IN THE SUPREME COURT OF FLORIDA

THOMAS LEE GUDINAS,

Appellant,

v. **CASE NO. SC00-954**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This is an appeal from the denial, following an evidentiary hearing, of Gudinas' first *Florida Rule of Criminal Procedure* 3.850 motion.

Gudinas was convicted of the first degree murder of Michelle McGrath, in addition to two counts of sexual battery, attempted sexual battery, and attempted burglary with an assault on May 4, 1995. The penalty phase proceedings were conducted on May 8-10, and the jury ultimately recommended a sentence of death by a vote of 10-2. Orange County Circuit Judge Belvin Perry sentenced Gudinas to death on June 16, 1995.[1] This Court affirmed the convictions and sentences on April 10, 1997, *Gudinas v. State*, 693 So.2d 953 (Fla. 1997), and the United States Supreme Court denied certiorari review on October 20, 1997, *Gudinas v. Florida,* 522 U.S. 936 (1997).

On June 9, 1998, Gudinas filed what he describes as a "shell" Rule 3.850 motion. (R515-538). Gudinas amended that motion twice, first on July 19, 1999, and again on September 30, 1999. (R808; 1002). A *Huff* hearing was conducted on October 15, 1999, and an evidentiary hearing on specified issues was scheduled for December 17, 1999. (R1070; 1354). Following that evidentiary hearing, the Circuit Court denied all relief on March 20, 2000. (R1391). Notice of appeal was given on April 19, 2000, and the record was certified

[1]Judge Perry presided over the Rule 3.850 proceedings, as well.

on July 31, 2000. (R1440). Gudinas filed his *Initial Brief* on November 30, 2000.

STATEMENT OF THE FACTS

On direct appeal, this Court summarized the facts of Gudinas' crimes in the following way:

> Gudinas and three of his roommates arrived at an Orlando bar, Barbarella's, between approximately 8:30 and 9 p.m. on May 23, 1994. Prior to arriving at the bar, the group drank beer and smoked marijuana at their apartment and in the car on the way to the bar. While drinking throughout the night, Gudinas and his roommates periodically returned to their car to smoke marijuana. However, when the bar closed at 3 a.m, Gudinas could not be located. One of Gudinas' roommates, Todd Gates, testified that he last saw Gudinas in the bar at approximately 1 a.m.
>
> Rachelle Smith and her fiancé arrived at the same bar between 11 and 11:30 p.m. They stayed until about 2 a.m. Rachelle left the bar at that time, while her fiancé remained inside saying goodbye to friends. She initially went to the wrong parking lot where she saw a man watching her while crouched behind another car. Realizing she was in the wrong parking lot, Rachelle walked to the lot where her car was parked. Because she felt she was being followed, she immediately got into her car and locked the door. Looking into her mirror, she saw the same man she had just seen crouched behind a car in the other parking lot. After trying to open Rachelle's passenger side door, the man crouched down, came around to the driver's side and tried to open the door. While screaming at Rachelle, "I want to f___ you," the man covered his hand with his shirt and began smashing the driver's side window. Rachelle blew the horn and the man left. Upon hearing of the murder that occurred nearby that same night, Rachelle contacted police, gave a description of the man, and identified Gudinas from a photographic lineup as the man who tried to attack her. (FN1) She also identified Gudinas at trial.
>
> The victim, Michelle McGrath, was last seen at Barbarella's at approximately 2:45 a.m. She apparently had left her car in the same parking lot where Rachelle Smith first saw Gudinas crouching behind a car. Between

4 and 5 a.m., Culbert Pressley found Michelle's keys and a bundle of clothes next to her car in the parking lot. (FN2) Her body was discovered at about 7:30 a.m. in an alley next to Pace School. (FN3) Michelle was naked, except for a bra which was pushed up above her breasts.

