remain confidential" (R383), but, at the hearing on the motion, Gudinas insisted that he did not ask counsel to withdraw. (TR47) The objective that counsel believed to be imprudent was never disclosed, but it is apparent that that objective was not one that counsel believed to be unethical.

Based upon the facts that were developed at the hearing (and what subsequently transpired in this case), what was presented at

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[30]The only identifiable action that Gudinas wanted that was apparently not done by counsel was the filing of a motion to disqualify Judge Dawson. This case was reassigned to Judge Perry for other reasons on December 15, 1994.

the hearing on the motion to withdraw was a difficult client who apparently had a generalized lack of trust in one of his lawyers. That is not a sufficient basis to support the granting of a motion to withdraw. *See, e.g., Johnston v. State*, 497 So.2d 863, 868 (Fla. 1986); *see also, Ventura v. State*, 560 So.2d 217, 219 (Fla. 1990); *Thomas v. Wainwright*, 767 F.2d 738 (11th Cir. 1985). Most significantly, no further complaints were voiced by Gudinas after the November 8, 1994, hearing, even though he was advised by the trial court to communicate, in writing, with the court if there were further concerns about counsel's representation. (TR52-54) Gudinas never took advantage of the offer, and, from the record, it is clear that "an open line of communication" existed throughout the rest of the proceedings. *Johnston, supra*.

Of course, the fact that a client will not heed the advice of his attorney or is a "difficult" client is not a basis for granting leave to withdraw. *Johnston, supra,* at 867. At the hearing on the motion, Gudinas had every opportunity to voice his complaints to the court. None of those complaints amount to anything approaching a sufficient basis for discharging counsel (which Gudinas said he did not want to do, anyway), and are certainly not sufficient to place the court in error for refusing to grant the motion to withdraw. There is no claim that further conflicts arose between

Gudinas and his attorney, and the denial of the motion to withdraw was not error.

To the extent that Gudinas claims that the trial court should have appointed a different lawyer to represent him, there is no legal basis for that claim. Florida law is well-settled that a defendant has no constitutional right to obtain counsel other than the lawyer appointed to represent him. *Hardwick v. State*, 521 So.2d 1071, 1074 (Fla. 1988). In any event, at the conclusion of the guilt phase, Gudinas stated "I'm satisfied with the representation. *They* did a wonderful job". (TR 794-5)[31] Under any possible view of the facts, Gudinas got over whatever dissatisfaction he had (early in the case) with one of his lawyers. The fact that Gudinas may now believe, after he has been convicted and sentenced to death, that that lawyer should have been allowed to withdraw so someone else could be appointed does not state a basis for reversal. The convictions and sentences should not be disturbed.

V. THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHS OF THE VICTIM INTO EVIDENCE

On pp. 50-52 of his brief, Gudinas argues that it was error to

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[31]This explains why the withdrawal issue never came up again.

allow six photographs of Michelle McGrath's body into evidence during the guilt phase of his capital trial. In a sub-issue, Gudinas also argues that it was error to allow the State to refer to some of those photographs (which were already in evidence) during the penalty phase closing argument. Neither of those claims has merit.

Under settled Florida law, the admission of photographs of a murder victim is within the discretion of the trial court. *See, e.g., Pangburn v. State,* 661 So.2d 1182, 1186-87 (Fla. 1995); *Windom v. State,* 656 So.2d 432, 437 (Fla. 1995); *Larkins v. State,* 655 So.2d 95, 98-99 (Fla. 1995); *Mordenti v. State,* 630 So.2d 1080 (Fla. 1994); *Preston v. State,* 607 So.2d 404, 411 (Fla. 1992). The photographs were relevant to the Medical Examiner's testimony, which was in connection with and explanation of the injuries depicted in the photographs. (TR407-410) Because the photographs were viewed preliminarily by the trial court, and because they were relevant (and necessary) to the expert testimony, there is no abuse of discretion in their admission into evidence. *See, e.g., Pope v. State,* 21 Fla. L. Weekly S257, 258 (Fla., June 13, 1996) ("The test for admissibility of photographic evidence is relevancy rather than necessity"); *Pangburn, supra; Larkins, supra.* In light of the multiple injuries she sustained at the hands of the defendant, the

photographs of Ms. McGrath's body were certainly necessary in order for the location and extent of those wounds to be accurately explained to the jury. It is not, and should never be, an abuse of discretion for the trial court to allow the admission of accurate photographs which are relevant to, and illustrative of, the injuries inflicted on a murder victim by his or her killer. As the Ninth Circuit has pointed out, "murder is a grisly affair . . .", *Jeffers v. Ricketts*, 832 F.2d 476, 484 (9th Cir. 1987), *rev'd sub nom, Lewis v. Jeffers*, 110 S.Ct. 3094 (1990). While the photographs at issue in this case are no doubt unpleasant, there is no claim that they are inaccurate or cumulative, nor is there any claim that they became a feature of the trial. Instead, Gudinas relies on decisions from foreign jurisdictions to support the proposition that reversal is required because the photographs are too horrible to allow a jury to see them. The defect with that argument is that, no matter how horrible those photographs may be, they are an accurate depiction of Gudinas' handiwork.[32] It is a far reach indeed to conclude that the photographs detailing the defendant's brutality should have been excluded or sanitized by a

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[32]Carried to its logical conclusion, Gudinas' argument is that some murders are so gruesome that the jury should not be allowed to see *any* photographs.

black-and-white reproduction. *See, Henderson v. State*, 463 So.2d 196, 200 (Fla. 1985)("Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments."). Those photographs were highly relevant to the injuries received by Ms. McGrath, were relied upon by the Medical Examiner during his testimony about the injuries suffered by the victim, and it was not error to admit them into evidence. The fact that the brutality shown in those photographs was extreme is not cause for reversal.

Alternatively, even if the photographs should have been reduced to a black-and-white format, any error was harmless beyond a reasonable doubt under the particular facts of this case. *DiGuilio v. State, supra.* To the extent that Gudinas argues that the photographs were not necessary, that claim strains credulity.[33] There can be no colorable argument that the jury was not entitled to see what Gudinas had done to his victim, and there can be no reasonable claim that the nature and extent of Ms. McGrath's injuries was not highly probative. The convictions and sentence should be affirmed.

To the extent that Gudinas argues that it was improper for the

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[33]Necessity is not the test--*relevancy* is. *Pope, supra.*

State to refer to the photographs during the penalty phase closing argument, that claim is not a basis for reversal, either. For the reasons set out above, the photographs were properly admitted at the guilt phase of Gudinas' trial. Moreover, those photographs were highly relevant at the penalty phase insofar as the heinous, atrocious or cruel aggravating circumstance was concerned. Those pictures well-illustrated the total brutality of this murder, and it makes no sense to argue that they had no probative value at sentencing. Given the relaxed standard governing the admission of penalty phase evidence, the fact that the photographs were already in evidence (properly), anyway, and the undeniable fact that the photographs were probative of the heinousness aggravator, there is no basis for argument that it was error to allow the State to refer to them during the penalty phase closing argument. While the photographs are not appealing, their probative value outweighs any prejudice. Of course, "a defendant suffers no undue prejudice when true details of his crime are rendered to the jury considering his punishment". *Hill v. Black*, 891 F.2d 89, 91-92 n.1 (5th Cir. 1989). In the final analysis, Gudinas committed a crime that was very nearly incomprehensible in the torture inflicted on his

victim. The fact that his handiwork was, as he puts it, repulsive, is not a reason to keep it from the jury.[34]

VI. THE TRIAL COURT PROPERLY ALLOWED EVIDENCE OF FRED HARRIS' PRIOR INCONSISTENT STATEMENT

On pp. 53-54 of his brief, Gudinas argues that it was error to allow testimony about a prior statement made by State witness Fred Harris which was inconsistent with his trial testimony. While Gudinas presents this claim as being a violation of the hearsay rule because, according to him, the State presented evidence of a prior *consistent* statement when there was no charge of recent fabrication, the record does not support that position. Instead, the record establishes that the admission of the statement was in the context of impeachment of a witness. There was no error in the admission of testimony about that prior inconsistent statement for the reasons set out below.

