IN THE SUPREME COURT OF FLORIDA

THOMAS LEE GUDINAS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 86,070

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

INITIAL BRIEF OF APPELLANT

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SEVENTH JUDICIAL CIRCUIT

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In referring to the record on appeal, the following symbols will be used:

(R) -- to refer to the thirteen volume record on appeal including ten volumes of various hearings (Volumes 1-10, Pages 1-198), and three volumes of pleadings (Volumes 11-13, Pages 199-655);

(T) -- to refer to the five volumes of transcript of the guilt phase (Volumes 1-5, Pages 1-891);

(P) -- to refer to the two volumes of transcript of the penalty phase (Volumes 1-2, Pages 1-350), and;

(SR) -- to refer to the two volumes of supplemental record (Volumes 1-2, Pages 1-35).

STATEMENT OF THE CASE

On July 15, 1994, the State indicted Thomas Lee Gudinas charging him with first-degree murder, attempted sexual battery, attempted burglary with an assault, and two counts of sexual battery. (R209-11) On August 18, 1994, the trial court granted the Public Defender's motion to withdraw and appointed private counsel. (R227-31,233)

Appellant filed numerous pretrial attacks on the constitutionality of Florida's death penalty sentencing scheme. Most of these were denied. (R257-73,278-321,459-91; SR1-22)

On November 10, 1994, the trial court conducted a hearing on defense counsel's motion to withdraw and took the motion under advisement. The trial court also heard complaints from the Appellant concerning the representation provided by his lawyer. (R33-64,382-83) The trial court subsequently denied counsel's motion to withdraw. (R384)

Appellant filed a motion to sever the attempted burglary and attempted sexual battery charges from the remaining counts. (R392-93) Appellant contended that these crimes were unrelated to the other charges. Following a hearing, the trial court denied Appellant's motion to sever. (R67-84,396,402-5) In mid-December, 1994, this case was reassigned from the Honorable Daniel P. Dawson to the Honorable Belvin Perry, Jr. (R399,405)

On March 19, 1995, the trial court heard numerous pretrial motions filed by the Appellant. (R454-55) The court granted Appellant's motion for juror questionnaires and one motion in

limine. (R454-55) The court deferred ruling on Appellant's motions regarding victim impact evidence. (R455)

Prior to trial, Appellant filed a motion to prohibit argument and/or instructions concerning first-degree felony murder. (R278-79) The trial court denied the motion at a pretrial hearing.[1] (SR12)

The trial court granted Appellant's motion for change of venue and subsequently transferred venue to the Twentieth Judicial Circuit, Collier County, Naples, Florida. (R331-34,411, 415)

The case proceeded to a jury trial on May 1, 1995. (T1-891) During the guilt phase, the trial court overruled Appellant's strenuous objections to the State's use of gruesome photographs. (R316-17; SR15-18; T209-20,405) The trial court also overruled Appellant's objections to the State's use of the same photographs at the penalty phase. (P265-68)

At the conclusion of the State's case-in-chief, Appellant moved for a judgment of acquittal as to all counts, which the trial court denied. (T732-35) Appellant rested after presenting the testimony of one witness, who was called out of order. (T716-20,742-46) The trial court denied Appellant's renewed motion for judgment of acquittal. (T742-46) Following deliberation, the jury found Thomas Gudinas guilty as charged on

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[1] The trial court instructed the jury on both theories of murder. (T860-62) The jury ultimately returned a general verdict finding Gudinas guilty of murder in the first degree, as charged in the indictment. (R542)

all counts. (T881-90; R538-42)

The penalty phase commenced on May 8, 1995. (P1-343) The trial court excluded the State's proffer of victim impact evidence and heard such testimony and evidence outside the presence of the jury. (P8-25; R124-70,171-98) The State introduced three prior convictions and rested. (P44-49) The trial court denied several requests by the Appellant for special jury instructions. (R447-50,550-51; P237-41) Over Appellant's objection the court modified the standard instruction regarding the burden of proof for mitigating circumstances. (P243-49) Following deliberation, the jury returned with a recommendation that Thomas Gudinas be sentenced to death. (P340-43; R562-63)

The trial court adjudicated Gudinas guilty. (R584-85) The court sentenced Gudinas to thirty years as to Count I (attempted burglary with an assault), thirty years on Count II (attempted sexual battery), life imprisonment on Count III (sexual battery), life imprisonment as to Count IV (sexual battery), and death as to Count V (first-degree murder). (R589-603) The trial court rendered a sentencing order finding three aggravating circumstances, one statutory mitigating circumstance, and twelve nonstatutory mitigating circumstances. (R611-33) Appellant filed a notice of appeal on June 12, 1995. (R636) This Court has jurisdiction.[2]

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[2] Art. V, §3(b)(1), Fla. Const.

STATEMENT OF THE FACTS

GUILT PHASE

Between 10:30 p.m. and 11:00 p.m. on May 23, 1994, Michelle McGrath parked her red compact car in the parking lot of Scruffy Murphy, a popular downtown Orlando bar. (T272-77) McGrath was a regular club-goer who frequented the area three or four times a week. (T278-79) McGrath drank and socialized for the next several hours at Skinny Dick's and Barbarella's, two downtown bars. (T281-88) Troy Anderson, a friend of McGrath's, last saw her that evening at approximately 2:45 a.m. in the courtyard out back of Barbarella's. (T281-86) At approximately 7:30 a.m. the next day, a Pace School employee discovered Michelle McGrath's body in a downtown alley. (T299-301,346) The cause of death was brain hemorrhage resulting from blunt force injuries to her head. (T444) McGrath had a blood alcohol level of .17. (T444) Serologists found evidence of semen in her vagina. (T726-27) The medical examiner estimated the time of death to be between 3:00 and 5:00 a.m. (T449)

The State's case against Thomas Gudinas was based in large part on circumstantial evidence. At the time of the murder, Gudinas was living in a two bedroom apartment with his cousins Fred and Dwayne Harris along with Mark and Todd Gates. (T574) Todd Gates drove Fred, Mark, and the Appellant to Barbarella's that evening, arriving between 8:30 and 9:00 p.m. (T606-8) For $5.00, a customer could drink all the draft beer he could stomach at Barbarella's that night. Michelob bottles were on sale for a

dollar each. (T583-84)

Thomas Gudinas bore a striking resemblance to his cousin, Fred Harris. In fact, Gudinas, who was only 20 at the time, used Fred's ID to get into the bar that night. (T632-37,657) The boys drank and socialized that evening. They did not remain strictly together as a group. Each went their own way at various points in the evening. (T609)

Dwayne Harris arrived at Barbarella's at approximately 1:00 a.m. in the company of Frank Wrigley. (T569-72,674-78) Wrigley noticed that Gudinas already had a "buzz on" and had a drink in his hand. (T583) During the evening at the bar, various members of the group (Appellant included) made trips to the parking lot to smoke marijuana. (T580-82,588,618-19,660-63) Before going to Barbarella's, the group had drunk beer and smoked pot at the apartment as well as on the ride downtown. (T620,659,697)

When Barbarella's closed at 3:00 a.m., no one could seem to find Thomas Gudinas. (T573,584,610-11,634-42,678-80) Frank Wrigley drove back to the apartment in his truck with Fred and Dwayne Harris as passengers. (T574) Todd Gates used his own truck to drive his brother Mark back to the apartment. (T611-12) When they did not find Gudinas already at the apartment, Todd drove Fred back downtown to search for him. They drove around the downtown area for approximately fifteen minutes before returning to the apartment at about 4:00 a.m. (T612-13,641) Back at the apartment, several of the boys stayed up drinking some more beer. (T575)

Gudinas returned to the apartment at approximately 7:30 a.m. the next morning. (T684) When questioned about the scratches on his knuckles, Gudinas explained that he was attacked by two assailants during a robbery attempt. (T577-78,614-16,643-45,685-89) Gudinas showed his roommates the boxer shorts he had worn during the attack. The crotch area had a red stain that appeared to be blood. (T615-16,630-32,643-45,686-89) Gudinas explained that his attackers had forced him to remove his pants. (T645)

In the days following the murder, Dwayne and Fred Harris were drinking and playing cards with Gudinas. Dwayne Harris jokingly accused Gudinas of committing the murder. Harris then asked Gudinas if McGrath was a "good fuck." Gudinas continued the nonsense saying, "Yes, and I fucked her while she was dead." All parties to the conversation for the most part agreed that everyone was fairly intoxicated and no one took the subject seriously, i.e., it was believed to be merely a sick joke.[3] (T648-55,658-59,689-91,693-94)

Rachelle Smith was at Barbarella's that night with her fiancee. She left the bar about 2:00 a.m. and proceeded to find their car while her fiancee remained in the bar saying goodbye to friends. Smith initially went to the wrong parking lot where she saw a man lurking in the first row of cars. She eventually found the right parking lot and got into the passenger seat and immediately locked her car. She then noticed in her mirror the

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[3] However, Harris did admit that when Gudinas made the statement, it was weird. He sort of seemed serious.

same man who had been acting suspiciously in the other parking lot. After acting as if he was getting into a nearby car, he attempted to open Smith's locked car door. He then tried her driver's door with no success. He then wrapped his hand in his shirt tail and twice slammed his fist into the driver's window in an apparent attempt to break it. At the same time he yelled, "I want to fuck you." Smith screamed and began honking the horn. Her assailant then fled. (T251-62) Smith identified Thomas Gudinas at trial and in a photographic lineup after the incident. (T262-63)

On May 24th, Jane Brand arrived at her job at the Pace School in downtown Orlando at her usual time of approximately 7:00 a.m. When she went to unlock the gate, she saw a young male sitting on the steps in the courtyard behind the school. The man's back was facing Brand when she discovered him. Brand described him as approximately eighteen years old with short brown hair, and very average-looking. He wore dark, loose-fitting shorts. Brand told the man that he would have to leave. With his back still facing Brand, the man stood up and appeared to be either tucking in his shirt or doing something to the front of his shorts. He walked up the steps that ended at the brick wall behind the school. Brand offered to let him leave by opening the gate. He mumbled something, perhaps a negative response. He walked up the steps, climbed over the wall, and jumped into the alley behind the school. (T290-9)

Brand admitted that she did not get a good look at the

culprit, only one or two minutes. She could not identify Gudinas as the man until approximately one month before trial. At that time, she saw Gudinas walking in a television report and concluded that he was the same individual she saw in the courtyard that morning. (T302-7)

Brand walked through the courtyard and entered the school. After turning off the security alarm, she sat at her desk and ate breakfast. She heard someone walking in the alley and believed that it was the young man leaving the area. About 7:15, Brand heard a crash and later realized that it was the sound of the gate shutting. (T296-99) At approximately 7:30, Brand left her classroom and walked up the stairs in the courtyard to look into the alley to make sure the intruder had left. She spotted Michelle McGrath's body, promptly called her supervisor, and then 911. (T299-301) Outside the school, Brand flagged down Officer Chisari of the Orlando Police Department bicycle patrol. (T302)

Culbert Pressley is a well-known transient who frequents downtown Orlando. Every weekend morning at dawn, Pressley searches the area for lost valuables. (T309-12) Between 4:00 and 5:00 a.m. on May 24th, Pressley found Michelle McGrath's keys next to a bundle of clothes by a red car in the parking lot next to Pace School and Scruffy Murphy's. (T309-12) Noticing that the keychain had a souvenir picture from Howl At The Moon (another club), Pressley went to the bar which was not yet opened. (T312-14) He returned to Scruffy Murphy's parking lot and unsuccessfully attempted to convince a female deputy to run

the picture on the keychain on the police computer. Pressley then wiled away the next couple of hours sitting on a downtown bench. (T314-16) Shortly after 7:00 a.m., a man whom Pressley subsequently identified as Gudinas, came walking down the sidewalk. (T316-18,324-26) When the man saw the keys Pressley had found, he said, "Those look like my keys, I've been looking for them all morning." Pressley asked for a reward and the stranger promised to give him $50.00 at a later time. (T316-18) The sirens of the arriving emergency vehicles ended their discussion, and Gudinas walked away.