Jane Brand flagged down Officer Chisari of the Orlando police bicycle patrol. Officer Chisari had been informed by a deputy sheriff on the scene that Pressley had found some keys. Pressley then told Chisari he had just given them to "that guy," referring to a man walking south. As Chisari then rode toward the man, Ms. Brand screamed as she spotted Michelle's body. Chisari returned to where Ms. Brand was. Subsequently, he saw a man he later identified as Gudinas driving a red Geo Metro from the parking lot where Michelle had parked her car. Pressley wrote down the car's license plate and the tag number was traced to Michelle McGrath. The car was later recovered at 7 p.m. that night at the Holiday Club Apartments. (FN4)

During the jury trial, all four (FN5) of Gudinas' roommates testified that he was not at their apartment when they returned from Barbarella's. Frank Wrigley said he next saw Gudinas that afternoon; he had blood on his underwear and scratches on his knuckles, allegedly from a fight with two black men who tried to rob him. Todd Gates testified that Gudinas was at the apartment when he awoke between 8:30 and 9 a.m., wearing boxer shorts covered with blood, allegedly from a fight with a black man. Fred Harris offered similar testimony. Fred added that later that day, after being asked if Michelle was "a good f___," Gudinas replied, "Yes, and I f___ed her while she was dead." Dwayne Harris likewise testified that he heard Gudinas say, "I killed her then I f___ed her."

Dr. Hegert, the medical examiner, testified that the cause of death was a brain hemorrhage resulting from blunt force injuries to the head, probably inflicted by a stomping-type blow from a boot. He found severe cerebral edema and determined that Michelle died thirty to sixty minutes after the fatal injury, the forceful blow to the head. Dr. Hegert also found defensive wounds on one of Michelle's hands and two broken sections of a stick, one inserted two inches into her vagina and the other inserted three inches into the area near her rectum. In addition, Dr. Hegert also determined that Michelle had been vaginally and anally penetrated by

something other than the sticks, as indicated by trauma to her cervix. He also found that Michelle had a blood alcohol content of .17% at the time of her death. While Michelle might have lived longer without that amount of alcohol in her system, Dr. Hegert testified that the head injury would have been fatal anyway. He estimated the time of death to be between 3 and 5 a.m.

Timothy Petrie, a serologist with the Florida Department of Law Enforcement, testified that he found semen on the vaginal swab as well as on a swab of Michelle's thigh. Amanda Taylor, a latent fingerprint examiner with the Orlando Police Department, identified a latent fingerprint on the alley gate pushbar as Gudinas' right palm and thumbprints on Michelle's car loan payment book as Gudinas'. Taylor acknowledged she had no way of knowing when the prints were made.

After the trial concluded, the jury returned a guilty verdict on all counts. The penalty phase commenced several days later.

> (FN1.) Two other witnesses, Culbert Pressley and Mary Rutherford, also positively identified Gudinas from the same photo lineup. They had each seen Gudinas near the scene of the murder later that morning.
>
> (FN2.) Several hours later, shortly after 7 a.m., a man whom Pressley subsequently identified as Gudinas came walking down the sidewalk. When the man saw Pressley holding the car keys, he said, "Those look like my keys. I've been looking for them all morning." Pressley gave him the keys in exchange for a promised $50 reward. The man then walked away.
>
> (FN3.) Pace School employee Jane Brand discovered the victim in the alley. In the preceding half hour before seeing Michelle's body, Ms. Brand had arrived at school and encountered a young man inside the gated area on the steps leading to the school's front door. The man, whose back was to Ms. Brand, remained seated and did not look at her. She described him as about eighteen years old with short brown hair and wearing dark, loose-fitting shorts and a loose shirt. After

> being told to leave the school grounds, the man jumped the fence and ended up in the alley. About ten minutes later, Ms. Brand heard a loud crash in the alley. She looked outside and saw Michelle's body. She later identified Gudinas as the same man she saw in the courtyard that morning after seeing him in a television report.
>
> (FN4.) Gudinas' apartment was less than a half mile from where Michelle's car was found.
>
> (FN5.) These were Frank Wrigley, Todd Gates, and brothers Fred and Dwayne Harris. The Harris brothers are Gudinas' first cousins.

Gudinas v. State, 693 So.2d 953, 956-57 (Fla. 1997).