As set out in Gudinas' brief, Fred Harris testified on direct examination (after being shown a transcript of his statement) that

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[34]To the extent that Gudinas argues, in footnote 18, that the court should have allowed his mother to testify about Christmas cards and letters she received, that argument is insufficiently briefed to present an issue for appellate review. *St. Mary's Hosp., Inc. V. Sanchioni*, 511 So.2d 617 (Fla. 4th DCA 1987).

Gudinas "sounded serious" when he stated that he had sex with Ms. McGrath after she was dead. (TR655) However, during cross-examination by Gudinas' attorney, Harris testified differently:

> Q. Okay. When the remarks were made a little while ago, a few minutes ago when Mr. Ashton asked you the questions about having sex with her after she was dead, isn't it true you were all playing cards?
>
> A. I believe we might have been, yes.
>
> Q. And isn't it true that Dwayne brought the subject up?
>
> A. Yes.
>
> Q. No one else brought the subject up?
>
> A. Yes.
>
> Q. And isn't [it] true that it was done in a very joking, careless manner?
>
> A. Yes.
>
> Q. In fact, it was done in a very crude manner?
>
> A. Yes.
>
> Q. And Tom's response was done in a joking, crude manner?
>
> A. Yes.

(TR658-59) During redirect examination by the State, Harris testified as follows:

> Q. Just so we're clear, Mr. Harris. Do you recall today that when you spoke with the police in June and they asked you about Mr. Gudinas' attitude when he made the statement that you told the police he actually he sounded kind of serious?

Mr. Irwin [defense counsel]: Objection; asked and answered.

The Court: Overrule.

Q. Do you recall that's what you told the police?

A. No.

Q. You don't recall?

A. I don't remember exactly what I said.

Q. All right. So you, you are not admitting that you said, "actually he sounded kind of serious"?

A. Yes.

(TR668) In his statement to investigators, Harris said:

> One time, but it was in the morning again, and he mentioned something about it. And he asked if she was a good fuck. Tom said, 'Yeah, I fucked her while she was dead.' And it was weird. I just sat back. I did--
>
> Then the subject got changed again. And we went out swimming to the pool.
>
> [Q]: What was his attitude when you said that? I mean--
>
> [A]: He actually sounded kind of serious. He said, 'I fucked her while she was dead too.'

(TR712-13)

What Gudinas has attempted to characterize as improper hearsay that was used for no purpose other than to bolster the testimony of a witness was not that at all. When the record is considered as a whole, it is clear that Harris testified on cross-examination and on redirect examination in a manner that was squarely opposite to

and in repudiation of his direct testimony. Under those circumstances, the later admission of his prior inconsistent statement to the police was nothing more than proper impeachment. *See, e.g., State v. Smith*, 573 So.2d 306, 313 (Fla. 1990); *see also*, Ehrhardt, *Florida Evidence*, § 608.4 (1996 Edition). The foundational requirements of § 90.614 were fully satisfied, inasmuch as Harris had the opportunity to explain or deny the statement but nevertheless insisted that he did not recall "exactly what he said", and specifically testified that he did not say that "actually he sounded kind of serious". That is all that is required prior to the admission of extrinsic evidence of a prior inconsistent statement. *See, e.g.*, Ehrhardt, § 614. There is no error, and there is no basis for reversal. The convictions and sentences should be affirmed in all respects.

Alternatively and secondarily, even if the inconsistent statement to law enforcement should not have been admitted, any error is harmless beyond a reasonable doubt. The testimony of Fred Harris is, at best, a small bit of the evidence linking Gudinas to the sexual battery and murder of Michelle McGrath.[35] When all of the evidence of guilt is considered, it is clear beyond a

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[35]The State should not be construed as suggesting that Harris was impeached on a collateral matter--he was not.

reasonable doubt that Gudinas would have been convicted regardless of how Fred Harris testified. *State v. DiGuilio, supra; see also,* pp. 4-21, above.

Finally, this issue was not preserved by a proper specific objection. At the time the tape-recorded statement was offered, Gudinas objected only on the ground that the tape was hearsay. (TR711) However, as set out at pp. 57-58, above, the tape recording was not offered for the truth of the statements contained therein, but was, instead, offered to impeach the testimony of Fred Harris. In other words, the taped statement was not offered for the truth of the matters asserted therein, and, therefore, the hearsay objection preserved nothing for appellate review. *See, e.g., Larkins, supra,* at 99; *Jackson v. State,* 648 So.2d 85, 90 (Fla. 1994);*Rodriguez v. State,* 609 So.2d 493, 499 (Fla. 1992); *Thompson v. State,* 589 So.2d 1013, 1014 (Fla. 2d DCA 1991); *Harmon v. State,* 527 So.2d 182, 185 (Fla. 1988); *Steinhorst, supra.* Even if the statement was erroneously admitted, and the record establishes that it was not, the general hearsay objection at trial did not preserve the issue for review.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR MISTRIAL BASED UPON THE TESTIMONY OF STATE WITNESSES

On pp. 55-57 of his brief, Gudinas argues that he is entitled

to reversal because the trial court denied his motions for mistrial made in connection with the testimony of witnesses Frank Wrigley and Fred Harris. For the reasons set out below, the trial court did not abuse its discretion in denying the motions for mistrial. Because there is no abuse of discretion, there is no basis for reversal.

Florida law is settled that the trial court's ruling on a motion for mistrial will not be disturbed on appeal except for an abuse of discretion. *See, e.g., Power v. State,* 605 So.2d 856 (Fla. 1992). Under the particular facts of this case, the trial court's denial of Gudinas' two motions for mistrial was not an abuse of discretion, and, consequently, is not a basis for reversal.

During the State's direct examination of Frank Wrigley, the following occurred:

> Q. What prompted you to contact the Orlando Police Department?
>
> A. Well, I went over to Fred's [Harris] house. Tommy was already gone up to North Carolina. Fred said--
>
> [Defense Counsel]: Your Honor, I'm going to object.
>
> Q. Don't tell me what Fred said. Based on some things Fred told you.
>
> A. Yeah. I told Fred that I was going to call the police if he really thinks that he did it.

[Defense Counsel]: Your Honor--

> The Court: *Hey. Listen carefully. Do not tell us anything that someone else told you, okay? Listen carefully to the question. Next question.*

(TR578-79) *After* the testimony of that witness was entirely completed, counsel for Gudinas objected to the testimony set out above and moved for a mistrial. (TR600-04) Florida law is well-settled that in order to preserve an issue for appellate review, a timely objection is required. *Fla. Stat.*, § 90.104(1)(a). In this case, there was no timely objection, and, for that reason, the issue is not preserved for review by this Court. As the subsequent colloquy between the trial court and counsel demonstrates, the court interrupted the witness without any objection being made.[36] Assuming that defense counsel had started to object and decided to sit down when the court cut off the witness's answer, that is not enough to preserve the issue for review by this Court. Assuming further that counsel could not have objected quickly enough to cut off the answer, nothing prevented counsel from making his motion to strike the testimony and his motion for a mistrial immediately following the court's admonition to the witness. Because there was

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[36]The court stated that he had noticed that defense counsel had stood up. However, the court apparently never heard counsel say anything. (TR603)

no contemporaneous objection, this issue is not preserved for review.