Officer Chisari heard from the female deputy sheriff that Pressley had found some keys. (T336-41) When Chisari approached Pressley and asked about the keys, Pressley explained that he had just given them to "that man," pointing to an individual walking south. (T342) As Chisari rode his bicycle toward the man with the keys, Chisari heard Jane Brand scream as she spotted McGrath's body in the alley. (T343-45) Chisari responded to the scene and found McGrath's body. Thinking that the individual with the keys might have had something to do with the death, Chisari went back toward the parking lot. (T345) He saw a man he subsequently identified as Thomas Gudinas driving a red Geo Metro from the Scruffy Murphy's parking lot. (T345-50,351-53) At Officer Chisari's request, Pressley (who evidently had a better angle) noted the license tag of the red Geo Metro and wrote it on his hand. (T321,348) The red Geo Metro belonged to Michelle McGrath. (T272-77,383-87,507-9) Police later recovered

the car about 7:00 p.m. on May 24th parked at the Holiday Club Apartments off Curry Ford Road. (T383-87, 462-69,512)[4]

A pushbar from the door leading from the alley where McGrath's body was found to the parking lot had a partial right palm print that matched Thomas Gudinas. (T529-30,546,549,552-62) Police also found Gudinas' left and right thumbprints on a bank payment book found in McGrath's car. (T535,547, 562) The forensic witnesses admitted that there was no way to determine when the fingerprints were left on the items. (T549-50,565)

PENALTY PHASE

The State presented only documentary evidence during their case-in-chief at the penalty phase. (P44-49) The State introduced evidence that Gudinas had previously been convicted of two counts of assault, one count of battery, one indecent assault, and breaking and entering of a conveyance. These offenses occurred in Massachusetts in the early 1990's.[5]

Tommy Gudinas' mother was barely sixteen when she married. She gave birth to Tommy at age seventeen. (P170-71) After five years of marriage and numerous separations, Tommy's mother

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[4] At approximately 3:00 p.m. on May 24, 1994, another citizen saw a man driving McGrath's car in an erratic manner. She picked Gudinas' picture from a photographic lineup as one of two photographs that looked like the driver. (T462-69)

[5] Mrs. Gudinas explained that Tommy's conviction for breaking and entering a motor vehicle was not a "stranger on stranger" crime. The owner of the car was a very good friend of the Gudinas family. (P207-8) Tommy's conviction (P3) for assault with the intent to commit rape was also an act committed on a friend of Tommy's, perhaps a girlfriend. (P208-9)

divorced his namesake. (P170-71) Two weeks before Tommy's birth, Mrs. Gudinas[6] was hospitalized with severe toxemia, a form of blood poisoning. (P172-73) It was a very difficult birth. Mrs. Gudinas went into convulsions during delivery and had no memory of the birth. (P173) She did not see her son for two days. (P173) She remained in the recovery room, hooked up to a number of machines. (P173-74)

Tommy was born with fluid on the brain. (P174) His mother watched as they inserted a very thin, seven inch tube into the back of his head. Blood squirted out the back of the tube. (P174) Tommy remained in the hospital with his mother for two weeks. (P174-75) During his first six months of life, Tommy suffered from Sudden Infant Death Syndrome. When he stopped breathing, his mother rushed him to the hospital. They made at least six trips those first few months. (P175) As a small child, Tommy suffered from extreme temper tantrums, which his mother saw as a cry for help. (P210-11)

Mrs. Gudinas described her marriage to Thomas, Sr. as "happy, but confused." (P176) During the first few years of Tommy's life, his mother worked and his unemployed father stayed home with the children. (P191-92) Mr. Gudinas liked to dress up in his wife's negligees and underwear[7]. (P176) He explained

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[6] Although Tommy's mother had long ago divorced and remarried, counsel will refer to her as Mrs. Gudinas to avoid confusion.

[7] Mrs. Gudinas attributed her happy but confused state to her extreme youth. Apparently, she and Mr. Gudinas were divorced before she reached the age of twenty-two. (P176)

that he liked the silky feel of the material.[8] (P176) He did not hesitate to engage in this behavior in front of the children. (P176-77)

His mother said that Tommy was "always a short little kid, and everybody would always make fun of him for being so short." (P198) Tommy's cousins frequently beat up the smaller boy. (P210) Mrs. Gudinas agreed with Dr. Cohen that, at age thirteen, Tommy looked approximately eight years old. (P198-99) Tommy was always bothered by his delay in maturation. It was frequently a subject of his counselling discussions. (P199) He was anxious and depressed about it. (P199)

Tommy's mother admitted that her children were "disciplined very strangely." (P177) After the children complied with instructions to wash their hands for supper, Mr. Gudinas would repeatedly inspect their hands, find a spot, and order them back into the bathroom. The children usually ended up washing their hands five times before they passed muster. (P177)

When Tommy was three, his father caught him and his cousins playing with matches. (P100,148-49,177-78) The elder Gudinas taught his son a lesson by placing the child's hand on a hot stove burner. Mr. Gudinas also attempted to punish one cousin similarly, but **his** mother intervened. (P179) Needless to say, Tommy screamed and cried. The other children were very frightened. (P179) After the trauma of having his hand burned

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[8] There was some hint that Tommy was sexually abused by someone as a child. (P201)

by his own father, Mrs. Gudinas noticed changes in Tommy's behavior. (P180-81) He still bore the physical scar on his left hand. (P157,180-81)

When Tommy was about seven years old, his father punished him for soiling his bed sheets. Mr. Gudinas forced his son to stand outside in the snow wearing only his underwear and a sign announcing, "I will not wet the bed." (P149,183)

The family once took a camping trip in Massachusetts by a lake. (P183-84) At one point during the trip, Tommy and his sister were nowhere to be found. Mrs. Gudinas frantically ran to the lake where she found her children at the lake's edge. Relieved, she returned with them to camp. Mr. Gudinas immediately took Tommy into the tent and smacked him so hard, his face was bruised. (P184-85) Another time, Tommy's father picked him up and threw him forcefully to the ground. (P184) Mrs. Gudinas never reported any of these incidents to the authorities. (P185) Mr. Gudinas never struck Tommy's sister, Michelle. (P184) The difference in discipline was "noticed" but never discussed. (P153,184-85)

Although she denied physical abuse, Mrs. Gudinas admitted she was emotionally abused during her marriage. (P185) After finally divorcing her husband, Mrs. Gudinas allowed the father to take the children on a three-week vacation. He absconded with the children and illegally had "custody" of them for almost three years. (P151,182) After living with his father for a couple of years, the children were returned to the proper custodial parent,

Mrs. Gudinas. That was when she first noticed Tommy's violent behavior. (P185-87,215-16) He also began having nightmares. (P215-16) He acted up in school, and threw chairs. (P185-87) When he was six years old, she took Tommy to Boston University for an evaluation. Tommy's teacher had reported his hyperactivity and acting up in class. (P185-86) Mrs. Gudinas sought help from the Division of Youth Services. (P216) Over the next several years, Tommy had 105 different placements through that agency. (P190)

Mrs. Gudinas noticed Tommy drinking alcohol, even as a juvenile. She also saw him smoke marijuana. (P194) Tommy also imbibed in cocaine and LSD. (P194,213-14) Although his mother did not allow him to drink alcohol, he came home once very intoxicated. She rushed him to the hospital where they diagnosed alcohol poisoning and pumped his stomach. (P194)

Mrs. Gudinas repeatedly changed her residence in order to achieve better treatment for her son. (P194-95) As a result of his treatment in numerous facilities, Tommy only completed his formal education through the fourth grade. (P196-97) Because of his low I.Q., he attended special education classes. (P196) Tommy eventually secured his GED. (P197)

Experts told Mrs. Gudinas numerous times that Tommy should be placed in a long-term residential treatment program. (P199) However, that never occurred. He bounced from place to place as the "experts" attempted to find "the right place" for him. (P199) "Before you knew it, all the years went by. There was no

right place." (P199)

Dr. James D. Upson, a clinical neuropsychologist and professor, testified for the defense. (P50-109) The trial court accepted Dr. Upson as an expert in the area of clinical neuropsychology. (P52-53) Although several neuropsychological evaluations gave no indication of brain impairment, the records revealed significant emotional disturbances. (P54) As early as the first grade, Gudinas had behavioral problems in school. He had much aggression which was later identified as sexual problems. Gudinas acted out on occasion, had poor peer relationships, and had difficulty in adjusting to adults. (P54) Throughout his childhood, a total of seventeen professional reports recommended treatment; fifteen of those recommended long-term residential treatment. (P55) Unfortunately, Gudinas never received the recommended long-term residential treatment.[9] (P55) Most of the programs only **evaluated** Gudinas without any **treatment** whatsoever. (P192-3)

Dr. Upson's psychological evaluation revealed an I.Q. of 85, the low-average range. (P55-56) The testing also revealed some impulsivity. (P58-59,63) The test also indicated attentional-type difficulties which were consistent with a past diagnosis of attention deficit disorder. (P61-63) Dr. Upson also detected that Gudinas had some difficulty in judgments, concentration and higher mental processing. (P64-65)

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[9] Gudinas once spent nine days in a psychiatric ward. (P190) The five month Coolidge Program was the lengthiest treatment. (P192)

The MMPI[10] revealed that Gudinas has very strong underlying emotional deficiencies and difficulties that were not readily apparent on the surface. (P66-67) This type of person has a higher degree of impulsivity, sexual confusion and conflict, bizarre ideations, manipulative behavior, and regressive tendencies. This type tends to be physically abusive and has the capacity and ability to be violent. (P66-67) These behaviors escalate when the person is either threatened or loses control for some other reason. (P67)

Tommy Gudinas' troubled childhood was well documented in reports and evaluations throughout his life. A school psychologist called seven-year-old Thomas Gudinas "a very anxious, frustrated young boy. He's struggling with a significant amount of anger, fear, anxiety, negative feelings, and inner conflict....he's extremely angered with adult figures, especially with a mother figure." (P69-70) Another report noted that an eight-year-old Thomas Gudinas had difficulty getting along with everybody. He was a constant behavior problem and experienced rapid mood swings. (P70) Even as a child, he was hostile, aggressive, and disruptive. (P70) Thomas' father complained that he cried frequently and often had nightmares. (P70)

When Gudinas was approximately thirteen, Carol Cohen, a psychological consultant at Harvard Medical School, evaluated him. Cohen called Thomas severely anxious, hyperactive and

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[10] Minnesota Multi-Personality Inventory.

destructible, although not psychotic.

> ...His behavior is strikingly age inappropriate. It swings from overly sophisticated postures appropriate to a mature, middle-aged man to notably infantile behavior, such as insisting on playing hide-and-seek repetitively with the affect appropriate of a five year old....his striking discrepancy between his chronological age and the extreme immaturity of his appearance, he looks approximately eight....suggests that Thomas' behavior is, at least, to [sic] part, reflecting of the developmental crisis in adolescents, stemming from the late physical maturation.
>
> Thomas' physical maturation appears significantly delayed, and he appears to be terrified by it. His apparent terror is considered to be a healthy response to profound developmental stress. And it calls for alarm.

(P70-71) Dr. Cohen recommended that Thomas be treated and evaluated in a secure, inpatient department of the hospital. (P71)

Dr. Derby also evaluated Gudinas at about the same age. Dr. Derby described Thomas as impulsive, anxious, depressed and withdrawn. (P72-73) Dr. Derby had difficulty determining whether Thomas' primary problem was attention deficit disorder, hyperactivity, or the secondary development of common emotional problems. (P73) A few months later, another doctor described Gudinas as severely disturbed and extremely frightened. Dr. Valdez's testing suggested anxiety regarding sexuality. (P73) Gudinas developed a defense mechanism of acting out which, misunderstood by his primary caretakers, resulted in a perpetual cycle of punishment. (P73-74) Dr. Valdez "strongly recommended"

that Thomas be placed in a long-term highly-structured residential school. (P74) A number of other experts concurred in the recommendation. (P74-75) Unfortunately, Gudinas never received any such treatment. (P76)

When Gudinas was approximately five years old, his father placed his hand over a stove burner and burned the young child's hand. (P76) His parents also punished him by forcing him to stand on his head in the corner. (P76-77) Thomas' father was a cross-dresser who changed into women's clothing at home while he worked around the house. (P77)

Dr. Upson concluded without equivocation that Thomas Gudinas was a very seriously and emotionally disturbed young man at the time of the murder. (P77) Dr. Upson based his opinion on Gudinas' well-documented psychological history, the battery of psychological tests, and the pathological, psychological, dysfunctional nature of the crime. (P77-78) The doctor pointed out that Gudinas would benefit from long-term residential treatment which he had never had a chance to receive.