With respect to the penalty phase of Gudinas' trial, this Court summarized the evidence in the following way:

> During the penalty phase, the State introduced certified copies of Gudinas' Massachusetts felony convictions. These included convictions for burglary of an automobile; assault; theft; assault with intent to rape; indecent assault and battery; and assault and battery. These offenses all occurred in the early 1990's.
>
> Karen Ann Goldthwaite, Gudinas' mother, testified that she had a difficult pregnancy and delivery with Gudinas and that he had some health problems during the first six months of life. She also testified that he had extreme temper tantrums as a small boy, although he was never violent toward others. His teacher reported that he was hyperactive at school, sometimes throwing chairs and acting up. Mrs. Goldthwaite had Gudinas evaluated at Boston University when he was six. Thereafter, she sought help from the Massachusetts Division of Youth Services. Over the next several years, Gudinas had 105 different placements through that agency. Mrs. Goldthwaite was advised that Gudinas should be placed in a long-term residential program, but she was never able to accomplish this. (FN6) Because of his treatment in numerous facilities, Gudinas only completed his formal education through the fourth grade, although he eventually attained his GED. He also was diagnosed as having a low IQ. Finally, Gudinas' mother testified that he began drinking

alcohol while a juvenile, smoked marijuana, and had used cocaine and LSD.

Michelle Gudinas, Gudinas' younger sister, testified that their father put Gudinas' hand over an open flame as punishment for playing with matches. She also testified that on another occasion, as punishment for wetting his bed, their father made Gudinas stand in front of their house in his underwear wearing a sign that said "I will not wet the bed." Ms. Gudinas noted that Gudinas had a good relationship with his stepfather. She denied ever having any sexual contact with her brother or telling anyone she had. However, in rebuttal, Emmitt Browning, an Orlando Police Department investigator, testified that Ms. Gudinas told him she was at a party and went into a bedroom with her brother. She allegedly said her brother lay on top of her and began tearing her swim suit off before some of their cousins entered the room and pulled Gudinas off her.

Dr. James Upson, a clinical neuropsychologist, testified for Gudinas. He concluded that Gudinas was seriously emotionally disturbed at the time of the murder and that the "symbolism" of the crime indicated that he was "quite pathological in his psychological dysfunction." Dr. Upson testified that Gudinas has an IQ of 85, in the low-average range. Testing revealed that Gudinas has very strong underlying emotional deficiencies. Dr. Upson explained that this type of person has a higher degree of impulsivity, sexual confusion and conflict, bizarre ideations, and manipulative behavior, tends to be physically abusive, and has the capacity to be violent. He noted that these behaviors escalate when the person is either threatened or loses control. Dr. Upson felt that Gudinas would probably be a danger to others in the future unless he was properly treated and that the murder was consistent with the behavior of a person with his psychological makeup.

Dr. James O'Brian, a physician and pharmacologist, was recognized by the trial court as an expert witness in the area of toxicology. He testified that Gudinas is unable to control his impulses in an unstructured environment and opined that Michelle's murder was impulsive. Gudinas told Dr. O'Brian that on the day before the murder, he ate marijuana "joints" at breakfast, at 1:30 p.m., five between 3 and 8 p.m., and another at 1 a.m. the following morning. Gudinas also reported that he drank alcohol

between 1:30 and 3 p.m. and 9:30 p.m. and 2 a.m. the following morning. Dr. O'Brian testified that marijuana and alcohol remove inhibitions, thus allowing the underlying personality to show through. He stated that as the dosage increased, someone like Gudinas would not be able to control his "strong impulses." Based on his alcohol consumption and evaluation of Gudinas' underlying psychological makeup, Dr. O'Brian concluded that Gudinas' ability to conform his behavior to the requirements of the law was substantially impaired on the night of the murder.

The jury recommended a death sentence by a vote of ten to two. The trial court conducted a sentencing hearing on May 19, 1995, and imposed Gudinas' sentence in a separate proceeding on June 16, 1995. After adjudicating Gudinas guilty on all counts, the court sentenced him to death for the first-degree murder of Michelle McGrath. (FN7) The court also sentenced Gudinas to thirty years for attempted burglary with an assault, thirty years for attempted sexual battery, and life imprisonment for each count of sexual battery.