Alternatively and secondarily, even assuming that defense counsel did enough to preserve this issue, the result does not change. The trial court clearly instructed the jury that they were to disregard anything that Wrigley said during his testimony about what Fred Harris thought about Gudinas and the murder. Of course, juries are presumed to follow their instructions, and, under these facts, the denial of the motion for mistrial was not an abuse of discretion. *Power, supra; see also, Sochor, supra; Gorby, supra.*

Gudinas' second motion for mistrial came after Fred Harris testified that Gudinas commented that none of the composite drawings (which were posted in area stores) looked like him because Gudinas had pending charges in North Carolina. (TR647) The motion for mistrial was denied, and the jury was instructed ". . . you are instructed to disregard the last comment about, the witness made concerning Mr. Gudinas having pending charges in North Carolina." (TR648) As discussed above, the ruling on a motion for mistrial is within the discretion of the trial court, and reversal on appeal is proper only when there is an abuse of that discretion. *Power, supra*. Moreover, juries are presumed to follow their instructions and, in this case, the jury was clearly instructed to disregard the

comment of the witness. *See, e.g., Sochor, supra; Gorby, supra*. The trial judge was in the best position to observe the effect of the complained-of answer, and did not abuse his discretion in denying the motion for a mistrial. There is no error. Alternatively, any error was harmless beyond a reasonable doubt. *State v. DiGuilio, supra*.

To the extent that Gudinas complains that the trial court's "one lawyer-one witness" rule deprives him of the effective assistance of counsel, that claim is wholly meritless. While this issue has not been addressed often, the appeals court that has considered whether it is error to refuse to allow re-cross examination by a second attorney has flatly rejected the claim. *See, e.g., Perdomo v. State*, 458 So.2d 66 (Fla. 3d DCA 1984); *see also*, Ehrhardt, *Florida Evidence*, § 612.4.[37] Of course, under the *Evidence Code*, the trial judge is directed to "exercise reasonable control over the mode and order of the interrogation of witnesses"-- the number of lawyers who may interpose objections during the examination of a single witness certainly falls within the directives of the statute. There is no claim that either of

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[37]The *Perdomo* decision is silent as to whether there was a Sixth Amendment component to that case. That issue may well be one that has never before been considered.

Gudinas' attorneys were in any way prohibited from communicating with each other during trial either by written note or whispered conversation, and it stands reason on its head to suggest that Gudinas was deprived of anything when, as events played out in the courtroom, an objection was not necessary because the court cut off the arguably objectionable testimony and gave a curative instruction which was fully sufficient to cure any error. Because Gudinas received all that he was entitled to receive anyway, the court rule that is challenged did not have any effect on his representation. For that reason, there is no ineffectiveness of counsel, and Gudinas is not entitled to relief on this claim.[38]

VIII. THE TRIAL COURT PROPERLY DENIED GUDINAS' MOTION TO PROHIBIT ARGUMENT ON BOTH FELONY-MURDER AND PREMEDITATED MURDER

On pp. 58-59 of his brief, Gudinas argues that it was error for the trial court to deny his motion which sought to preclude prosecutorial argument and jury instructions on first-degree felony-murder because the indictment charged only premeditated

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[38]The ineffectiveness component of this claim is predicated upon a claimed "outside interference" with counsel's performance. Typically, this is referred to as a constructive ineffective assistance of counsel claim. Because every fact necessary to decide this claim is found in the record, the State urges the Court to find, in addition to a lack of merit, that counsel was not rendered ineffective by the court rule.

murder. Gudinas also argues that he cannot be convicted of both felony-murder and the underlying felonies--two counts of sexual battery. Both of those claims are foreclosed by binding precedent.

Florida law is settled that an indictment charging premeditated murder also allows the state to proceed on a theory of felony-murder. *See, e.g., Armstrong v. State,* 642 So.2d 730 (Fla. 1994); *Lovette v. State,* 636 So.2d 1304 (Fla. 1994); *Young v. State,* 579 So.2d 721 (Fla. 1991); *Bush v. State,* 461 So.2d 936 (Fla. 1984); *O'Callaghan v. State,* 429 So.2d 691 (Fla. 1983); *Knight v. State,* 338 So.2d 201 (Fla. 1976). Those prior decisions of this Court control disposition of the claim that the trial court erred in allowing argument and jury instructions on both premeditated and felony-murder. This claim is wholly meritless, and is foreclosed by binding precedent. The convictions should be affirmed in all respects.

To the extent that Gudinas claims that he cannot be convicted "of both felony murder and the underlying felonies", that claim is also foreclosed by binding precedent.[39] In *State v. Enmund,* 476 So.2d 165 (Fla. 1985), this Court squarely addressed the issue

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[39]This sub-claim was not raised at trial, and is therefore procedurally barred. While Gudinas attempts to avoid that result, this claim is no more based on "new" law than the other sub-claim contained in this issue.

contained in Gudinas' brief and decided it adversely to him. There is no reason to retreat from that well-settled precedent.

In *Enmund*, this Court analyzed the effect of the then-recent *Hunter v. Missouri*[40] decision, and found "sufficient intent" that the legislature "intended multiple punishments when both a murder and a felony occur during a single criminal episode". *Enmund, supra*, at 167. Under *Hunter*, "the underlying felony is not a necessarily included offense of felony murder", *Id.*, and that is the end of the inquiry. Punishment for the underlying felony as well as for the murder during the commission of that felony is specifically authorized under Florida law, and there is no basis for disturbing that well-settled proposition. The claim contained in Gudinas' brief is meritless, and is not a basis for reversal. *See also, Garcia v. State*, 492 So.2d 360 (Fla. 1986).[41]

IX. THE TRIAL COURT DID NOT RESTRICT GUDINAS' PRESENTATION OF A DEFENSE

On pp. 60-61 of his brief, Gudinas argues that the trial court restricted his ability to present a defense when "numerous

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[40]459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

[41]To the extent that Gudinas relies on the certified question in *Boler v. State*, 654 So.2d 603 (Fla. 5th DCA 1995), as a basis for relief, that claim is meritless. This Court decided that case adversely to Gudinas' position. *Boler v. State*, 21 Fla. L. Weekly S 307-8 (Fla., July 7, 1996).

relevance objections" were sustained during the defense case-in-chief. A cursory reading of the record establishes that this claim has no factual basis. For the reasons set out below, this claim is utterly meritless.