Department of Youth Services records revealed that Gudinas was placed in numerous treatment facilities from 1986 to 1991. (P79) Although the facilities were custodial, Dr. Upson saw no evidence that any were long-term residential facilities. (P79-81) During those five years, records revealed approximately 105 changes in Gudinas' placement. (P79) During his five years with Youth Services, Gudinas went AWOL from residential centers on

approximately four different occasions.[11] (P82) He was also expelled from some programs due to his inability to abide by the rules. (P82) Dr. Upson explained that the residential facilities were not treatment oriented, i.e., they were not places that could deal with Gudinas' disruptive behavior. Gudinas would act out and the facility responded by discharging him. This perpetual cycle never addressed his problems. (P82-84) The State was simply housing him rather than treating him. (P83-84)

Upson described Gudinas as having a high degree of repressed experiences which he has learned to control under most situations. The repressed experiences appear to center around targeted figures, specifically the female and a very inadequate male image. (P98) Therefore, under certain conditions (alcohol ingestion for example) he loses control. (P98) Aggression and hostility begin to surface. (P98-99)

The trial court recognized Dr. James O'Brian as an expert witness in the area of toxicology. (P111-15) Dr. O'Brian is a physician as well as a pharmacologist. (P112) Dr. O'Brian reviewed arrest records, psychological tests, neurological reports, and consulted with Dr. Upson. (P115) Dr. O'Brian also discussed the night's events with Thomas Gudinas. (P116) During

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[11] When Tommy went AWOL from the various facilities, he invariably returned home to his mother. Sometimes she would get a call before he arrived, but sometimes she had to call them. (P206) Frequently, the treatment facility refused Tommy's return after he "escaped." (P206-7)

the afternoon of May 23, 1994, Gudinas reported that he drank alcohol between 1:30 p.m. and 3:00 p.m. (P116) He commenced drinking again that night at approximately 9:30 until 2:00 a.m. the following morning. (P116) Additionally, Gudinas ate marijuana "joints" that day, one at breakfast, one around 1:30 p.m., five between 3:00 p.m. and 8:00 p.m., and another at 1:00 a.m. the following morning. (P116)

Dr. O'Brian explained that alcohol acts as a depressant that removes inhibitions. (P116-17) Marijuana acts initially as a stimulate and also removes inhibitions. The drug also may cause aggression depending on the dosage. (P117-18) Dr. O'Brian opined that alcohol would initially make someone with Mr. Gudinas' psychological makeup uninhibited with his underlying personality showing through. As the dosage increased, Gudinas would not be able to control his underlying "strong impulses." (P118) People that observed Gudinas that night (four individuals -- cousin, attempted victim, and two others) indicated that Gudinas showed signs of intoxication. (P119)

Dr. O'Brian concluded without equivocation that on the night of the murder, Gudinas' ability to conform his behavior to the requirements of the law was substantially impaired. The doctor based this conclusion on the consumption of alcohol combined with Gudinas' underlying psychological makeup. (P119,144-45)

SUMMARY OF THE ARGUMENT

POINT I: Appellant contends that the trial court's refusal to sever the unrelated attempted burglary and attempted sexual battery with Rachelle Smith as the victim, denied Gudinas a fair trial as to the murder and rape of Michelle McGrath. The unrelated offenses were tenuously connected by geography and time. However, this is not enough. The State used the Smith case to bolster their weak circumstantial case against Gudinas for the murder of McGrath. The rule requires severance when joinder might prevent a fair determination of a defendant's guilt.

POINT II: Two pretrial hearings were held without Appellant's presence. Additionally, during the hearing on defense counsel's motion to withdraw, the court adjourned to chambers without Gudinas. After a forty minute hearing with just the lawyers, the trial court continued the hearing in Gudinas' presence. This was clearly error. Appellant's presence was especially critical at the hearing on the motion to withdraw, since Appellant had numerous complaints about his lead trial counsel. Appellant's involuntary absence violates this Court's holding in Francis v. State, 413 So.2d 1175 (Fla. 1982) and Coney v. State, 653 So.2d 1009 (Fla. 1995).

POINT III: The evidence is insufficient to support the convictions for attempted burglary and attempted sexual battery. The State failed to prove an overt act that sufficiently established attempted sexual battery. Since sexual battery was

the offense the State alleged Gudinas intended to commit in the course of the burglary, the attempted burglary must also fall.

POINT IV: Appellant's lead defense counsel filed a motion to withdraw, allegedly because Gudinas requested it. The trial court conducted an inquiry which was insufficient under Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973). This error was compounded due to the fact that a portion of the hearing was held without Appellant's presence.

POINT V: The introduction of gruesome photographs over Appellant's objections constitutes reversible error in this case. The photographs in question were extremely gory color slides. They included at least one autopsy picture and several which prominently featured sticks jammed into the victim's vagina and anal region. Any probative value was outweighed by the extreme prejudice.

POINT VI: The trial court erred in allowing the State to introduce a taped statement police took from Fred Harris months before trial. Harris testified that Gudinas sounded serious when he claimed to have killed McGrath, even though the atmosphere was one of frivolity. Harris testified to these facts at trial. Allowing the State to play the taped interview of Harris was error. The tape was hearsay and improperly bolstered Harris' testimony.

POINT VII: The jury heard improper evidence which ultimately attributed to Appellant's conviction. Frank Wrigley made reference to hearsay that Fred Harris, Appellant's cousin,

believed Gudinas committed the murder. Appellant's motion for mistrial should have been granted. Appellant also contends that the trial court's rule that only one lawyer may make objections for each witness violates the Sixth Amendment. The jury also heard irrelevant and prejudicial evidence that Gudinas was wanted on grand theft auto charges in North Carolina. The State deliberated elicited this testimony. The motion for mistrial should have been granted. The curative instruction was insufficient.

POINT VIII: Over objection, the State proceeded on both premeditated and felony murder. The trial court instructed the jury on both theories. They returned a general verdict. The evidence supports a conviction only for felony murder, not premeditated. Since the jury's verdict is ambiguous as to theory, it must be set aside. Additionally, double jeopardy proscribes convictions for both felony murder and the underlying felonies.

POINT IX: At the guilt phase, Appellant called only one witness, the lead homicide investigator. The State successfully restricted Appellant's presentation of evidence. Appellant's defense pointed to a former boyfriend as the real culprit.

POINT X: The jury's recommendation for death was tainted in a number of different ways. The prosecutor engaged in improper argument where he deliberately mislead the jury concerning a valid mental mitigating circumstance. Additionally, the trial court's modification of the standard jury instructions over

defense objection placed a heavier burden on Appellant to prove mitigating circumstances. The trial court should have granted Appellant's special requested jury instruction that acts committed after the victim is unconscious cannot be considered in a determination of whether or not the murder was heinous, atrocious, or cruel.

POINT XI: Appellant contends that the evidence fails to support the trial court's finding that the murder was committed in a heinous, atrocious, or cruel manner. The evidence is just as consistent that the victim was knocked unconscious immediately and was perhaps brain dead. As a result, the victim felt no pain.

POINT XII: The trial court improperly rejected age and substantial impairment as statutory mitigating circumstances. The evidence supports a finding of both of these valid mitigators. Additionally, the trial court treated twelve valid nonstatutory mitigating circumstances as only one. The court also dismissed all of the nonstatutory evidence as being entitled to "little weight" without explanation. The trial court erroneously concluded that the expert testimony was based on erroneous facts. The testimony clearly established the facts upon which the expert relied in reaching his conclusion. Gudinas was only twenty at the time of the offense. Contrary to the trial court's conclusion, the evidence showed that Gudinas was mentally and emotionally immature and his young age should have been considered in mitigation. A proper weighing of the valid

aggravators and established mitigators should result in a life sentence. Proportionality demands it.

ARGUMENT

Thomas Lee Gudinas discusses below the reasons which, he respectfully submits, compel the reversal of his convictions and death sentence. Each issue is predicated on the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 16, 17, and 22 of the Florida Constitution, and such other authority as is set forth.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SEVER COUNTS I AND II FROM THE REMAINING CHARGES.

On December 15, 1994, Appellant filed an amended motion to sever pursuant to Florida Rule of Criminal Procedure 3.152(a). (R402-3) Following a hearing on December 8, 1994, the trial court denied the motion to sever. (R73-83,404) Appellant contends that the trial court abused its discretion in denying the motion to sever. The first two counts involve Rachelle Smith as the alleged victim of an attempted burglary with an assault and an attempted sexual battery. The other three counts charged Appellant with two counts of sexual battery and the murder of Michelle McGrath, a different victim.

Florida Rule of Criminal Procedure 3.152(a)(1) provides that if two or more offenses are improperly charged in a single indictment, the defendant shall have a **right** to a severance of the charges on timely motion. Severance is also required under

the rule before trial or during trial, only with a defendant's consent, on a showing that the severance is appropriate or necessary to promote a fair determination of the defendant's guilt or innocence of each offense. Offenses are properly charged in the same information only when they are "based on the same act or transaction or on two or more connected acts or transactions." Fla.R.Crim.P. 3.150(a); see generally Crossley v. State, 596 So.2d 447, 449 (Fla. 1992); May v. State, 600 So.2d 1266, 1268 (Fla. 5th DCA 1992). When offenses are improperly joined, upon proper motion, severance is mandatory and prejudice is conclusively presumed. Macklin v. State, 395 So.2d 1219 (Fla. 3d DCA 1981).

Counts III, IV, and V charged two counts of sexual battery and one count of first-degree murder with **Michelle McGrath** the victim of all three offenses. (R209-10) Counts I and II charged attempted burglary with an assault and attempted sexual battery with **Rachelle Smith** as the victim of both offenses. (R209) The episode involving Rachelle Smith was entirely unrelated to the crimes committed against Michelle McGrath. They occurred hours apart. There is no evidence that the different episodes occurred in the same location or in the same manner.

At trial, the prosecutor thought that Rachelle Smith was fortunate to lock her doors. The prosecutor sincerely believed that, if she had not, Smith would have been raped and killed instead of Michelle McGrath. There is no basis in the evidence for the prosecutor's conclusion. However, the evidence of

Gudinas' attack on Smith improperly bolstered the State's case against Gudinas for the rape and murder of McGrath.

As this Court held in Crossley v. State, 596 So.2d 447, 449-50 (Fla. 1992):

> [t]he justifications for the consolidation of charges are convenience and the preservation of the court's valuable resources. However, practicality and efficiency cannot outweigh the defendant's right to a fair trial. The danger in improper consolidation lies in the fact that evidence relating to each of the crimes may have the effect of bolstering the proof of the other. While the testimony in one case standing alone may be insufficient to convince a jury of the defendant's guilt, evidence that the defendant may also have committed another crime can have the effect of tipping the scales. Therefore, the court must be careful that there is a meaningful relationship between the charges of two separate crimes before permitting them to be tried together.

(citations omitted). Accord Paul v. State, 385 So.2d 1371 (Fla. 1980), adopting Judge Smith's dissenting opinion in Paul v. State, 365 So.2d 1063 (Fla. 1st DCA 1979). The Crossley court held that offenses alleged to have taken place at about the same time and place are not necessarily meaningfully related to one another. This Court reversed Crossley's convictions for two armed robberies although the proof at trial showed they were committed within two miles of each other at 3:00 p.m. and 6:15 p.m. respectively, because nothing else connected the two offenses. Crossley, 596 So.2d at 448, 450.

The first witness presented by the State was Rachelle Smith,

the victim of the first two, unrelated counts in the indictment. As any psychologist will tell you, primacy is a critical aspect of people's perception and memory. By presenting Rachelle Smith's testimony first, the State gave the jury the distinct impression that Thomas Gudinas was hunting for a victim that night; a woman to rape and kill.