> (FN6.) His lengthiest treatment was a five-month program. He also spent nine days in a psychiatric ward during this time.
>
> (FN7.) The trial court found the following statutory aggravators: (1) the defendant had been convicted of a prior violent felony, section 921.141(5)(b), *Fla. Stat.* (1995); (2) the murder was committed during the commission of a sexual battery, section 921.141(5)(d); and (3) the murder was especially heinous, atrocious, or cruel, section 921.141(5)(h). The court found one statutory mitigator: the defendant committed the murder while under the influence of an extreme mental or emotional disturbance, section 921.141(6)(b). The court found the following nonstatutory mitigating factors and accorded them very little weight: (1) defendant had consumed cannabis and alcohol the evening of the homicide; (2) defendant had the capacity to be rehabilitated; (3) defendant's behavior at trial was acceptable; (4) defendant had an IQ of 85; (5) defendant was religious and believed in God; (6) defendant's father

> dressed as a transvestite; (7) defendant suffered from personality disorders; (8) defendant was developmentally impaired as a child; (9) defendant was a caring son to his mother; (10) defendant was an abused child; (11) defendant suffered from attention deficit disorder as a child; and (12) defendant was diagnosed as sexually disturbed as a child.

Gudinas v. State, 693 So.2d at 958-59. This Court affirmed Gudinas' convictions and sentences. *Id.*

THE DIRECT APPEAL ISSUES

In this Court's direct appeal opinion, the issues raised by Gudinas on appeal were summarized in the following way:

> (1) the trial court erred in denying Gudinas' motion to sever counts I and II from the remaining charges; (2) the trial court erred in conducting several pretrial hearings without Gudinas present; (3) the trial court erred in not granting Gudinas' motion for judgment of acquittal for the attempted sexual battery of Rachelle Smith; (4) the trial court failed to conduct an adequate inquiry after Gudinas complained about lead counsel; (5) the trial court erred in overruling Gudinas' objections and allowing graphic slides into evidence; (6) the trial court erred in allowing the State to bolster a witness's testimony with a hearsay statement; (7) the introduction of collateral evidence denied Gudinas his constitutional right to a fair trial; (8) the trial court erred in denying Gudinas' motion in limine; (9) the trial court erred in restricting Gudinas' presentation of evidence; (10) the jury's advisory sentence was unconstitutionally tainted by improper prosecutorial argument and improper instructions; (11) the trial court erred in finding the heinous, atrocious, or cruel aggravating circumstance; and (12) the trial court erred in its consideration of the mitigating evidence.

Gudinas v. State, 693 So.2d at 959 n. 8.

THE EVIDENTIARY HEARING FACTS

The Statement of the Facts contained in Gudinas' brief is

argumentative in all respects and is denied. The State relies on the following Statement of the Facts.

Fred Harris is Gudinas' first cousin, and has known Gudinas all his life. (R133-34). Harris testified about one incident, which took place when Gudinas was fourteen, in which he took LSD. (R135). Harris testified that Gudinas' mother was present when Gudinas was under the influence of LSD, and that his mother could have provided information about that incident. (R140). Harris only knows of Gudinas taking LSD one time. (R141). Harris does not remember talking to Gudinas' trial counsel or to any investigators. (R140-41). Harris does not remember if he was specifically asked, by Gudinas' attorneys, about LSD use, but he would have testified about it had he been asked. (R142).[2]

Ellen Evans is Gudinas' aunt – Gudinas' mother is Evans' younger sister. (R143). Ms. Evans lived close to Gudinas' parents for much of Gudinas' early life. (R143-46). Ms. Evans testified about Gudinas' upbringing, as well as providing testimony concerning his background and early life, including his mother's behavior during her pregnancy. (R146-53). Ms. Evans testified that Gudinas was placed in the Department of Youth Services, but was not treated by them. (R180). Ms. Evans testified that she was not contacted by Gudinas' trial counsel, and would have testified if

[2]This testimony appears inconsistent with Harris' testimony that he was not interviewed by trial counsel.

she had been so contacted. (R177).