This claim purports to be based on the objections made by the State during the testimony (in the defense case-in-chief) of Detective Griffin set out at TR 717-20.[42] A review of that testimony establishes that only one relevance objection was made, and that objection was overruled. (TR718) The State objected three times based on hearsay (with one question being answered before the objection was made), and those objections were sustained. (TR718-20) Another objection based on the speculative nature of the testimony was also sustained. (TR719)[43] Despite Gudinas' claims to the contrary, the rules of evidence are not suspended for his benefit. *See, e.g., Hitchcock v. State*, 578 So.2d 685, 690 (Fla. 1990) ("While the rules of evidence have been relaxed somewhat for

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[42]Detective Griffin was called as a State witness and as a defense witness. The testimony as a defense witness was taken out of order. (TR716)

[43]That question was "Did [David Colbert] appear to you to be obsessed with Michelle McGrath?". Testimony about an "obsession" would clearly be highly speculative, and, in any event, is inadmissible under § 90.604. In any event, Detective Griffin testified that Colbert seemed "very interested" in the victim.

penalty proceedings, they have not been rescinded".); *see also, Crump v. State*, 622 So.2d 963, 969 (Fla. 1993). However, unlike Hitchcock (who wanted a lowered standard for penalty phase evidence), Gudinas attempted to introduce classic hearsay at the guilt phase of his trial. There is no reduced standard for the admissibility of evidence at that stage of the proceedings, and no case cited by Gudinas stands for the proposition that hearsay testimony and speculative testimony must be admitted at the defendant's request--this Court should not create such an exception in this case.

In his brief, Gudinas relies on *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), for the proposition that it is error for the trial court to sustain the State's objection to inadmissible evidence offered by the defendant. However, *Chambers* was decided upon and is limited to its particular facts, which turned upon peculiarities of Mississippi evidence law which are of no application to this case.

At the time of Chambers' trial, Mississippi law did not recognize a hearsay exception for declarations against penal interest, and expressly limited that exception to declarations against pecuniary interest. *Chambers*, 410 U.S. at 299-300. There is no similar issue in this case, and Gudinas does not suggest what

Florida hearsay exception is applicable. The *Chambers* Court specifically limited its holding to the particular facts and circumstances of that case, and emphasized that the "respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures" was in no way affected. *Id.*, at 302-303. *Chambers* is of no help to Gudinas--the only relationship between *Chambers* and the facts of this case is that a criminal defendant is not relieved of compliance with the rules of evidence. The evidence which Gudinas claims was erroneously excluded was classic hearsay which fell within no exception to the hearsay rule. Refusal to admit that evidence was not error.

To the extent that Gudinas complains, in the last paragraph on p. 60 of his brief, that he believed Detective Griffin's testimony to be "so strong" that he "forfeited final closing argument", the most that that claim does is complain about a strategic decision that did not turn out as planned. That does not state a claim of any sort, much less a claim of constitutional magnitude. "Such is the stuff out of which trials are made", *Solomon v. Kemp*, 735 F.2d 395, 404 (11th Cir. 1984)--appellate reversals do not come from the same events. This claim is wholly meritless, and the convictions and sentences should be affirmed in all respects.

X. THE JURY INSTRUCTION/PROSECUTORIAL ARGUMENT CLAIMS

On pp.62-68 of his brief, Gudinas argues that he is entitled to a new penalty phase based upon jury instruction errors and because of the prosecutor's closing argument. These various claims are either procedurally barred because there was no timely objection, meritless because they are foreclosed by binding precedent, or, alternatively, harmless beyond a reasonable doubt. The individual claims are separately addressed below.

The Mitigation Jury Instruction

In the first sub-claim, Gudinas argues that the jury instruction on the burden of proof required for mitigating circumstances "placed an undue burden on the defense to prove mitigating factors." The instruction which, according to Gudinas, accomplished this result was:

> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established.

(TR333) The part of that instruction which Gudinas claims raised his burden of proof is the phrase "by the greater weight of the evidence". The claims contained in Gudinas' brief are procedurally barred because they were not raised at trial, are without merit, and are, in the alternative, harmless error.

To the extent that Gudinas claims that there is reversible error because the requested jury instruction (that was given) was not submitted in writing, that claim was not raised below. Florida law is well-settled that the absence of a contemporaneous objection results in a procedural bar to later appellate review. *See, e.g., Steinhorst v. State, supra*. Likewise, the claim that the jury instruction as given placed an increased burden of proof on the defendant was not raised below and is, therefore, procedurally barred. *Id.* (TR243-49).

Further, even if this claim was not procedurally barred, it would not be a basis for reversal because the jury instruction correctly stated Florida law. Under long-standing precedent, the defendant's burden of proof as to mitigating circumstances is the "greater weight of the evidence" standard. *See, e.g., Ferrell v. State*, 653 So.2d 367 (Fla. 1995); *Walls v. State*, 641 So.2d 381 (Fla. 1994); *Nibert v. State*, 574 So.2d 1059 (Fla. 1990); *Campbell v. State*, 571 So.2d 415 (Fla. 1990). That proposition of law is settled, and, since the jury was properly instructed in accord with Florida law, there can be no error.[44] Florida law is long-settled

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[44]To the extent that Gudinas complains that greater weight of the evidence "sounds suspiciously like preponderance of the evidence", that complaint makes no sense. Both terms refer to the same standard. *See, Walls, supra*.

that the trial judge's decision regarding the jury instructions "has historically had the presumption of correctness on appeal." *State v. Bryan*, 287 So.2d 73, 75 (Fla. 1973).

To the extent that Gudinas complains that the jury was never given a definition of "greater weight of the evidence", it is true that no such instruction was given. However, it is also true that Gudinas did not submit a proposed instruction defining the greater weight of the evidence. (TR248)[45] It stands reason on its head to allow the defendant to place the trial court in error based upon grounds that could have been avoided by the submission of a jury instruction further defining the greater weight of the evidence. Counsel did not present a true alternative, and this claim is procedurally barred. *Johnson v. State*, 660 So.2d 637, 648 (Fla. 1995); *Castro v. State*, 644 So.2d 987, 991 n. 3 (Fla. 1994).

Alternatively, even if there was error, that error was harmless beyond a reasonable doubt. The jury was specifically instructed that the defendant did not have to prove mitigating circumstances beyond a reasonable doubt (TR333), and, in any event, the proposed mitigation was so weak that it could not (and did not)

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[45]Gudinas' attorney did comment that the absence of a definition was of concern to him (TR245), but he never offered a proposed instruction, and continued to insist on the standard jury instruction. (TR248)

outweigh the substantial aggravation that exists in this case. See pp.3-4, above. The jury could not have failed to understand that the burden of proof that applied to mitigating circumstances was less than the reasonable doubt standard, and, in view of the long-settled presumption that juries follow their instructions, it is simply not possible to conclude that any error that may have occurred had any effect at all on the jury's verdict in this case. *See, e.g., Sochor v. Florida,* 504 U.S. 527,112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); *Gorby v. State,* 630 So.2d 544 (Fla. 1993). Without conceding that error occurred, any error was harmless beyond a reasonable doubt based upon the facts of this case. *DiGuilio, supra.*

Gudinas' Special Requested Jury Instructions Were Properly Denied

Gudinas next claims that it was error for the trial court to deny his requested jury instructions concerning the heinous, atrocious or cruel aggravator and the catch-all mitigating circumstance. As to the mitigating circumstance instruction, Gudinas claims that he was entitled to a jury instruction that listed his proposed non-statutory mitigators. Further, Gudinas challenges the constitutionality of the standard jury instruction on the heinous, atrocious or cruel aggravator. All of these claims

are foreclosed by binding precedent.