The evidence does not support the State's orchestrated scenario. There is no evidence that Gudinas grabbed Michelle McGrath in the parking lot. It is just as likely that he met McGrath inside Barbarella's and she voluntarily accompanied him into the alley for what began as a consensual sexual encounter. The crimes committed against McGrath were completely different from the attempted offenses where Rachelle Smith was the victim. The prosecutor was wrong in contending that the State could introduce the Smith crimes as similar fact evidence. (R73-81)

The crimes are not similar in any aspect. Although they were close geographically, the offenses were hours apart and involved different victims. One victim was brutally raped and killed, while the other was merely frightened. Elsewhere in this brief, Appellant contends that the evidence was insufficient to support either of the "crimes" against Rachelle Smith. See Point III. The State was unable to show a modus operandi. There is no evidence that Gudinas even encountered McGrath in the parking lot.

The danger of consolidating unrelated crimes was realized at Gudinas' trial. The State used Gudinas' encounter with Rachelle

Smith to bolster their case against Gudinas for the rape and murder of Michelle McGrath. The State's case against Gudinas for the McGrath murder was almost entirely circumstantial. No one saw Gudinas with McGrath that night. There was no physical evidence to tie Gudinas to the rape and murder. The State's case was a carefully constructed web of circumstantial evidence which admittedly pointed to Gudinas. Any doubt in the jury's mind was undoubtedly removed when they improperly added the testimony of Rachelle Smith.

The prosecutor began her closing argument by analyzing the crimes against Smith, not McGrath. (T799-805) After analyzing the evidence as to the crimes against Rachelle Smith, the prosecutor said:

> ...Did Rachelle Smith feel threatened? Justifiably, she felt threatened that he had the apparent ability to carry out that threat. Well, of course he did. He had the ability to do horrendous things, as we saw later that night with Michelle McGrath....Her fear was justified....Well, ladies and gentlemen, if the violence that he was willing to use to get into her car is any indication of the violence that he would have used on her, there is no doubt that he would have done great damage to her had he gotten into her car. That is also justified by what he did to Michelle McGrath a short time later.... He tried. Rachelle Smith prevented him from sexually battering her.
>
> After the series of events that Rachelle Smith told you about that happened between 2:00 and 2:15 on May 24, 1994, we next go to Michelle McGrath...

(T803-4) (emphasis supplied). The State used the Rachelle Smith

crimes throughout closing to bolster their case against Gudinas for the murder of McGrath.

> ...You heard Rachelle Smith. She was assaulted....The crux of your deliberations, I'm reasonably sure, is whether the Defendant is the one that committed these crimes, because the State has shown you that the crimes that we've charged were, in fact, committed. Rachelle Smith at 2:00 or 2:15 is in this parking lot....During this entire episode, Rachelle Smith is watching the person doing this. She calls the police the next day and does a composite drawing. Look at it folks. It's him....She said number two [in photographic lineup], Thomas Gudinas is the one who approached her car. Then she saw him in the courtroom and said, "It's him." There is no doubt that Rachelle Smith was attacked on May 24, 1994, by him...

(T810-11) (emphasis supplied). During final summation, the State again dealt with the troubling issue of the identification of the murderer.

> ...And again, you have to look at all these different factors in judging a composite. Some people have excellent memories and excellent verbal skills.
>
> Let's look at the first composite by Rachelle Smith. Rachelle Smith saw Mr. Gudinas close and in good lighting. ...Compare what you can see of this composite of Mr. Gudinas....That's Mr. Gudinas. Look at the lips...that's Mr. Gudinas. The nose. That's Mr. Gudinas. Look at the eyes. That's Mr. Gudinas. Look at the high cheekbones....That's Mr. Gudinas. This is practically a photograph of Thomas Gudinas because you had a good witness [Rachelle Smith] with a good view, good verbal skills, and was able to put into words what she saw.... This is an example of how good a composite can be if all the forces are with you.

(T835-37) (emphasis added). Rachelle Smith's description of Gudinas was absolutely the best evidence that the State had. The State went on to make excuses for the composites made by Culbert Pressley, Mary Rutherford, and Ms. Armstrong. (T837-40)

The problem with Rachelle Smith's identification of Thomas Gudinas is that it identified Gudinas as **her assailant, not Michelle McGrath's**. That is the prejudice. The prosecutor argued the chain of circumstances pointing to Gudinas' guilt.

> ...There are just too many coincidences that have to come together in precisely the right way for the Defendant not to be guilty. And it simply is not reasonable for you to accept any explanation for the facts of this case other than the one we have given you, which is the Defendant is guilty; that the Defendant waited out there in the parking lot for a victim to come out.
>
> He'd seen young ladies in Barbarellas and he was waiting there for one of them to come out. And the first one to come out was Rachelle Smith. Rachelle Smith almost fell into his web, almost got trapped. If she had gone a little farther in that parking lot, Rachelle Smith might be the victim today instead of Michelle McGrath. But Rachelle Smith got lucky.
>
> Some angel was watching her that day because she walked out....he was intent upon getting a victim that night. He was going to get somebody.
>
> Thank God she locked her door.... It saved her life. He went back, the same parking lot, and waited, and he waited until poor Michelle McGrath was in a place where she was so accustomed and felt so safe...he had his victim.

(T844-45) (emphasis supplied).

This Court must reverse based on the State's improper use of the crimes against Rachelle Smith to bolster the case against

Gudinas for the McGrath murder.

The trial court abused its discretion in denying the motion to sever. Porter v. State, 21 Fla. L. Weekly D603 (Fla. 2d DCA March 8, 1996) (Abuse of discretion to deny motion to sever charges of murder and attempted robbery of one victim from robbery charge of another where defenses were independent, although they occurred within a short time frame and in the same geographical area). See also Puhl v. State, 426 So.2d 1226 (Fla. 4th DCA 1983). Two criminal acts by a defendant may occur within minutes of each other and yet constitute separate offenses. See, e.g., Brown v. State, 502 So.2d 979, 981 (Fla. 1st DCA 1987). When, as here, the accuracy of an identification witness is critical in an unconnected case, the identification will be regarded as supportive, although the identification may not be corroborative in law or in fact. The support that each identification lends to the other enables the prosecution to try the accused on a theory of cumulative guilt. Taylor v. State, 455 So.2d 562, 565 (Fla. 1st DCA 1984).

POINT II

THE TRIAL COURT ERRED IN CONDUCTING SEVERAL PRETRIAL HEARINGS WHERE THE APPELLANT WAS INVOLUNTARILY EXCLUDED THUS DENYING GUDINAS' RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

Florida Rule of Criminal Procedure 3.180 states that "the defendant shall be present...at any pretrial conference, unless waived by the defendant in writing." A defendant's absence with no express waiver is error. See Garcia v. State, 492 So.2d 360 (Fla. 1986). This Court has held that a defendant's involuntary absence may be harmless error where his presence would not have assisted the defense in any way. Id.

> [The defendant] has the constitutional right to be present at the stages of his trial where fundamental fairness might be thwarted by his absence.

Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982) (citations omitted). Recently, in Coney v. State, 653 So.2d 1009 (Fla. 1995), this Court extended Francis and held that a defendant has a right to be physically present at the immediate site (in that case, at sidebar) where pretrial juror challenges are exercised.

Thomas Gudinas was involuntarily absent during two pretrial hearings and a portion of another. The most blatant error occurred at the November 10, 1994, hearing held on defense counsel's motion to withdraw. (R33-64) Defense counsel filed a motion to withdraw based on a request by Gudinas to discharge his

appointed counsel. (R35) At the beginning of the hearing, Appellant orally amended his motion indicating that he was satisfied with Mr. LeBlanc, but wished to discharge Mr. Irwin. (R35-36) Under questioning by the trial court, the Appellant complained that Mr. Irwin "put words in [his] mouth...he gives paperwork to doctors before I... give him permission...We disagree a lot...He ain't handling [the case] correctly...He gets me and my Mom worried all the time... about [the trial judge]...He told me Your Honor -- told my Mom that you were out to burn me at all extents [sic], all angles through trial...He said you're a very bad judge and he definitely didn't want you on this case, that you were very prejudiced towards the defense from past experiences with you and being a prosecutor half your life." (R36-39) The Appellant also complained that, "Mr. Irwin only talks about one defense and one defense only..." (R42) Gudinas also complained that he never had a chance to discuss other possible defenses with Mr. Irwin. (R48) After a general discussion about the issue, the trial court took the motion under advisement and reserved ruling. (R49-51)

The hearing concluded at 2:12 p.m. and court was in recess. (R51) Forty minutes later, the trial court recommenced the hearing and had the Appellant brought back into court. (R51) The court informed the Appellant:

> Mr. Gudinas, we have brought you back in. The Court had some conversations with the attorneys, your two attorneys, as well as the State, in chambers discussing some of the practicalities of proceeding. At this

> point the Court still has not made a ruling on the motion that was brought here today. I will let you know that there are some requirements that must or that the Court feels, based on the testimony that's been presented here today, that I am not legally required to let your attorney to withdraw or to discharge him. I do have some discretion on that issue, and I can exercise that discretion if I wish to. I will make that decision before the end of today.

(R52) The trial court then went on to explain to Mr. Gudinas that if he has further difficulty with his lawyers, that he should write the court directly. (R52-54) That same day, Judge Dawson signed an order denying counsel's motion to withdraw although the order was not rendered until November 14th. (R384)

Appellant submits that reversible error occurred when the trial court continued holding a portion of the hearing on the motion to withdraw his counsel in chambers without the required presence of the defendant. The trial court heard the Appellant's complaints in open court and reserved ruling on the motion. After deputies removed Gudinas from the courtroom, the trial judge and the lawyers adjourned to chambers where they continued with the hearing for another forty minutes. Counsel learned that one item discussed in chambers off the record was the trial court's concern that no other lawyer would agree to represent Mr. Gudinas in this high-profile murder case.[12]

This was not a hearing involving strictly legal matters.

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[12] April telephone conversation between undersigned counsel and Michael Irwin, lead trial counsel for Mr. Gudinas.

Thomas Gudinas had specific complaints about his lead trial counsel such that Mr. Irwin felt compelled to file a motion to withdraw as counsel. Complaints about one's trial attorney are as important as a defendant's input into jury selection. Coney v. State, 653 So.2d 1009 (Fla. 1995). No one ever told Gudinas exactly what was discussed during the "secret" forty minute hearing held in chambers outside his presence. At least the trial court told Gudinas that the hearing occurred! The process harkens back to the days of the Star chamber.

Additionally, two other hearings were held without Gudinas' presence whatsoever. The August 23, 1994, hearing on the State's motion for exemplars (blood, hair, saliva and dental impressions) does not reflect Appellant's presence. (R1-7) Gudinas subsequently complained about the extreme force and absence of counsel when the State took his hair and blood samples. (R55-60) Gudinas also complained that the representatives from the State did not even give him a chance to fully read the court order before extracting the samples. (R55) Appellant submits that this particular hearing also involved more than merely legal matters. Gudinas had a constitutional right to be present where fundamental fairness might be thwarted by his absence.

Similarly, the record does not reflect that Gudinas was present at the September 1, 1994, hearing. (R8-17) The hearing involved the appointment of an investigator and a motion for a mental health assessment. This type of hearing is more of the type involving merely legal argument. Although Gudinas' absence

was error, at that hearing, it was probably harmless error.

However, Gudinas' involuntary absence from the August 23rd hearing and, even more egregiously, from the secret portion of the November 10th hearing, violated the Florida Rules of Criminal Procedure as well as his constitutional right to be present at all stages of his trial where fundamental fairness **might** be thwarted by his absence. Francis v. State, 413 So.2d 1175 (Fla. 1982). The exclusion of Thomas Gudinas from these critical portions of the proceedings resulted in a deprivation of his constitutional rights under both the federal and state constitutions.

POINT III

APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE ATTEMPTED SEXUAL BATTERY OF RACHELLE SMITH SHOULD HAVE BEEN GRANTED WHERE THE STATE FAILED TO PROVE AN OVERT ACT IN FURTHERANCE OF THE ATTEMPTED SEXUAL BATTERY.