James Upson is a Clinical Psychologist who was retained in this case in 1995, and testified as an expert in the field of Forensic Neuropsychology. (R181-82). Dr. Upson was provided with materials when he was originally hired in 1995, and, at that time, he conducted an evaluation of Gudinas. (R183). He has since been contacted again and provided additional background information, as well as having spoken with a clinical social worker and a neuropharmacologist. (R183-84). Dr. Upson testified that, at the time of trial in 1995, additional information and consultations would have been helpful to him, as would additional witnesses with respect to Gudinas' background and early life. (R184). However, Dr. Upson emphasized that the information he has received recently about Gudinas does not change his opinion about him. (R185).

Specifically, Dr. Upson testified that, both at the time of trial and at the time of his collateral proceeding testimony, his opinion was that Gudinas has no significant cognitive dysfunction, and that he never received any significant treatment. (R191). Dr. Upson was aware that Gudinas had been subjected to "severe child abuse" and had a "disruptive childhood". (R192). Gudinas' trial counsel provided Dr. Upson with everything that he asked for, and Dr. Upson felt that he had a good picture of Gudinas from the information he had before him. (R192-93). Dr. Upson was provided with a document reflecting alcohol abuse treatment that he did not

recall having previously seen, but emphasized that he was aware of Gudinas' alcohol use because Gudinas had told him about it. (R195). Dr. Upson agreed with the mental status report prepared by Dr. Danziger and, moreover, emphasized that he has not seen any information from anyone who actually observed Gudinas being abused. (R197). Dr. Upson emphasized that selection of data upon which he relies in formulating his opinion is his responsibility, and that defense counsel does not tell him how to do his job. (R201). Dr. Upson was retained well in advance of trial, and had adequate time to complete his work in this case. (R202). Specifically, Dr. Upson testified that he took into account the lack of treatment received by Gudinas, and the custodial nature of the placements within the Massachussetts Department of Youth Services. (R203-204). He testified about the inadequacy of that treatment, and, while he commented that a social worker could have conducted interviews, Dr. Upson's professional opinion that Gudinas was emotionally disturbed is not "watered down" because of any insufficiency of information. (R204-05).

Michael Irwin is an Attorney in private practice in Orlando, Florida, who represented Gudinas in the murder case at issue. (R207-208). Mr. Irwin had co-counsel, Robert Leblanc, and both lawyers worked on the case together in an effort to be familiar with both phases of the proceedings. (R211-212). Mr. Irwin testified that Gudinas specifically rejected an insanity defense,

but that he followed up upon the insanity issue, anyway. (R212-213). Gudinas refused to cooperate with an insanity defense, and, in any event, no expert ever "came close" to saying that Gudinas was insane. (R213-214).

Given the rejection of an insanity defense, and in light of the evidence and the statements available to law enforcement, the only theory possible for the defense was that "someone else did it". (R216). Mr. Irwin described that theory as being the only one available, and it was not very much. (R216). Moreover, any forensic evidence was potentially a double-edged sword, and Mr. Irwin did not want to bring out any more evidence of guilt. (R216).

Mr. Irwin sought out an expert in neuropharmacology, and succeeded in identifying a potential expert. (R217). However, the Orange County Attorney objected to the retainer requested by that expert, and Mr. Irwin was unable to find another such expert who would work for the funds available. (R219-20). Mr. Irwin testified that he was satisfied with the testimony of the medical examiner at trial, and emphasized that he wanted to avoid any DNA evidence for strategic reasons. (R221).[3] Mr. Irwin testified that Gudinas' sister wanted very badly to testify. (R232). Further, Mr. Irwin testified that no motion to interview jurors with respect to media exposure was filed because he was not aware of any such exposure in

[3]As Mr. Irwin pointed out, it would have been difficult for him to withhold an unfavorable DNA result since a notice of intent to participate in discovery had been filed. (R221).

the first place.