Gudinas' claim that the jury should have been instructed that acts occurring after the victim lost consciousness are not relevant to the heinous, atrocious or cruel aggravator is without merit. First of all, the matters contained in the proposed instruction were covered in the charge that was given to the jury. The jury was instructed that "[t]he kind of crime intended to be included [] as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." (TR331-32) The jury was also instructed that actions of the defendant which took place after the victim was dead play no part in the applicability of the HAC aggravator. *Id.* The latter component of the instruction was as requested by Gudinas, with the deletion of the reference to actions which followed loss of consciousness. Florida law is settled that refusal of a proposed jury instruction is not error when the substance of the requested instruction is covered in the charge given to the jury. *See, e.g., Bertolotti v. State,* 476 So.2d 130 (Fla. 1985). The (modified) standard instruction given to the jury adequately covered the concept contained in the refused charge, and there is no error. Under the instructions given the jury, it is clear that the actions of the defendant had to be

unnecessarily torturous to the victim--subsumed within that statement is the premise that the victim must be able to perceive the pain inflicted. Gudinas' penalty phase jury received a proper instruction on the HAC aggravator, and, in fact, received more than is required because the trial court also gave the post-mortem acts instruction which is not required to be given. The standard instruction was all that Gudinas was entitled to, and that instruction has been repeatedly upheld by this Court.[46] *Johnson v. State*, 20 Fla. L. Weekly S343, 346 (Fla. July 13, 1995); *Preston v. State*, 607 So.2d 404 (Fla. 1992); *Mendyk v. State*, 545 So.2d 846 (Fla. 1989).

In any event, the instruction proposed by Gudinas reflected, at most, a refinement in the law which need not be the subject of instructions to the jury. *See, e.g., Vaught v. State*, 410 So.2d 147 (Fla. 1982). To the extent that Gudinas claims that "the evidence clearly supported the conclusion that the victim was

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[46]The HAC instruction read as follows: "Heinous" means extremely wicked and shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of the other. The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim. (TR331-32)

unconscious during much, if not all, of the attack", the evidence is hardly as ice clear as the defendant suggests. To the contrary, the evidence, when it is fairly considered, is far more consistent with the victim being conscious during a substantial part of the ordeal. See pp.12-15, above. That is a question for the fact-finder, and there is no error.

Alternatively and secondarily, without conceding that error occurred, any error was harmless beyond a reasonable doubt because the murder Gudinas committed was heinous, atrocious or cruel under any possible definition of that aggravator. *See, e.g., Henderson v. Singletary*, 617 So.2d 313, 315 (Fla. 1993); *Gorby, supra*.

The Prosecutorial Argument Claim

On pp. 65-68 of his brief, Gudinas raises two separate claims relating to the prosecutor's penalty phase closing argument. Both of those discrete claims are procedurally barred because they were not preserved at trial, and, alternatively, are not grounds for reversal because they are meritless.

Florida law is settled that a claim of error based upon prosecutorial argument is not preserved for review unless there is a contemporaneous objection accompanied by a motion for mistrial. *See, e.g., Allen v. State*, 662 So.2d 323, 330 (Fla. 1995); *Spencer v. State*, 645 So.2d 377, 383 (Fla. 1994). As Gudinas concedes,

there was no contemporaneous objection to any of the claimed instances of prosecutorial misconduct--nothing is preserved for review, and this Court should apply settled Florida law and deny relief.

Even if the two prosecutorial argument claims contained in Gudinas' brief had been preserved for review, there was no error associated with either of those matters, anyway. Insofar as the prosecutor's argument against the applicability of the "mental or emotional disturbance" aggravator is concerned, that argument, under these facts, was not error. When the argument is fairly considered, it is clear that the prosecutor argued that Gudinas did not fall under this aggravator because he is, simply put, a pathological person rather than a mentally ill one. Of course, not all mental state diagnoses are mitigating in nature, and it is certainly the right (and the duty) of the prosecutor to argue against the application, as a mitigating factor, of a diagnosis such as anti-social personality disorder, which seems to be the diagnosis that is applicable to Gudinas.[47] To state the complained-

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[47]Gudinas' mental state expert testified that his problems have always been behavioral, that he has no real desire to control himself, and that he is manipulative and assaultive. Those characteristics are hallmarks of anti-social personality disorder. *Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition*, 646-9 (1994).

of argument in slightly different terms, the State argued that a defendant is not under a mental or emotional disturbance when he acts in conformance with his personality, which is that of a violent and sexually assaultive person.[48] That is legitimate argument, and there is no basis for reversal.

Alternatively, even if the prosecutor's argument was improper, any error was harmless beyond a reasonable doubt. *State v. DiGuilio, supra.* The jury was instructed that the arguments of counsel were not evidence (TR799), and the presumption is that the jury followed that instruction. *Sochor, supra.* Further, the argument of the prosecutor was a reasonable inference from the evidence that did not deprive Gudinas of a fair trial. That is the standard for reversal, and Gudinas falls far short of meeting it. *See, e.g., Darden v. Wainwrght*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed. 2d 144 (1986). Any error was harmless beyond a reasonable doubt.[49] Moreover, the sentencing court found the existence of the

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[48]Gudinas' argument, on p.67 of his brief, that the mental mitigator would not apply to a person in the throes of a psychotic episode is inapposite. The argument was limited to the facts of this case, and does not lend itself to argument by analogy.

[49]The jury's sentencing recommendation of death was by a vote of 10-2 (TR340-43), a fact that is hardly surprising under these facts.

extreme mental or emotional disturbance mitigator in the final sentencing order. (R618-19) Because Gudinas received the benefit of that mitigator, any error before the jury was harmless beyond a reasonable doubt. The death sentence should be affirmed.

Gudinas also argues that he is entitled to relief because the prosecutor referred to him as "a monster" during the penalty phase closing argument. As discussed above, there was no contemporaneous objection to that argument (TR296), and, therefore, nothing is preserved for review under settled Florida law. *See, Allen, supra; Spencer, supra.* Alternatively and secondarily, even if the complained-of argument had been preserved for review by timely objection, there would be no basis for reversal because the comment by the prosecutor, when viewed in the context of the entire argument, did not deprive Gudinas of a fair trial. Under the facts of this case, which unquestionably show a level of brutality that this Court has seldom seen, the reference to the defendant as a monster can hardly have influenced the jury to recommend that Gudinas be sentenced to death. The jury reached that recommendation because this case is extremely aggravated and virtually unmitigated, not because of anything the prosecutor said during closing argument. The statement that led to a sentence of death was made by the defendant when he brutally sexually battered

and murdered Michelle McGrath. Gudinas received a fair trial, and the death sentence should be affirmed in all respects. *See, e.g., Darden v. Wainwright, supra.*

Finally, even if the prosecutor's reference to Gudinas as "a monster" was error, any error was harmless beyond a reasonable doubt. *State v. DiGuilio, supra.* Even if that reference had not been made at all, it is still clear, beyond a reasonable doubt, that the jury would have returned an advisory sentence of death. That sentence is the one that Gudinas deserves, and it should not be disturbed.

XI. THE SENTENCING COURT PROPERLY FOUND THE MURDER TO BE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

On pp. 69-74 of his brief, Gudinas argues that the trial court should not have found the heinous, atrocious, or cruel aggravator because "the State failed to prove beyond a reasonable doubt that Michelle McGrath was conscious during the attack and therefore capable of feeling the pain". *Initial Brief* at 69. That conclusion is possible only through a restrictive view of the evidence which fails to account for the undisputed physical evidence that the victim was subjected to a series of torturous acts prior to the time that a kick to the head rendered her unconscious. For the reasons set out below, the trial court

properly found this murder to be especially heinous, atrocious or cruel.