Rachelle Smith was at Barbarella's the evening of the murder. She walked out to leave and mistakenly went to the wrong parking lot. She noticed Gudinas "lurking" in the parking lot before she realized her mistake and headed for her car in a nearby lot. She entered her car and locked the doors. Looking in her side mirror, she noticed Gudinas behind her car. When the car next to her drove away, Gudinas tried to open the driver's door of Smith's car. Screaming, "I want to fuck you," Gudinas wrapped his fist in his shirt tail and pounded the driver's window twice in an attempt to break it. Smith screamed, honked the horn, and Gudinas ran away. (T251-63)

Counts I and II of the indictment charge Gudinas with attempted burglary of the automobile with the intent to commit a sexual battery and, in the course of committing the burglary, the indictment alleged that Gudinas committed an assault upon Rachelle Smith by pounding the window and yelling. (R209) Count II charged Gudinas with attempted sexual battery upon Rachelle Smith and, in the process thereof, attempted to use actual physical force likely to cause death or serious personal injury; to wit pounding the window and yelling, "I want to fuck you." (R209) At the close of the evidence, defense counsel moved for a

judgment of acquittal:

> I'll begin with Count II (sic) involving Rachelle Smith. There have been no fingerprints taken from her car and no latents which were of any value which would be matched up to Mr. Gudinas.
>
> As to the attempted sexual battery, there's no evidence that there was any act in furtherance of a sexual battery other than a banging on the window. Apparently no windows were broken. There was no entry of any kind into the car. Additionally from the testimony, it appeared that the assailant abandoned his attempt in this particular case.

(T733) The State responded:

> As to the first two counts, the State has shown that the Defendant attempted to enter the vehicle of Rachelle Smith first by opening the doors without consent, second by attempting to smash the window by striking it twice with his covered fist; that is sufficient evidence of an attempt.
>
> Abandonment does not occur upon the Defendant's failure to accomplish his crime....
>
> Attempted sexual battery. The Defendant clearly stated his desire, what he wanted to do to Ms. Smith. He was prevented from doing that, and therefore, the attempted sexual battery is shown.

(T734-35) The trial court ruled on Appellant's motions for judgment of acquittal:

> As to Count I of the indictment charging attempted burglary with an assault, the motion for judgment of acquittal will be denied.

(T744) The trial court also denied Appellant's motion as to Count II, attempted sexual battery, citing State v. Jackson, 813

P.2d 156 (Wash. App. 1991). The trial court concluded that Gudinas' stalking of Smith coupled with his attempt to break into her car to carry out "those intentions" was sufficient to prove the charge. The court concluded that Gudinas did not abandon his attempt, but rather failed, was intercepted, or was prevented from carrying out the offense. (T744-45)

An attempt to commit a crime involves an uncompleted act as distinguished from a completed act necessary for the crime. Justine v. State, 86 Fla. 24, 97 So. 207 (1923). An attempt involves two essential elements: specific intent to commit the crime and a separate overt, ineffectual act done towards its commission. Littles v. State, 384 So.2d 744 (Fla. 1st DCA 1980). An information charging an attempt must allege facts showing an overt act. Pittman v. State, 47 So.2d 691 (Fla. 1950). "Overt" means open, apparent and an "overt act" denotes some outward act in manifest pursuance of a design or intent to commit a particular crime. Morehead v. State, 556 So.2d 523 (Fla. 5th DCA 1990). The overt act must reach far enough toward accomplishing the desired result to amount to commencement of the consummation of the crime. State v. Coker, 452 So.2d 1135 (Fla. 2d DCA 1984). Cf. Hyde v. United States, 225 U.S. 347, 388 (1912) (wherein Holmes, J., dissenting, stated "there must be dangerous proximity to success.")

Viewing the evidence in a light most favorable to the State (as we must), Appellant lurked in a parking lot, attempted to open Smith's locked car door, attempted to break the car window,

and yelled "I want to fuck you." Appellant contends on appeal that the State failed to prove an overt act that clearly showed that the Appellant intended to commit a sexual battery on the victim. In Rogers v. State, 660 So.2d 237 (Fla. 1995), this Court held that the trial court should have granted a motion for judgment of acquittal as to the charge of attempted sexual battery. Rogers held a gun to his victim's head and ordered the man's girlfriend to take off her clothes. When she refused, Rogers asked the boyfriend to make the women remove her clothing. When the boyfriend refused, Rogers squeezed the woman's left breast. This Court held that these acts do not rise to the level of an overt act toward the commission of a sexual battery. Rogers, 660 So.2d at 241.[13]

In Ticknor v. State, 595 So.2d 109 (Fla. 2d DCA 1992), the victim testified that she closed her knees when Ticknor, standing over her in his underwear, moved toward her and stated, "Isn't this what you want...." The appellate court concluded that the victim's testimony was insufficient to establish the elements of attempted sexual battery. Smith v. State, 632 So.2d 644 (Fla. 1st DCA 1994) held that the State failed to present a prima facie case as to two counts of attempting to handle, fondle, or make an assault upon a child under the age of sixteen years in a lewd, lascivious or indecent manner contrary to Section 800.04(1), Florida Statutes (Supp. 1990). Smith drove by two young girls

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[13] In addition, once the woman refused Rogers' advances and orders, Rogers left her alone.

and said, "Hey, girls, show me your pussy." The girls took a detour before they walked to a nearby restaurant where Smith followed them. The appellate court found no overt act toward commission of the offense. Smith's request to the girls to expose themselves did not evince the specific intent to handle, fondle, or assault the girls required under the charged statute. Nor did Smith's act of following the girls to the restaurant prove the offense.[14]

Similarly, Thomas Gudinas' statement, "I want to fuck you" does not express a desire for nonconsensual, forced intercourse. It would have been a different matter if Gudinas had removed all doubt and shouted, "I want to rape you." Gudinas may have been stating his desire, albeit in a socially unacceptable manner, to engage in perfectly legal, consensual sexual intercourse.[15]

This is not a case where the defendant unsnapped the victim's pants without her consent. L.J. v. State, 421 So.2d 198 (Fla. 3d DCA 1982). Nor is Appellant attempting to argue that he

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[14] The appellate court affirmed Smith's two convictions for the same offense where he approached two other girls and said, "Honey, let me have some pussy," or "give me your pussy." Smith's command demonstrated a specific desire to handle or fondle the girls and his act of repeatedly driving by the girls could properly be viewed as a direct act in furtherance of this specific intent. Smith, 632 So.2d at 646.

[15] Herman Pittman was erroneously convicted of attempting to have unlawful carnal intercourse where he asked the "victim" to accompany him into the nearby woods for the purpose of having sexual intercourse. This after she rebuffed his invitations to a dance or the movies. Pittman v. State, 47 So.2d 691 (Fla. 1950). This Court found no overt act sufficient to establish a criminal intent although Pittman's conduct was "indeed reprehensible." Pittman, 47 So.2d at 692.

abandoned the attempt because of premature ejaculation. Bates v. State, 465 So.2d 490 (Fla. 1985). Nor is it a case where the victim's clothing was partially removed and semen was found nearby. Barwick v. State, 660 So.2d 685 (Fla. 1995).

The State's evidence may have proved an attempted burglary of the car. However, the State failed to prove beyond a reasonable doubt that Thomas Gudinas intended to sexually batter Rachelle Smith. The evidence reveals an overt act to support the attempted burglary charge (attempt to open the door and break the window). The evidence does not reveal an overt act to support the charge of attempted sexual battery. Since the State thus failed to prove the "offense therein," the attempted burglary must also fall.[16]

Evidence of Appellant's intent is clearly circumstantial. The evidence fails to exclude the reasonable hypothesis that Gudinas was merely soliciting Rachelle Smith for a consensual sex act. See Mariano v. State, 615 So.2d 264 (Fla. 4th DCA 1993) (evidence failed to exclude reasonable hypothesis that defendant went to pharmacy to have only legal portion of prescription filled and to straighten out mistake as to portion relating to controlled substance.)

Attempt and solicitation are different crimes. The gist of

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[16] Appellant also submits that the same overt act cannot support both the attempted burglary and the attempted sexual batter. See, e.g., Grinage v. State, 641 So.2d 1362 (Fla. 5th DCA 1994) (Essential element of underlying qualifying felony cannot also serve as overt act required to prove attempted murder.)

solicitation is enticement, whereas attempt requires intent to commit a specific crime, an overt act in furtherance of such and failure to consummate the same. The overt act differentiates the two. State v. Johnson, 561 So.2d 1321 (Fla. 4th DCA 1990). The evidence in Appellant's case fails to exclude the reasonable hypothesis that Thomas Gudinas was attempting to solicit, admittedly in a crude and unacceptable manner, a consensual sexual encounter with Ms. Smith. The trial court should have granted Appellant's timely and specific motion for judgment of acquittal.

POINT IV

THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE INQUIRY OR HEARING WHERE APPELLANT COMPLAINED ABOUT LEAD TRIAL COUNSEL AND WANTED HIM DISCHARGED.

Michael L. Irwin, lead defense counsel, filed a motion to withdraw almost six months prior to trial. (R383) The motion indicated that on November 8, 1994, Gudinas expressed a desire to discharge Irwin "for reasons which must remain confidential." (R383) The motion also stated that Appellant insisted upon pursuing and objective "which counsel feels is imprudent." Irwin also claimed that representation has been rendered unreasonably difficult by Gudinas. (R383) At a hearing on the motion, the trial court examined Gudinas. (R33-64) Gudinas told the judge that Irwin:

> Put words in my mouth...He gives paperwork to doctors before I...give him permission...we disagree a lot. He ain't handling [the case] correctly.... He gets me and my mom worried...He told me Your Honor...that you were out to burn me at all extents, all angles through trial...He said you're a very bad judge and he definitely didn't want you on this case, that you were very prejudiced towards the defense from past experiences with you and being a prosecutor half your life....Mr. Irwin only talks about one defense and one defense only...the whole time he's been my lawyer....I would want to put a motion in to get you disqualified.... Yes, I have [requested Mr. Irwin to file a motion to recuse]...Yes, I have and so has my mom....I think we have no interest -- We don't see eye to eye.
>
> THE COURT: So you're requesting the Court to remove him completely from the

case. Is that what you're telling the Court?

THE DEFENDANT: Well, he's asking to withdraw, too, so...

THE COURT: Well, he's asked to withdraw mainly because you've requested him to do so.

THE DEFENDANT: I didn't request him.... He said on the phone,..."I'm going to withdraw from the case."...He only talks about one defense and one defense only, and I don't know -- we're supposed to go every way. He don't do that....

THE COURT: Have you discussed with him other possible defense (sic) you feel are appropriate?

THE DEFENDANT: I don't ever have a chance too....I should have a decision. My life's at stake.

(R36-48) The trial court asked Mr. Irwin if the problem would be resolved by replacing him with some other attorney. Mr. Irwin was not sure. (R39-40) The State argued that there was an insufficient showing to discharge Mr. Irwin. (R40-41) The trial court stated that his common policy has been to replace an attorney one time in a case upon representation from the attorney or the defendant that a conflict existed that could be resolved by appointment of another lawyer. (R43) The trial court then took the motion under advisement, expressed concern over possible delay, and advised Gudinas to rely on co-counsel more heavily. (R49-51) The hearing ended, Gudinas returned to his cell, and the lawyers and the judge continued the hearing for forty minutes in chambers without Gudinas' presence or knowledge. (R51-52) See Point II. After the hearing in chambers, the trial court

brought Gudinas back into open court and advised him to write the trial judge directly if he had other concerns over his representation. (R52-54) The trial court said he would take the motion under advisement and, later that same day, the judge signed an order denying Appellant's motion to withdraw.[17] (R384)

When a defendant complains of incompetency of court-appointed counsel, a trial court must inquire of the defendant and counsel to see if reasonable cause exists to believe counsel is not rendering effective assistance. Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), approved Hardwick v. State, 521 So.2d 1071 (Fla. 1988). Gudinas specifically asked for another lawyer, complaining that Mr. Irwin had different ideas about defense strategy. Gudinas had no faith in Mr. Irwin. The relationship, confidence, and trust between a client and his lawyer is one of the most important aspects of legal representation. To the client, it is sacred. That relationship had dissipated. It was undoubtedly made worse after all of the parties continued the hearing in chambers without Gudinas' presence or knowledge. The trial court's inquiry was insufficient. Additionally, the court should have granted the motion to withdraw based on the record before him.