At the time of this trial, Mr. Irwin had tried some fifty felony jury trials, had observed other death penalty trials, had attended at least four death penalty seminars, and had available to him the materials from the public defender seminars with respect to capital defense. (R237-39). Mr. Irwin testified that, in reaching his strategic decision with respect to the DNA matter, it was important to determine whether or not the defendant was guilty. (R243). He considered the evidence against the defendant, and gave considerable weight to what Gudinas had told him -- Gudinas' statements to his counsel included an admission of guilt. (R243-44). For obvious reasons, this influenced Mr. Irwin's decision not to seek DNA typing.[4] In short, Mr. Irwin thought that DNA evidence would be devastating, and, moreover, he knew that the State had no DNA evidence of value. (R246; 248). Insanity was the best defense available to Gudinas, but he rejected such a theory. (R248). Moreover, Dr. Danziger informed Mr. Irwin that Gudinas was the most evil person Danziger had met, and commented that "I hope there aren't any other shallow graves out there." (R256). After receiving that information from Dr. Danziger, Mr. Irwin decided not to call him as a witness.

Mr. Irwin attempted to verify Gudinas' use of LSD (R259), but was unable to do so -- he felt strongly that it would not be wise

[4]Gudinas also confessed to Dr. Danziger. (R245).

to call Gudinas to the stand to testify about having taken LSD on the night of the murder. (R260). In any event, Gudinas' story changed throughout the course of the representation. (R260).

The defense team had substantial background information about Gudinas, and much of it was a double-edged sword. (R261). Specifically, Gudinas had been in almost every institution in Massachusetts, and none of those institutions had been able to help him. (R262). Mr. Irwin believed, as a practical matter, that Gudinas' history was a double-edged sword that he did not want to dwell on. (R262).

Gudinas' inculpatory statements were consistent with the forensic evidence. (R272). There was nothing available that would support an insanity defense. (R278). Moreover, a social worker would not be of much help, and, in any event, such testimony would dwell unnecessarily on Gudinas' past. (R288). Moreover, Mr. Irwin testified that he attempted to present Gudinas' placement history in a limited fashion because none of it had done any good. (R289). With respect to Fred Harris, Mr. Irwin felt that he was a hostile witness. (R291). In summary, Mr. Irwin testified that he vigorously pursued Gudinas' background as potential mitigation, and settled on the best available strategy given the facts. (R292).

Jonathan Lipman is a neuropharmacologist. (R296-97). Lipman is not a medical doctor, and is not licensed to treat patients. (R299). Lipman testified that, in his opinion, Gudinas suffers

from Attention Deficit Disorder, which was what Dr. Upson testified about. (R304; 308). Lipman testified that drug abuse is common among children with untreated Attention Deficit Disorder. (R315). Lipman testified that Gudinas might have been "turned around" with treatment, and that the crime might not have occurred had he been treated. (R331-32). Dr. Lipman however admitted that he relied upon Gudinas as his main source of information, and testified that Gudinas was not completely cooperative and would not discuss the offense. (R335).

Robert LeBlanc was co-counsel with Michael Irwin in connection with the Gudinas trial. (R343-44). Mr. LeBlanc testified that he spoke with Fred Harris and Ellen Evans, and that Fred Harris did not want to help because he was afraid of somehow being implicated in the offense. (R346). Mr. LeBlanc testified that much information was known about Gudinas, that they had the Department of Youth Services records, and that, at the time of the trial, he thought that the record of placement spoke for itself. (R347; 349). Mr. LeBlanc obtained background information about Gudinas, and knew about alcohol and drug use by him. (R351). Moreover, Gudinas' statements to Mr. LeBlanc concerning the crime were taken into account in determining what procedure to follow with the mental state experts. (R353). Gudinas wanted the defense theory to be that he was not there, but, based upon what Gudinas had told his counsel, such a theory could not ethically be pursued. (R357).

Janet Vogelsang is a Clinical Social Worker from Greenville, South Carolina. (R378). She has a Masters Degree in Social Work from the University of South Carolina. (R379). Vogelsang testified that psychologists are not trained to do "psychosocial assessments", and that "good" psychologists rely on social workers to do them. (R388). Vogelsang testified at length about her work, but, in the final analysis, testified that Gudinas has a personality disorder, is developmentally impaired or abused as a child, suffers from Attention Deficit Disorder, was a sexually disturbed child, and is "seriously emotionally disturbed." (R434-36).[5]

SUMMARY OF THE ARGUMENT

The collateral proceeding trial court did not abuse its discretion when it denied Gudinas' motion for a continuance of the evidentiary hearing. Likewise, the trial court did not abuse its discretion in refusing to order the release of certain evidence for DNA typing.