The cornerstone of Gudinas' argument seems to be founded on the premise that Michelle McGrath was rendered unconscious (by a blow to the head) in the parking lot and then dragged into the alleyway where the rest of the assaults took place on her unconscious (and unresponsive) body. However, that theory can only be accepted by ignoring almost all of the evidence. First, while Gudinas makes much of his theory that Michelle McGrath must have been dragged into the alley because her arms were pulled back over her head when her body was found, there is no evidence to support that idea. In fact, all of the evidence is to the contrary because there were no drag-type injuries anywhere on the victim's body, nor were there any drag marks on the ground. (TR434-5; 459; 487-90) As the medical examiner testified, Ms. McGrath had an abrasion below the small of her back in an area that would only touch the ground if her legs were raised. (TR434) Further, that injury was consistent with the surface of the alley, not that of the parking lot. (*Id.*) There is no evidence at all to support Gudinas' theory that Ms. McGrath was dragged into the alley. When all of the evidence is considered, the logical explanation for the position in which Ms. McGrath's body was found is that Gudinas posed her for

reasons known only to him.

The second reason that Gudinas' theory collapses is that the blood spatter patterns found in the alley are consistent with the fatal kick to the head (which was the only blow that would have caused loss of consciousness) being delivered in that location. (TR443) Some of the other injuries inflicted on Ms. McGrath would have bled profusely, and the blood spatter evidence suggests that she was kicked in the head after her face was already bloody. (*Id.*) While it is true that some blood was found in the parking lot (TR482), that does not support Gudinas' claim in the absence of anything to suggest that the victim was, in fact, dragged into the alley.[50] All of the evidence indicates that the fatal blow to the head was administered in the alley at a time well into the series of events that made up this crime.

In cataloging the injuries sustained by the victim, the sentencing court found as follows:

> 1. That the body of Michelle McGrath was found in nude state, with the legs in somewhat of a flexed position. A stick was found inserted into her vaginal opening and a stick extending into the tissue of the rectal area.
>
> 2. That Ms. McGrath had an area of injury extending from the left upper or left outer forehead, beginning at the

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[50]The abrasions to Ms. McGrath's back strongly indicate that she was raped in the alley instead of the parking lot.

mid-eye area and covering the outside margin of the forehead, extending from the eye brow back to the hairline of the forehead and head region. This area had a lot of hemorrhage with it around the eye.

3. That Ms. McGrath suffered a very severe injury to the brain surface, which took thirty minutes to an hour for it to fully develop. Dr. Hegert felt that this major area of injury was possibly caused by the heel of a shoe or boot or something similar.

4. That Ms. McGrath suffered bruising and tearing of the inside area of the lip. She also had injuries to her mouth. That the injuries to this area were the results of a fairly significant blow. In describing the injuries to this area Dr. Hegert said:

> "We then start to see some of the hemorrhage here, there was also a tearing of the tissue inside the mouth, which was along the lower and bottom lip as the gum line, and then also inside the lip along the teeth, of the level of the teeth of the upper jaw. There was significant tearing of the membrane surface of the inside of the cheek that was associated with the blunt injury to this side, driving that surface of the cheek against the teeth, the pressure produced tearing. That would be consistent with the blow to the side of the cheek".

5. That Ms. McGrath suffered area of trauma to her jaw and extensive trauma to her neck.

6. That Ms. McGrath suffered a stab wound in the area between the vagina and anus. Dr. Hegert in describing this injury said:

> "This, then, is the rectum itself. And this is the area that the stick had produced actually a stab wound. This was a, not a penetration of the rectum with the stick, but right, this is the vagina here, so it's right

behind that or more towards the back of the body and penetrated, produced a wound about three sonometers, which is little bit over a inch to an inch and a half across, and penetrated into the soft tissue of the pelvis, approximately three inches."

"It produces hemorrhage, as we can see, so this is something that happened while the subject was still alive and is essentially a stab wound produced by the stick, rather than a penetration into the rectum as the stick penetrated into the vagina."

7. That there was evidence of bite marks and sucking marks on the breasts of the victim.

8. That there were abrasions on the outer lips of the victim's vagina.

9. That there was a quarter-inch tear of the left side of the inner lips of the victim's vagina.

10. That at the six o'clock level of the rectal opening of the victim there was trauma present, which consisted of some contusions and superficial tearing of tissue. This injury was consistent with the rectum being penetrated by some object.

11. That the injuries to the rectal area of the victim were produced while the victim was still alive.

12. That the abrasions and contusions on the outside of the vagina, along with injury to the lips of the vagina, were produced while the victim was still alive.

13. That the anus and vagina of the victim were penetrated by some object while the victim was still alive.

(R615-6). The court emphasized that, of all the injuries inflicted on her, only the blow to the side of Ms. McGrath's head would have

caused unconsciousness. (R617) As the sentencing court found, Ms. McGrath was beaten, taken into an alley, beaten some more, raped, and subjected to anal and vaginal penetration with a stick. (R618) Under the facts of this case, there is no doubt that Michelle McGrath was subjected to not only physical torture, but also extreme fear, mental anguish and emotional strain. In this case, the State's theory prevailed and, because that theory of the case is supported by more than enough evidence to establish the heinousness factor, this Court should accept that theory as lawfully established. *See, e.g., Wuornos v. State,* 644 So.2d 1012, 1019 (Fla. 1994), *cert. denied,* 115 S.Ct. 1708 (1995).

This Court has upheld the heinous, atrocious or cruel aggravator in cases in which the victim was beaten to death, as well as in gunshot murder cases when the victim was terrorized before being shot to death. *See, e.g., Cherry v. State,* 544 So.2d 184 (Fla. 1989); *Routly v. State,* 440 So.2d 1257, 1265 (Fla. 1983); *Smith v. State,* 424 So.2d 716 (Fla. 1982); *Griffin v. State,* 414 So. 2d.1025 (Fla. 1982); *Steinhorst v. State,* 412 So.2d 332 (Fla.1982); *Adams v. State,* 412 So.2d 850 (Fla. 1982); *White v. State,* 403 So.2d 331 (Fla. 1981); *Knight v. State,* 338 So.2d 201 (Fla. 1976). *See also, Hitchcock v. State,* 578 So.2d 685, 693 (Fla. 1990). Under the facts of this case, as found by the

sentencing court, Michelle McGrath was terrorized for an unknown period of time before Gudinas administered the kick to the head that rendered her unconscious and, ultimately, killed her. These facts fall well within the category of conscienceless, pitiless crimes which are unnecessarily torturous to the victim. Moreover, the facts of this murder demonstrate Gudinas' enjoyment of the suffering which he inflicted upon Michelle McGrath as he beat and sexually battered her. This is the sort of crime which falls well within the category of crimes to which the heinousness aggravator is applicable. *See, e.g., Cherry v. State*, 544 So.2d 184 (Fla. 1989). The facts in *Cherry* are substantially identical to those in this case--the only difference is the addition, in this case, of more blows to the victim and multiple sexual batteries. If the murder in *Cherry* was especially heinous, atrocious or cruel, and that is the law, then the murder committed by Gudinas certainly overmeets the criteria for that aggravator to apply. The death sentence should be affirmed in all respects.

To the extent that Gudinas argues that because there were few defensive injuries the victim was probably rendered unconscious with the first blow, that argument ignores the facts. There is no possible scenario which is consistent with the absence of drag marks on the victim's back and shoulders (and the other physical

evidence) under which the crimes could have been committed in the way theorized by Gudinas. The absence of defensive injuries means nothing. What is established from the evidence is that Gudinas terrorized and brutalized his victim--this murder was especially heinous, atrocious or cruel.