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[17] Counsel has learned that at the hearing in chambers, the court expressed doubt that any other lawyer would agree to represent Gudinas in this extremely high-profile murder case. (April telephone conversation with Mr. Irwin.)

POINT V

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND ALLOWING GRUESOME PHOTOGRAPHS INTO EVIDENCE WHERE THE PREJUDICE OUTWEIGHED THE PROBATIVE VALUE.

Prior to trial, Appellant filed a motion in limine asking the court to preclude the State from introducing autopsy or other gruesome photographs of the victim. (R316-17) The trial court deferred ruling on the motion until trial. (SR15-18) After jury selection, the parties discussed the photographic slides that the State wanted to introduce into evidence. (T209-20) Appellant objected to all six slides of the body in the alley as gruesome and cumulative. The trial court overruled the objections. (T209-11) The trial court also overruled Appellant's objections to two slides which showed the stick protruding from the victim's vagina. (T211-12) The trial court also overruled Appellant's objection to a number of slides which were shots of the body in the morgue. (T212-20) The trial court cautioned Appellant to renew his objections when the State introduced the slides during the trial.

Appellant was extremely concerned about the enormous impact on a lay jury when they viewed such gruesome full-color slides. Even in opening statement, defense counsel attempted to minimize their effect. (T249) The trial court overruled Appellant's renewed objections when the State sought to introduce the slides during the testimony of the medical examiner. (T405) The State then trotted out the gory, extra-prejudicial slides while the

good doctor described each excruciating detail.

The issue of gruesome photographs is one of the most troubling in capital cases today. Too often, appellate courts are asked to rubber stamp the admission of truly revolting pictures, even though "[i]t is unrealistic to believe, even after a limited view, that the horror engendered by these slides could ever be erased from the minds of the jurors...." Commonwealth v. Garrison, 331 A.2d 186, 188 (Pa. 1975).

> [A] trial is conducted not only to determine that an atrocious crime has occurred, but to determine whether the accused committed the crime. Too often the former obscures the latter.

Johnson v. State, 476 So.2d 1195, 1209 (Miss. 1985). (Emphasis supplied).

Even if relevant to some degree, the horrible pictures were not necessary. See, e.g., Commonwealth v. Rogers, 401 A.2d 329, 330 (Pa. 1979). Had there been any significant probative value, the prosecution might easily have had "the photograph... reproduced in black and white in order to reduce its potential for prejudice." State v. Polk, 397 A.2d 330, 334 (N.J. Super. 1977).

The prejudice escalated at the penalty phase. Prior to closing argument, Appellant objected to the State's intent to use ten of the gruesome slides during closing argument at the penalty phase. (P265-68) Appellant contended that, at this point, the use of the slides is "overwhelmingly prejudicial." (P265) There was no medical examiner's testimony to accompany the slides at

this point, and Appellant argued that the only purpose is to arouse overwhelming sympathy for the victim. (P265)[18] Defense counsel also questioned the relevance of the slides to prove heinousness where the testimony established that the victim was either unconscious or brain dead. (P266) The trial court overruled the objections and denied Appellant's motion for mistrial. (P267-68) Sure enough, the State displayed ten of the slides again during closing argument at the penalty phase in a futile attempt to show that the murder was heinous, atrocious, or cruel. (P282-91) The photographs in this case go too far. Even the prosecutor recognized the repulsiveness of the photographs showing close-ups of the sticks protruding from the victim's vagina and anal area. During closing argument at the penalty phase, the prosecutor, in an attempt to alleviate the jury's concerns, promised them, "I'm not going to show you the photographs of the close-up of the sticks. You've seen enough of that. I'm sure that that image is indelibly etched in your memory." (P282) The photographs became the focus of the jury at the guilt as well as the penalty phase. The slight probative value was outweighed by the enormous prejudice. §90.403, Fla. Stat.

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[18] Appellant also objected to the inequity of the trial court's rulings in allowing the State to use the slides but refusing to allow (as too sympathetic) Gudinas' mother to testify about Christmas cards and letters she received. (P265-66)

POINT VI

APPELLANT WAS DENIED DUE PROCESS OF LAW GUARANTEED BY BOTH THE FEDERAL AND STATE CONSTITUTIONS WHERE THE TRIAL COURT OVERRULED HIS OBJECTION AND ALLOWED THE STATE TO IMPROPERLY BOLSTER A KEY WITNESS' TESTIMONY THROUGH THE INTRODUCTION OF A PRIOR CONSISTENT STATEMENT THAT WAS CLEARLY HEARSAY.

Fred Harris testified at trial. (T632-75) Harris testified about the "joking conversation" that he witnessed between Dwayne Harris and Gudinas while they were all drinking and playing cards. (T648-55) After the State refreshed his memory, Harris testified that someone jokingly accused Gudinas of murdering McGrath. (T653) Gudinas replied, "Yes, and I fucked her while she was dead." (T654) Harris said Gudinas "laughed it off," but his attitude was "kind of weird, strange, different." (T654) Harris initially denied that Gudinas sounded serious. (T654) However, the State again refreshed his memory and Harris admitted telling the police back in June that Gudinas "actually sounded serious." (T655)

The State later called Detective Griffin who took the taped statement from Fred Harris in June. Over Appellant's hearsay objection, the trial court allowed the State to play the portion of the interview where Harris again related the conversation, Gudinas' "admission," and that Gudinas actually sounded serious. (T711-13) The taped statement was hearsay and was not subject to cross-examination. The evidence also constituted improper bolstering.

A prior consistent statement may not be introduced to shore up a witness' testimony unless and until an effort is made to impeach his testimony as a recent fabrication. Van Gallen v. State, 50 So.2d 882 (Fla. 1951). It matters not that the prior consistent statement is sought to be elicited on direct examination of the same witness who made the prior statement. In Trainer v. State, 346 So.2d 1081 (Fla. 1st DCA 1977), the testimony elicited was that the testifying witness had previously told the prosecutor "the same thing that you have stated to the jury here about what happened." Trainer, 346 So.2d at 1082. No one ever insinuated that Fred Harris' testimony was the result of recent fabrication, improper influence, or motive. That is the only theory whereby the State could argue the objectionable testimony was properly admitted. §90.801(2)(b), Fla. Stat. (1993). The introduction of the testimony violates Gudinas' constitutional right to confront witnesses in contravention of the state and federal constitutions.

POINT VII

THE INTRODUCTION OF COLLATERAL, IRRELEVANT, AND PREJUDICIAL EVIDENCE DENIED GUDINAS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Frank Wrigley, a friend of Gudinas as well as his cousins, ultimately reported Gudinas to the Orlando Police Department as a suspect. (T578-79) During Wrigley's testimony he explained, "I told Fred that I was going [to] call the police if he [Fred] really thinks that he [Gudinas] did it." (T579) Defense counsel stood up and uttered, "Your Honor..." before the trial court interrupted and cautioned the witness against hearsay testimony. (T579) At the conclusion of Wrigley's testimony, defense counsel moved for a mistrial based on Wrigley's testimony that Fred Harris thought Gudinas committed the murder. (T600-5) Additionally, counsel objected on Sixth Amendment grounds based on the trial court's rule that only the lawyer handling a particular witness could object during the State's cross-examination of that witness. (T600-5) The trial court denied the motion for mistrial but did give a curative instruction. (T606)

The introduction of the hearsay testimony constitutes reversible error. Appellant submits that a curative instruction cannot cure the error. The fact that Gudinas' **own cousin** believed that he committed the crime is damning evidence indeed. Fred Harris never testified that he did indeed believe in Gudinas' guilt. The influence of the improper testimony cannot

be underestimated or cured. A new trial is necessary.

Additionally, Appellant submits that the trial court's rule regarding "one lawyer -- one witness" violates his constitutional right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Sections 9 and 16 of the Florida Constitution.

Additionally, the jury heard evidence of a completely unrelated, collateral crime during the testimony of Fred Harris. When the composite drawings of the murder suspect appeared downtown, Gudinas told Fred Harris that "none of them look like me." (T646) When the State asked, "What prompted him to say that?" Harris replied, "He said that he had some charges pending in North Carolina due to a grand theft auto." (T647) Appellant objected and immediately moved for a mistrial. The State argued the testimony was relevant, but the trial court disagreed. The court sustained the objection, denied the motion for mistrial, and gave the following curative instruction:

> Ladies and gentlemen, you are hereby instructed to disregard the last comment about, the witness made concerning Mr. Gudinas having pending charges in North Carolina. Let's move on.

(T648)

Section 90.404(1), Florida Statutes (1993), clearly states that the prosecution may not offer testimony during its case-in-chief of the accused's past character to prove that the accused committed the crime in question. See also Ehrhardt, Florida Evidence, §404.4 (1996 edition). Even a reference to "mug shots"

can be grounds for a new trial. See, e.g., Russell v. State, 445 So.2d 1091 (Fla. 3d DCA 1984). See also Wilding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983) (error to admit testimony concerning defendant's arrest for unrelated crimes). The jury heard irrelevant, prejudicial, and unsubstantiated testimony that Gudinas was a wanted felon in North Carolina. Prejudice should be presumed. A new trial is mandated.

POINT VIII

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE, ALLOWING THE STATE TO ARGUE BOTH PREMEDITATED AND FELONY MURDER, AND THIS COURT SHOULD ADDITIONALLY VACATE THE CONVICTIONS AND SENTENCES FOR SEXUAL BATTERY ON DOUBLE JEOPARDY GROUNDS.

Prior to trial, Appellant filed a motion to prohibit argument and/or instructions concerning first-degree felony murder. (R278-79) Appellant contended that, since the indictment charged only **premeditated** murder, the State should not argue nor should the jury be instructed concerning **felony** murder. The trial court denied the motion. (SR12) During closing argument, the State argued **both** premeditated and felony murder. (T807-9) The court also instructed the jury on both theories of murder. (T860-62) The trial court told the jury to check off murder in the first degree if they found that the evidence proved **either** premeditated **or** felony murder. (T874) At the charge conference, Appellant renewed his previous motion on this issue. (T756) The jury's verdict was a general one finding Gudinas guilty of "murder in the first degree, as charged in the indictment." (R542) The jury was never given a choice of premeditated or felony murder on the verdict form.

In Mills v. Maryland, 486 U.S. 367, 376 (1988), the United States Supreme Court stated:

> With the respect of findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but

> not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. [Citations omitted]. In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds...

This Court cannot be certain which of the two theories (premeditated versus felony murder) the jury relied on in reaching the verdict. The evidence establishes that the crime was a classic case of **felony** murder. The evidence does not support a conviction for premeditated murder. Since the State argued both theories and the trial court instructed on both theories, it is impossible to determine which theory the jury accepted. The verdict must therefore be set aside and Thomas Gudinas must be retried with proper jury instructions. Amends. V, VI, VIII and XIV, U.S. Const.

Additionally, recent caselaw indicates that Gudinas cannot be convicted of both felony murder and the underlying felonies (two counts of sexual battery). In Boler v. State, 654 So.2d 603 (Fla. 5th DCA 1995), the lower court certified the following question to this Court:

> After United States v. Dixon, ___ U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), may a defendant, in Florida, be separately convicted and sentenced for the felony murder and qualifying felony even in the same prosecution?

Boler, 654 So.2d at 604. This issue is currently pending before this Court and may be raised for the first time on appeal.

POINT IX

THE TRIAL COURT ERRED IN RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE THEREBY RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT.

The Appellant called Detective Griffin as its only witness during the defense case-in-chief. (T716-20) Police received four hundred leads in the case. They developed Gudinas as a suspect approximately three weeks after the murder. (T716-17) The murder was committed right before World Cup soccer matches were held in Orlando. (T717) As a result, the town was filled with soccer fans from all over the world.