The collateral proceeding trial court properly denied Gudinas' "prosecutorial misconduct" claim without an evidentiary hearing. The claims contained in the brief before this Court were not raised in the Rule 3.850 motion, and, to the extent that this claim contains an ineffective assistance of counsel component, Gudinas

[5]This testimony directly tracks the nonstatutory mitigation found by the sentencing court. (R1407).

cannot demonstrate prejudice under *Strickland v. Washington*, even assuming that he can in some way establish that trial counsel's performance was deficient.

The penalty phase ineffective assistance of counsel claims are not a basis for relief because Gudinas cannot establish either deficient performance or prejudice.

Gudinas' ineffective assistance of guilt phase counsel claim is not a basis for relief because, as the circuit court found, Gudinas cannot establish either deficient performance or prejudice under *Strickland v. Washington*.

Gudinas' claim of a constitutional violation because of the enforcement of the Florida Bar Rule prohibiting his lawyers from interviewing jurors is procedurally barred, and, alternatively, is meritless.

Gudinas' claim that the collateral proceeding trial court erred in not granting him an evidentiary hearing on his claims concerning various aspects of the constitutionality of the Florida Death Penalty Act is meritless. These claims are purely legal in nature, and the trial court did not abuse its discretion in denying these claims without an evidentiary hearing. Moreover, the record does not establish that Gudinas even sought an evidentiary hearing on these claims. Alternatively and secondarily, this claim is not a basis for relief because the underlying legal claims are meritless.

The cumulative error claim contained in Gudinas' brief is procedurally barred, as the collateral proceeding trial court found. Moreover, there is no basis for relief because there is no "error" to "cumulate".

ARGUMENT

I. THE DENIAL OF A FULL AND FAIR HEARING CLAIM

On pages 12-22 of his brief, Gudinas complains that it was error for the collateral proceeding trial court to have denied his motion for a continuance of the evidentiary hearing. Specifically, Gudinas asserts that the trial court abused its discretion when it denied his December 1, 1999, motion for a continuance of the December 17, 1999 hearing, and when the trial court refused to order the release of certain evidence for DNA typing. Neither ruling was an abuse of discretion, *Kearse v. State*, 25 Fla. L. Weekly S507 (Fla. 2000), and the denial of relief should be affirmed in all respects for the following reasons.

With respect to the denial of the motion to continue, the trial court stated:

> THE COURT: He's filed a motion to release evidence for DNA testing, some blue jeans. And he's going to fax you a copy of that. He's just handed me a copy and handed Mr. Lerner a copy. Let me rule on the motion to continue.
>
> The Court will take judicial notice of the entire court file. This is the basic finding of facts contained in this court file. On June 16th, 1995, the defendant in this case,

Thomas Lee Gudinas, was sentenced to death by this court.

On April 10, 1997, his conviction and sentence of death was affirmed by the Florida Supreme Court. On February 18th, 1998, notice of appearance was filed by C.C.R. in this case. On June 9th, 1998, a so-called 3.850 was filed by C.C.R.

On June 25th, 1998, the time requirements of the rule that is 3.850 was tolled by the Florida Supreme Court until September 1st, 1998 because of amendments to the post conviction relief rules.

On November 13th, 1998, this court entered a scheduling order. The original deadline for public records was March 1st, 1999, and it was put off I think until May 3rd, 199 to have an amended 3.850 filed by that date. On February 16th, 1999, this court entered an order granting an extension of time.

The public records deadline was extended until April 12th, 1999. The 3.850 deadlines was extended until June 14th, 1999. And the reason I think those extensions were granted was because the public records request had not been completed.

On April 13th, 1999, I believe Mr. Aulisio of C.C.R. entered this case as lead counsel replacing the other lead counsel, Mrs. Settlemire.

On July 14th, 1999, a motion to stay pending review of an interlocutory appeal to the Florida Supreme Court was denied. On June 19th, the 3.850 – July 19th, rather, 1999, the amended 3.850 as filed. September 30th, 1999, a second amended 3.850 was filed. An on October 28th, 1999, we scheduled this evidentiary hearing or talked about it. It was originally scheduled for November the 10th, 1999. And at the request of C.C.R., it was moved to December 17th, 1999.