To the extent that Gudinas argues that his victim may have been "brain dead" early in the assault, that is pure speculation which finds no support anywhere in the record.[51] Likewise, the fact that the State presented no evidence that the victim was heard screaming establishes nothing other than that no such witness was located. That does not support Gudinas' suggestion that the victim was unconscious from the first blow and, in light of the evidence which establishes that the fatal blow was struck in the alley, the absence of evidence of any screams means nothing at all. The heinous, atrocious or cruel aggravator was proven beyond a reasonable doubt, and the death sentence should be affirmed in all respects.

Alternatively and secondarily, even if this aggravator is found not to exist, that does not render the death sentence invalid. Even without the heinousness aggravator, the prior

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[51] "Brain death" is not a legal term, anyway.

violent felony aggravator and the during the commission of a sexual battery aggravator remain. (R612-13)[52] Those aggravating circumstances are more than sufficient to support the death sentence even without the heinous, atrocious or cruel aggravator. The death sentence should not be disturbed.

XII. THE TRIAL COURT PROPERLY WEIGHED THE AGGRAVATING AND MITIGATING CIRCUMSTANCES

On pp. 75-80 of his brief, Gudinas argues that the trial court did not properly consider the mitigating factors offered by the defendant. As a sub-claim to this issue, Gudinas argues that the aggravators do not outweigh the mitigators, thus rendering death a disproportionate punishment. Both of these claims are foreclosed by binding precedent for the reasons set out below.

The sentencing court found three aggravating circumstances: that Gudinas had previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person; that the capital felony was committed while the defendant was engaged in the commission of a sexual battery; and that the capital felony was especially heinous, atrocious, or

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[52]Gudinas has four (4) prior violent felonies--two (2) arising from the Smith incident (See Issue I, above) and two (2) from Massachusetts. Those offenses were Assault with Intent to Commit Rape and Indecent Assault and Battery.

cruel. (R612-618) In mitigation, the sentencing court found that the extreme mental or emotional disturbance mitigator was present, as well as various non-statutory matters which were considered under the catch-all provision of the statute. The sentencing court rejected Gudinas' assertion that his ability to appreciate the criminality of his conduct was substantially impaired. (R620)

Gudinas' first sub-claim is that the sentencing court lumped all twelve (12) proffered non-statutory mitigators into one and only considered them as a single mitigating circumstance. That argument is based on a constricted reading of the sentencing order that, to say the least, is somewhat of a leap of logic. While it is true that the sentencing order refers to the catch-all mitigator in the singular, it is also true that that sentence comes at the conclusion of a twelve-item list which sets out all of the non-statutory mitigation Gudinas offered. The only conclusion that can reasonably be drawn from the sentencing order is that the sentencing court considered all of the proffered non-statutory mitigation--otherwise, there would have been no need for such an exhaustive list. The final sentence in the court's discussion of the non-statutory mitigation obviously refers to the catch-all mitigator itself in the singular, not to the enumerated items offered as mitigation. Of course, the weighing of aggravation and

mitigation is not a counting process, anyway. Whether or not the sentencing order would have been better worded in the singular or plural is a non-issue. The order clearly reflects that the sentencing court considered the non-statutory mitigation offered by Gudinas and found that it deserved very little weight. (R621) That is all the weight that mitigation deserved, and there is no error.

To the extent that further discussion of the non-statutory factors is necessary, the fact that the defendant had used alcohol and cannabis on the evening of the murder is due very little weight. There is no evidence that Gudinas is an alcoholic, or otherwise chemically dependant, and there is nothing to suggest that he was so intoxicated that he did not know that it was wrong to sexually batter and murder Michelle McGrath. In fact, all of Gudinas' behavior on the night of the murder demonstrates a clear desire to avoid apprehension--that undercuts any argument that Gudinas did not know that what he was doing was wrong.[53]

Gudinas' argument that he has the capacity to be rehabilitated is likewise entitled to very little weight. Given that Gudinas had

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[53]The full range of Gudinas' actions in furtherance of avoiding being caught is set out at pp. 5-11, above. At this point, it is enough to emphasize that after he initially contacted Michelle McGrath, he took her into an alley that was totally secluded.

previously been convicted for two sex offenses, his amenability to being rehabilitated is, to say the least, suspect. Likewise, the fact that Gudinas' behavior at trial was "acceptable" is hardly surprising. That shows no more than that Gudinas can act in an acceptable fashion when it is in his best interest to do so. The existence of this claimed mitigator is inconsistent with any claim that Gudinas is unable to conform to societal norms. This matter is due very little weight. The fact that Gudinas has an IQ of 85 is also of little significance. That IQ score does not fall in the mentally retarded range, and is, therefore, due very little weight in mitigation.

That Gudinas is "religious and believes in God", while certainly positive, is due very little weight inasmuch as those beliefs seem to have developed after he sexually battered and murdered Michelle McGrath. The fact that Gudinas' father "dressed as a transvestite", if that is true, is due very little weight inasmuch as there has been no attempt to demonstrate that that sort of behavior had any effect whatsoever on the defendant.[54]

The sentencing court found, as non-statutory mitigation, that

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[54]The only evidence of this came from the testimony of Gudinas' mother, who was divorced from his father. There is no evidence at all that Gudinas was aware of his father's behavior.

Gudinas "suffers from personality disorders". At least to some degree, this finding overlaps with the statutory mental mitigator that the court found and weighed. Whatever personality disorder Gudinas may have is, according to his expert, characterized by a tendency toward physical violence, the exhibition of a high degree of impulsivity, sexual confusion, the ability to manipulate others, sexual conflict and bizarre ideation. (R619) A personality disorder that manifests itself through such behavior is hardly due more than very little weight in mitigation--to hold otherwise would be to hold that it is a mitigating factor to be a violent criminal. That is not the law because that result would be absurd.

To the extent that the sentencing court afforded very little weight in mitigation to the fact that Gudinas was developmentally impaired as a child, there was no evidence that that fact had any effect on him as an adult. While that fact may evoke sympathy for Gudinas, it is due very little weight in mitigation. Likewise, the fact that Gudinas "was a caring son to his mother" is not entitled to more than very little weight in mitigation. Gudinas apparently had not lived with his mother for some time, and, in any event, the violence he displayed in killing Michelle McGrath (and toward his other victims) suggests that his mother may be the only woman who is safe from him. In any event, this factor does little more than

evoke sympathy for Gudinas--it is only slightly mitigating, at best. Likewise, that Gudinas was an "abused child" who suffered from attention deficit disorder is, at best, entitled to very little weight as mitigation. Neither of those matters are in any way linked to the offenses Gudinas committed, and their value as mitigation is minimal.

Finally, to the extent that the sentencing court found that Gudinas had been "diagnosed as sexually disturbed as a child", that fact is likewise entitled to very little weight in mitigation. Again, there is no demonstrable connection between that fact and the offenses at issue.