Police developed David Colbert as a suspect. Colbert was romantically obsessed with Michelle McGrath. He had been with the victim on the night of the murder and gave a rose to her earlier in the evening. Detective Griffin described Colbert's personality as "rather strange." (T717-18) After McGrath's murder, Colbert called the victim's home, just so that he could hear her voice on the answering machine. (T717) The jury heard the preceding evidence and on cross-examination, the jury heard that police ultimately eliminated Colbert as a suspect. (T720) However, the trial court sustained numerous relevance objections by the State and thus restricted evidence of Appellant's defense. (T718-20) Specifically, the defense was unable to elicit that David Colbert was a former boyfriend of McGrath (T719); that he appeared to be obsessed with McGrath (T719); and that Culbert Pressley and Officer Chisari did not agree that the composite

drawings looked like the person that they had each described. (T720)

The right of an accused to present witnesses to establish a defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14 (1967). Indeed, this right is a cornerstone of our adversary system of criminal justice. Both the accused and the prosecution present a version of the facts to the judge so that it may be the final arbiter of truth. Id.; United States v. Nixon, 418 U.S. 683, 709 (1974). Subject only to the rules of discovery, an accused has an absolute right to present evidence relevant to his defense. Roberts v. State, 370 So.2d 800 (Fla. 2d DCA 1979). A trial judge may not frustrate a defendant's legitimate right to present his defense by strict adherence to state evidentiary rules. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

The State's case against Thomas Gudinas was not the strongest. Additionally, Detective Griffin was the **only** evidence presented by Appellant at his trial. Appellant believed Detective Griffin's testimony strong enough that he forfeited final closing argument in order to present the witness. That concession surely went for naught where the court restricted much of Griffin's testimony. The result was a frustration of Appellant's constitutional right to a fair trial.

POINT X

THE JURY'S RECOMMENDATION FOR DEATH WAS CONSTITUTIONALLY TAINTED BY IMPROPER PROSECUTORIAL ARGUMENT AND IMPROPER, INADEQUATE INSTRUCTIONS.

During the penalty phase, the prosecutor engaged in an improper argument that misled the jury as to the applicable law. In particular, the prosecutor mislead the jury regarding the mitigating circumstance dealing with Thomas Gudinas acting under an extreme mental or emotional disturbance. Additionally, the trial court denied special jury instructions requested by the defense and granted the State's request to modify the standard instruction. The jury instructions given mislead the jury.

The Trial Court's Modification of the Standard Jury Instructions at the State's Request Placed an Undue Burden on the Defense to Prove Mitigating Factors

The proper standard jury instruction dealing with the burden of proof required for mitigating circumstances is:

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

Florida Standard Jury Instructions (Crim.) p.80. Over defense objection, the trial court granted the State's request to modify and gave the following special jury instruction:

> 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 as established.

(P33) The above was given over strenuous defense objection. (P38-39,243-49)

Initially, Appellant points out that the State's request was not in writing. This violates Florida Rule of Criminal Procedure 3.390(c). More importantly, the instruction given places a more onerous burden of proof on the defendant regarding mitigating circumstances. A jury surely understands whether or not they are "reasonably convinced" that something exists. To add the phrase "by the greater weight of the evidence" unjustly increases the burden of proof required by law. In a criminal trial, "reasonable doubt" is defined for the jury. Fla. Std. Jury Inst. 2.03 (Crim.) p.12. However, "greater weight of the evidence" (which sounds suspiciously like preponderance of the evidence) is never defined for a criminal jury; nor was it defined for Gudinas' jury. They had no idea what "greater weight of the evidence" meant. Undoubtedly, they rejected valid mitigating evidence as unsupportive of a mitigating circumstance they believed had not been proved "by the greater weight of the evidence." One cannot be sure. The only thing this Court can be sure about is that the jury was improperly instructed on this **critical** aspect of their consideration of sentence. Clearly, reversible error occurred.

<u>The Trial Court's Denial of Appellant's Special Requested Jury Instructions</u>

One month before the penalty phase began, Appellant filed a written request for a special jury instruction:

You are instructed that actions of

> the defendant which were taken after the victim was rendered unconscious or dead cannot be considered in determining whether the murder was especially wicked, evil, atrocious or cruel.

(R448) Appellant relied on Jackson v. State, 451 So.2d 458 (Fla. 1984); Halliwell v. State, 323 So.2d 557 (Fla. 1975); and Godfrey v. Georgia, 446 U.S. 420 (1980). The trial court granted the request in part but denied the request in part, omitted the word "unconscious" and instructed that the defendant's actions taken after the victim was dead cannot be considered in determining whether the murder was especially wicked, evil, atrocious or cruel. (P332)

The trial court's action constitutes reversible error. The requested instruction is a correct statement of the law. The "unconscious" portion of the requested instruction was critical in Appellant's case. The evidence clearly supported the conclusion that the victim was **unconscious** during much, if not all, of the attack. Whether or not she was unconscious and therefore oblivious to the pain was a point of great contention. The trial court told the jury only part of the story.

The trial court also denied Appellant's special requested instruction concerning the definition and treatment of mitigating evidence. (R550-51) The request correctly stated the law and, perhaps most importantly, enumerated eight potential nonstatutory mitigating circumstances. The denial of this instruction was also error.

Appellant also attacked the constitutionality and adequacy

of the jury instructions dealing with the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. [§ 921.141(5)(h), Fla. Stat.]. (R257-73,286-90,454-55; SR1-4) Additionally, Appellant requested a special instruction as to this particular factor. (R447) Appellant respectfully submits that the most recent standard jury instruction as to this particular factor still violates both the state and federal constitutions. The language fails to adequately channel the jury's discretion to inform the jury of when this aggravating circumstance is applicable. This Court has wrestled with the definition over the last twenty years with extremely inconsistent results. See, e.g., Raulerson v. State, 358 So.2d 826 (Fla. 1978); Raulerson v. State, 420 So.2d 567, 571 (Fla. 1982); and Omelus v. State, 584 So.2d 563, 566 (Fla. 1991).

The Prosecutor's Closing Argument

In addressing one of the applicable mitigating circumstances, the prosecutor argued:

> Let's go through those one at a time. **The crime for which the defendant is to be sentenced under the influence of extreme mental or emotional disturbance. The word disturbance is important.**
>
> **I would suggest to you that the work disturbance means that something is different than its natural state.** When you disturb something you take something in a state of rest or a state of normalcy and you change it, you disturb it.
>
> The reason that's important in this case is because the evidence that you've been given about Thomas Gudinas is that **his mental state at the time of this crime was exactly and precisely the way**

he normally is.

He is a man who is pathological. And it's testimony from his own witness...There was nothing about Mr. Gudinas at the time that he committed this crime that was any different on any other day of his life.

I suggest to you, ladies and gentlemen, that that is not a mental or emotional disturbance. He was not psychotic. He was not under the influence of some schizophrenic disease. He was simply being Thomas Gudinas. And **Thomas Gudinas is a monster.** Deep into the heart and soul, he is a monster. **That's what he was. That's what he is.** That's part of him. If you take that away, there is no Thomas Gudinas.... **that's not a mental or emotional disturbance. That is a sick, pathological person.**

(P294-96) (Emphasis added) After the prosecutor completed his argument, defense counsel renewed his previous objection to the display of photographs and also objected to the State's characterization of Mr. Gudinas as a "monster." (P309) Defense counsel also moved for a mistrial. The trial court denied the motion for mistrial, but reminded the prosecutor of the cases of this Court regarding characterization of defendants in pejorative terms. (P310)

Appellant concedes that there was no contemporaneous objection by defense counsel to the prosecutors' characterization of Thomas Gudinas as a "monster." Appellant concedes that there was **no objection at all** to the prosecutor's misstatement of the mitigating circumstance dealing with a defendant operating under an extreme mental or emotional disturbance at the time of the crime. However, Appellant contends that the prosecutor's

argument constitutes fundamental error. The prosecutor's "explanation" of a critical mental mitigating circumstance turned psychology and the law on its head. In essence, the prosecutor explained that Thomas Gudinas walked around every day of his life "mentally disturbed." The prosecutor explained that "disturbance" implies a departure from the norm. However, the prosecutor explained that the **defendant's norm** is the critical barometer, not **society's norm**. The prosecutor's explanation is outrageous and erroneous. Under the State's definition, this mitigating circumstance would not apply to a psychotic individual, unless a previously normal person suddenly had a psychotic episode and committed a capital murder. Ironically, the prosecutor objected to counsel misstating the law during defense closing. (P312-13)

At the charge conference, the prosecutor objected to a jury instruction on this specific mental mitigating circumstance based on the argument he made to the jury. (P237-38) He stated his belief that the issue needs to be addressed by this Court. (P237) His stated objection was that the evidence did "not meet the legal definition of a disturbance because it's a permanent condition [for Mr. Gudinas]." (P238) The trial court described the State's argument as "very interesting," and concluded that it may have some merit. (P238) The prosecutor responded that this Court "may tell us someday that it is not." (P238) Appellant strongly urges this Court to, at the very least, tell Mr. Ashton that his inventive interpretation is absurd. Even though defense

counsel did not object, the prosecutor's deliberate misleading of the jury constitutes fundamental error. The erroneous misstatement of law tainted the jury's recommendation. A new penalty phase is required. Amends. V, VIII, and XIV, U.S. Const.; Art. I, §§ 9 and 16, Fla. Const.

POINT XI

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The trial court concluded that the State proved beyond a reasonable doubt that the murder was heinous, atrocious or cruel. (R614-18) In finding this particular aggravating factor, the trial court let his emotion carry the day. This was undoubtedly a horrendous murder. The sentencing order relates how the victim was beaten to death and raped. Her assailant left a stick in her vagina and another stick stabbed some three inches into the area between her vagina and anus. This is all very true. It is also true that the victim incurred these injuries while her heart was still beating. However, the State failed to prove beyond a reasonable doubt that Michelle McGrath was conscious during the attack and therefore capable of feeling the pain. The evidence is just as consistent that McGrath was unconscious, perhaps even brain dead, at the outset of the attack.

After reciting the numerous injuries that the autopsy revealed, the trial court writes:

> While it may be subject to debate when Michelle McGrath lost consciousness during this attack, there is no question that she was alive and consciousness (sic) during significant portions of this attack by the defendant. The following testimony clearly shows that she was conscious during significant portions of this savage and inhuman attack upon her:
>
> > Q: Let me go back to a, one of the prior photographs. Now, of the areas of injury that we have to the head, you've identified at least three. Let me get my pointer here. The side of the head,

the neck, and to the mouth, which, if any, of those, in your opinion, could have caused unconsciousness of the victim?

A: Well, I think the blunt force injury of the head, in view of what we found internally on the brain, could have certainly caused unconsciousness.

Q: Okay. Let's -- the injuries to the mouth, in your opinion, would those blow (sic) have rendered the victim unconscious?

A: No, they would not.

Q: And the blows to the side of the neck -- this is, we're looking at the identification photograph, for the record. Would those, in your opinion, have caused unconsciousness?

A: Probably not.

Q: The one to the side of her head is the only one, in your opinion, that would have or could have caused unconsciousness?

A: Yes. I think that's the one that was responsible for the brain injury that resulted in her death.

(R616-17) The trial court then quotes language from State v. Dixon, 283 So.2d 1 (Fla. 1973), and concludes that the evidence supports this aggravating factor. (R617-18) Appellant submits that the portion of the medical examiner's testimony quoted by the trial court does **not** in any way establish that McGrath was conscious during much of the attack.

Looking at the medical examiner's testimony closely, Dr. Hegert estimated that McGrath remained alive for approximately thirty minutes to one hour after the first injury. (T416) All

Dr. Hegert could say about any of the injuries was that McGrath was still alive when they were inflicted. He admitted that he could not determine "whether she was conscious or not, I don't know." (T440) Dr. Hegert did testify that some of the injuries, e.g., blows to the mouth and neck, would not have rendered McGrath unconscious. (T442-43) However, Dr. Hegert had no way of determining the order of McGrath's injuries. (T451-52) The key injury that caused McGrath's death was a blow to the side of her head that appeared to have left the pattern of a shoe. (T442-43) This resulted in brain hemorrhage causing McGrath's death. (T444)

The State's evidence is just as consistent that her assailant stomped on her head, rendering her immediately unconscious with the first blow. All of the other injuries, horrible though they were, were inflicted after McGrath lost consciousness and therefore felt no pain. In fact, the evidence tends to support this theory. Dr. Hegert found only one **possible** defensive wound on one of McGrath's hands. (T451) Even that wound could have been aggressive rather than defensive. (T451) McGrath had long fake fingernails, none of which were broken. (T451) Dr. Hegert admitted that, "that would indicates (sic) that there probably had not been any significant struggling on her part that would have broken those off." (T451)

> Q: Isn't it reasonable to assume that the blunt force injury which resulted in her unconsciousness must have occurred early on in the confrontation given the fact we don't see any defensive wounds?