Insofar as the twelve non-statutory "mitigators" set out above are concerned, Florida law is settled that evidence is "mitigating" if, in fairness or in the totality of the defendant's life or character, it may be considered as extenuating or reducing the degree of moral culpability for the crime at issue. *See, e.g., Wickham v. State*, 593 So.2d 191 (Fla. 1991). However, none of the claimed mitigation set out above falls within that definition--only through a charitable view of the evidence was the sentencing court able to find that non-statutory mitigation. Of course, the relative weight given each mitigating factor is within the province of the sentencing court. *See, e.g., Campbell v. State*, 571 So.2d

415 (Fla. 1990); *Dailey v. State*, 594 So.2d 254 (Fla. 1991). No factor that Gudinas proffered as mitigation was dismissed as having no weight at all, and, under settled Florida law, it was clearly within the province of the sentencing court to assign very little weight to the tenuously connected non-statutory mitigation.

The second sub-claim contained in this issue concerns the sentencing court's refusal to find the existence of the "appreciate and conform" mental mitigator. In finding that this mitigating circumstance was not established, the sentencing court stated:

> The Court after carefully evaluating and analyzing the testimony of Dr. O'Brien finds that his testimony is not sufficient to establish this mitigating factor. Dr. O'Brien's opinion is too heavily based upon unsupported facts from what he was told other witnesses were going to testify about concerning the issue of intoxication. No witness that saw the defendant that night indicated that he [was] substantially impaired to the extent that he did not know what he was doing. In the fact the credible evidence shows that at approximately 2:00 A.M. on May 24, 1994, the defendant stealthily approached Rachelle Smith's car and attempted to gain entry to her vehicle. The defendant in attempting to gain entry into Ms. Smith's car tried to break the window. Once, he heard Ms. Smith sounding the horn, he fled. Upon attacking Michelle McGrath in the parking lot, he took her to a place of concealment to complete his horrible acts upon her.
>
> This Court is not reasonably convinced that the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was

> substantially impaired. The Court finds that this mitigating factor is not present.

(R620-21) The sentencing court is entitled to reject that sort of expert opinion testimony. In *Wuornos*, this Court stated:

> . . . the finder of fact is not necessarily required to accept the [expert] testimony. As we stated in *Walls*, even uncontroverted opinion testimony can be rejected, and especially where it is hard to square with the other evidence at hand, as was the case here. *Walls*, 641 So.2d at 390-91 & n. 8.

Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994). Moreover, as the *Wuornos* court emphasized, "the factor still can be deemed 'controverted' if there is any contrary or inconsistent evidence in the guilt or penalty phases, or if evidence of the factor is untrustworthy, improbable, or unbelievable. *Walls*." *Id.*, at n. 6. That is exactly what the sentencing court did in this case, and there is no basis for reversal. The reasons for refusing to find this mental mitigator were clearly set out, and those reasons are fully in accord with Florida law. *See, Cooper v. State*, 492 So.2d 1059 (Fla. 1986). The death sentence should be affirmed in all respects.

To the extent that Gudinas complains, in footnote 19 to his brief, that his expert witness should have been allowed to testify in response to a hypothetical question, that argument ignores the fact that there was no evidence to support the question that had

been asked. While Gudinas is correct when he states that the facts upon which a hypothetical question is based need not be undisputed, he ignores the fact that there must be some facts to begin with. *See, e.g., North Broward Hosp. Dist. v. Johnson,* 538 So.2d 871 (Fla. 4th DCA 1988), *rev. denied,* 551 So.2d 462 (Fla. 1989). In this case, there is no evidence to support the suggestion that Gudinas consumed 10 beers during his stay in the drinking establishment. The answer to the hypothetical question was properly stricken.[55]

To the extent that Gudinas argues that the sentencing court did not give his age enough weight in mitigation, that argument fails under binding precedent. As this Court has emphasized,"... age is simply a fact, every murderer has one...". *Echols v. State,* 484 So.2d 568, 575 (Fla. 1985). Furthermore, if age is to be afforded significant weight in mitigation, "it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility." *Id.* There is no per se rule that a particular age must be found mitigating in nature. *See, e.g., Kokal v. State,* 492 So.2d 1317 (Fla. 1986); *Peek v. State,* 395

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[55]Gudinas chose to raise this issue in a footnote. That is hardly sufficient to brief an issue for appellate review. *See, e.g., St. Mary's Hosp., Inc. v. Sanchioni,* 511 So.2d 617 (Fla. 4th DCA 1987).

So.2d 492, 498 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981); *Cooper v. State*, 492 So.2d 1059, (Fla. 1986). In this case, the sentencing court found that Gudinas' age was not mitigating because "[t]here is no evidence that the defendant was not mentally and emotionally mature". (R621) That determination is in accord with settled Florida law, as well as being supported by the evidence in this case. It was well within the discretion of the sentencing court to find that, under the facts of this case, Gudinas' age of 20 at the time of the murder was not mitigating.

To the extent that Gudinas argues that there was "extensive evidence" of his "abnormal development as a child, his extremely slow physical maturation, his low I.Q., and his assorted psychological problems", that is somewhat of an overstatement of the evidence. The penalty phase evidence presented by Gudinas does not establish "abnormal" development as a child--it establishes that he was small for his age. It is internally inconsistent to equate physical development with mental or emotional development in the first place, especially when, as here, there is no suggestion of any connection between the two. Moreover, the "low I.Q." referred to in Gudinas' brief is a full-scale score of 85, which is far above the range of mental retardation. There is no evidence

that Gudinas' I.Q. had any significant effect on his ability to function in society, and it is hardly so low that it precludes him from taking responsibility for his own actions.[56] Finally, whatever psychological diagnoses may be applied to Gudinas (and neither of his experts reached one), there is no suggestion in any of the expert testimony that Gudinas is not mentally and emotionally mature. That is what the sentencing court found, and that finding should not be disturbed.

Alternatively and secondarily, even if the sentencing court should have found Gudinas' age to be mitigating, any error is harmless beyond a reasonable doubt. *DiGuilio, supra*. In view of the heavily aggravated nature of this murder, the addition of age as a mitigator would not outweigh the overwhelming aggravation that exists. Death is the only proper sentence.

CONCLUSION

Based upon the foregoing arguments and authorities, the State submits that the various convictions and sentences should be affirmed in all respects. Insofar as the proportionality of the sentence of death is concerned, the facts of this case are closely

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[56]The upper limit IQ score for a diagnosis of mental retardation is approximately 70. *DSM-IV* at 40. Gudinas' score is far above that.

analogous to *Mendyk v. State*, 545 So.2d 846 (Fla. 1989), where this Court affirmed the sentence of death. The aggravating circumstances that exist beyond a reasonable doubt are overwhelming, while the mitigation that Gudinas offered is very weak. Even considering that one of the statutory mental mitigators was found by the sentencing court, the aggravation still outweighs the mitigation. The trial court properly weighed the penalty phase evidence and imposed a sentence of death. That sentence should not be disturbed.

Respectfully submitted,

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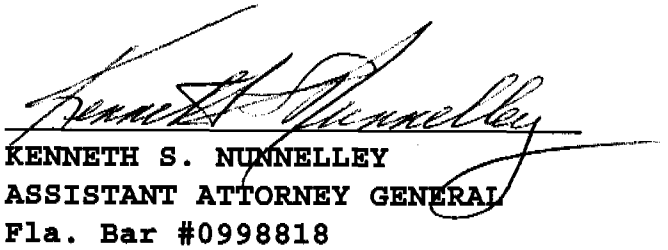

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been sent to: Mr. Christopher S. Quarles, Chief Capital Appeals, Asst. Public Defender, 112 Orange Ave., STE A, Daytona Beach, FL 32114, on this 7th Day of August, 1996.

Kenneth S. Nunnelley
Of Counsel