A: That could be true. If she had received significant injury to the face, there may have been some degree of submission. I don't -- that's just conjecture on my part. I really don't have that. It's a possibility. But I really, I don't have any opinion as to what happened.

Q: But it is true that injury would have caused unconsciousness? And I believe you stated there was no real evidence of defensive wounds that you can say was definitive defensive wounds?

A: That is correct, yes. And the blow to the head would have rendered her unconscious.

Q: And I believe you also stated in your deposition you do not believe that she was conscious during the sexual activity?

A: I would not be able to say that she was or was not. The -- once the blow to the head had been delivered...I think that either is a possibility, but she certainly, if she had received the head injury before the sexual part of it, she certainly would not have been conscious.

(T451-52) Additionally, when McGrath's body was found, her arms remained in a pulled-back fashion. Dr. Hegert admitted that this might be consistent with a scenario where she was pulled back into the alley in an unconscious state. (T453) Dr. Hegert also admitted that McGrath's head injury coupled with her high blood alcohol level (.17) could have resulted in the state of brain death during most, if not all, of the attack. (T444,455-57) Discussing the possibility that McGrath was brain dead, Dr. Hegert said, "I don't know. There's no way in which I can determine whether it happened or it did not." (T457)

In Richardson v. State, 604 So.2d 1107 (Fla. 1992), this Court, citing Sochor v. Florida, 504 U.S. 527 (1992), re-affirmed that to qualify for HAC "the crime must be **both** conscienceless or pitiless **and** unnecessarily torturous to the victim." Although death by a beating **usually** inflicts a high degree of pain, this Court rejected the application of this particular factor where the victim was rendered unconscious in a very short period of time. Elam v. State, 636 So.2d 1312 (Fla. 1994). Similarly, in Rhodes v. State, 547 So.2d 1201 (Fla. 1989), this Court rejected the circumstance for the strangulation murder of a semi-conscious victim. See also Scott v. State, 494 So.2d 1134 (Fla. 1986) (factor rejected where there was no evidence that victim was conscious, even though he was pinned under a car and suffocated), and Herzog v. State, 439 So.2d 1372 (Fla. 1983) (circumstance inapplicable where defendant beat the victim, suffocated her with pillow and then strangled her with telephone cord -- victim was under influence of methaqualone, eyewitnesses stated victim was unconscious although actual period of unconsciousness is unclear; victim was semi-conscious during entire incident as there's evidence the victim offered no resistance.)

Like the victim in Herzog, McGrath was under the influence of a substantial amount of alcohol. The fact that she suffered no defensive wounds, as well as the position of her arms when the body was found, indicates she was not responsive and was unconscious, perhaps even brain dead. The State presented no witnesses that heard any screams that night. The evidence is

just as consistent that the first blow struck rendered her unconscious, perhaps brain dead, and she suffered no pain during the entire attack. Aggravating circumstances must be proved beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973). The State failed to meet its burden in proving this aggravating circumstance.

POINT XII

THE TRIAL COURT ERRED IN ITS CONSIDERATION OF THE MITIGATING EVIDENCE.

In dealing with the mitigating evidence, the trial court listed each statutory mitigating circumstance as well as the catch-all factor relating to nonstatutory mitigating circumstances. (R618-21) Based upon the unrebutted testimony of Dr. Upson, the trial court concluded that the capital felony was committed while Gudinas was under the influence of extreme mental or emotional disturbance. (R618-19) However, the court rejected the other mental mitigating factor [substantial impairment of capacity to appreciate criminality of conduct or to conform conduct to the requirements of law; §921.141(6)(f), Fla. Stat.] (R620-21) The trial court based the rejection on his conclusion that Dr. O'Brian's opinion rested too heavily on unsupported facts, i.e., the degree of Appellant's intoxication.

The trial court also rejected Gudinas' age as a mitigating circumstance where there was no evidence that the Appellant was not mentally and emotionally mature. (R621) In dealing with the nonstatutory mitigating factors, the trial court wrote:

> The testimony established the following:
>
> 1. The defendant had consumed cannabis and alcohol the evening of the homicide.
>
> 2. The defendant has capacity to be rehabilitated.
>
> 3. The defendant (sic) behavior at

trial was acceptable.

4. The defendant has an I.Q. of 85.

5. The defendant is religious and believes in God.

6. The defendant's father dressed as a transvestite.

7. The defendant suffers from personality disorders.

8. The defendant was developmentally impaired as a child.

9. The defendant was a caring son to his mother.

10. The defendant was an abused child.

11. The defendant suffered from attention deficit disorder as a child.

12. The defendant was diagnosed as sexually disturbed as a child.

The Court finds **this** mitigating factor to be present, but gives **it** very little weight.

(R621)

NONSTATUTORY MITIGATING FACTORS.

It is abundantly clear from the sentencing order that the trial court is considering all twelve nonstatutory mitigating factors as merely one. The court refers to "this mitigating factor." (R621) The court also gives "it" very little weight. (R621) It is clear that the trial court is operating under the misapprehension that the catch-all mitigating factor is only one circumstance in and of itself. Such treatment violates this Court's pronouncement in Campbell v. State, 571 So.2d 415 (Fla.

1990) (nonstatutory circumstances should generally be dealt with as categories of related conduct rather than individual acts. The trial court must find as a mitigating circumstance each proposed factor that is mitigating in nature.)

The trial court's treatment of all of the nonstatutory mitigating factors as only one was reversible error. The list of twelve, distinct factors reveals a plethora of powerful, uncontroverted, and valid mitigating evidence. (R621) Appellant also finds very disturbing the trial court's inexplicable dismissal of all of the nonstatutory mitigating factors as being entitled to "very little weight." (R621) By finding the evidence to be entitled to "very little weight," in essence, the trial court ignores valid mitigating evidence. This is not the way Florida's death penalty scheme is supposed to work.

GUDINAS' CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT.

In rejecting this particular factor, the trial court analyzed the testimony of Dr. James O'Brian who concluded that, based on Gudinas' underlying psychological makeup and his use of alcohol that night, Gudinas met the substantial impairment requirement of this particular factor. (R620) The trial court concluded that the doctor's opinion was based too heavily on testimony of other witnesses as it was related to him. (R620) The trial court writes:

> Frank Wrigley,...testified that the defendant and he had one joint of marijuana that night. Mr. Wrigley in response to a question concerning whether he had seen the defendant high or drunk, said yes. When Mr. Wrigley

> was asked: "And would you say that he was high or drunk that evening?" He said, "he looked like he had a buzz on."
>
> Todd Gates and Frederick Harris... no testimony came from them to establish whether the defendant was intoxicated. There was also no testimony from Mr. Gates or Mr. Harris or Mr. Wrigley to show that the defendant was displaying in (sic) any unusual or bizarre behavior.
>
> Mr. Dwayne Harris testified that the defendant appeared pretty drunk. He also testified that he observed the defendant dancing and just having a good time....No witnesses that saw the defendant that night indicated that he (sic) substantially impaired to the extent that he did not know what he was doing. In fact the credible evidence shows...the defendant stealthily approached Rachelle Smith's car and attempted to gain entry...tried to break the window. Once, he heard Ms. Smith sounding the horn, he fled.

(R620) From this analysis, the trial court was not reasonably convinced that Gudinas' capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of law was substantially impaired. (R621)

The trial court's own words belie his conclusion. Gudinas was clearly under the influence of marijuana and alcohol at the time of the offense. Dwayne Harris testified that Gudinas appeared "pretty drunk." (R620) Frank Wrigley said Gudinas had a "buzz on." (R620) One must remember that Thomas Gudinas was only twenty years old at the time. He used his cousin's ID that night at the bar which was running a $5.00 "all you can drink" draft special. (T583-84,626) Gudinas and his friends arrived at Barbarella's between 8:30 and 9:00 p.m. that night. (T608) They

stayed until almost 3:00 a.m. (T610) They all split up at the bar, socializing, drinking, and trying to meet girls. No one was keeping track of anyone else's drinking that night. Todd Gates, who arrived at the bar with Gudinas early in the evening, saw Gudinas only two times over the next five to six hours. (T606-10) All the boys drank some beers at the apartment before they even left for the downtown bar. (T620) No one was sure exactly how many times they met at various vehicles to smoke marijuana. (T619) Looking at this group's lifestyle and the price of beer that night, one can rest assured that Thomas Gudinas was trashed.

Additionally, Dr. O'Brian did not simply rely on reports of the testimony as told to him.[19] Dr. O'Brian, a physician and pharmacologist, was qualified as an expert in the area of toxicology. (P111-15) He reviewed arrest records, psychological tests, neurological reports, and consulted with Dr. Upson. (P115) Perhaps most importantly, Dr. O'Brian also discussed the night's events with Thomas Gudinas. (P116) Dr. O'Brian's opinion about Gudinas' actions that night was based on a **combination** of alcohol and marijuana coupled with Thomas Gudinas' psychological makeup. (P118-19,144-45) The trial court

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[19] The trial court also improperly excluded the doctor's answer to a hypothetical question which took into account Appellant's height, weight, and amount of intoxicants consumed that night. The trial court sustained the State's objection that the facts on which the question rested had not been proven. (P144) The trial court granted the State's motion to strike the doctor's testimony that Gudinas may have had a blood alcohol level as high as .270. This was also error. Facts upon which a hypothetical question is based need not be undisputed before such testimony is admissible. See, e.g., Chiles v. Beaudoin, 384 So.2d 175 (Fla. 2d DCA 1980).

completely failed to analyze this mitigating factor from the angle of Appellant's unique psychological makeup. Based on the evidence presented by the Appellant, it is clear that the trial court abused its discretion in rejecting this particular mitigating factor.

APPELLANT'S AGE OF 20 AT THE TIME OF THE OFFENSE.

In rejecting Appellant's age as mitigation, the trial court wrote:

> Age is only a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences resulting from them. There is no evidence that the defendant was not mentally and emotionally mature.

(R621) This Court has held that an age of twenty, without more, was not significant. Garcia v. State, 492 So.2d 360 (Fla. 1986). However, given the extensive evidence of Appellant's abnormal development as a child, his extremely slow physical maturation, his low I.Q., and his assorted psychological problems, the trial court's conclusion is not supported by the evidence. The evidence clearly establishes Appellant's **lack** of mental and emotional maturity. Contrary to the trial court's conclusion, the evidence reveals Appellant's **inability** to take the responsibility for his own acts. The trial court abused its discretion in rejecting Appellant's young age as a mitigating circumstance.

CONCLUSION

At best, two valid aggravating circumstances exist. Neither

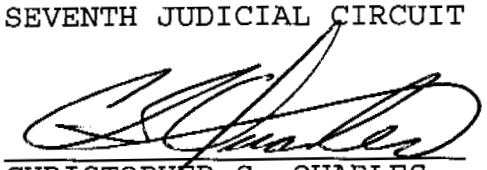
is very compelling. Although the trial court found only one statutory mitigating circumstance, the evidence supports the finding of two others. Additionally, a plethora of nonstatutory mitigating circumstances were proven and should have been given more weight. A correct weighing of the valid aggravating and mitigating factors should have resulted in a sentence of life imprisonment. Proportionality review by this Court is required and a life sentence should be the result. Amends. VIII and XIV, U.S. Const.; Art. I, §§ 9, 16, and 17, Fla. Const.

CONCLUSION

Based upon the foregoing cases, authorities, policies, and argument, Appellant respectfully requests this Court to reverse the convictions and vacate the sentences and remand for a new trial as to Points I, II, IV, V, VI, VII, VIII and IX. As to Point III, Appellant asks for discharge on Counts I and II. As to Points X, XI and XII, this Court should vacate the death sentence and remand for the imposition of life imprisonment. As to Point X, this Court at least remand for a new penalty phase.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Thomas Lee Gudinas, #379799 (R2N15), Florida State Prison, P.O. Box 747, Starke, FL 32091-0747, this 15th day of May, 1996.

CHRISTOPHER S. QUARLES
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