> I ask this rhetorical question: What is the purpose of a 3.850 motion, a post conviction relief motion? Thomas Lee Gudinas has had a full and fair opportunity to appeal his conviction and sentence to the Florida Supreme Court.
>
> After a lengthy review by the Florida Supreme Court, the judgment and sentence of the trial court was affirmed. Mr. Gudinas has had more than an ample and fair opportunity to file a 3.850, which he has filed.

(R103-105).

As the Court noted, present counsel entered this case in April of 1999, some eight months before the time the evidentiary hearing ultimately took place. (R104). Based upon the undisputed chronology of this case, there was no abuse of discretion on the part of the trial court when it refused to further delay a case that had already been continued several times at the request of the defense. Moreover, given the nature of the testimony from the "unprepared" social worker-witness[6], and the testimony of that witness that given time to "finish" her work in this case, she might well find information that would **weaken** her opinion (R432), it strains credulity to suggest that Gudinas is entitled to any relief based upon the claimed unpreparedness of this witness. In other words, the social worker's testimony was as good as it was likely to be, and the only result of a continuance would be further delay for no

[6]The social worker, Jan Vogelsang, is referred to in Gudinas' Second Amended Motion to Vacate, which was filed on September 30, 1999. (R1022). Presumably, she had been contacted some time before the date on the certificate of service attached to that pleading.

purpose.

Moreover, as the trial court found with respect to the social worker's testimony:

> The Defendant was given the opportunity to present the testimony of Jan Vogelsang, a licensed social worker, at the evidentiary hearing. Ms. Vogelsang did not present any information or opinion which differed from that already presented at the earlier proceedings. A review of the record demonstrates that Dr. Upson made a thorough review of the Defendant's placement records and was able to offer testimony regarding the treatment, or lack thereof. (S49-110). This evidence was sufficient to allow the jury and the Court to reach a reasonable conclusion regarding the effect of the Defendant's numerous childhood placements. Furthermore, the lack of any long-term treatment provided to the Defendant was presented in Dr. Upson's testimony. (S53-79, 84-85, 106).
>
> Based on the evidence at the penalty phase, the Court found that the Defendant had a personality disorder; that he was developmentally impaired as a child; that he was severely abused as a child; that he suffered from attention deficit disorder; that he was a sexually disturbed child; and that based upon his school, mental health, and placement histories, he was a very seriously emotionally disturbed young man. **The testimony of Ms. Vogelsang would have been cumulative as to these issues, and her testimony at the evidentiary hearing did not establish what further input she could have provided.** Thus, defense counsel was not deficient in failing to enlist a social worker to testify on the Defendant's behalf. In addition, the Court finds that Ms. Vogelsang's testimony would not have had any effect on the outcome of the earlier proceedings. The Defendant made no showing that he suffered any prejudice as a result of a social worker not testifying at the penalty phase.

(R1407). Because the social worker expressly adopted the above-referenced mitigation as what she would offer, the true state of the record is that, **at most**, her testimony would, as the court found, be merely cumulative to what was presented at the penalty

phase and found as mitigation by the sentencing court. Because that is so, the denial of the continuance is not an abuse of discretion, and, therefore, not a basis for reversal. Moreover, and perhaps even more significantly, the witness testified that documentation is the basis of her opinion, and the absence of any records indicating that Gudinas received treatment is what supports her opinion that he never received the treatment that, in her opinion, he needed. (R437). Because that is the state of the record, it makes no sense to suggest that it was error to deny the motion to continue because the only thing that could happen to change the social worker's opinion would be the discovery of records showing that Gudinas **did** receive treatment, a fact that would wholly undercut the basis of the testimony.[7] In other words, Ms. Vogelsang's opinion was as favorable as it was going to be, and it could only become less favorable through the discovery of additional documents.[8] There is no basis for relief of any sort.

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[7]On page 13 of his brief, Gudinas complains that his Massachusetts youth services case worker was unable to come to Florida to testify. Based upon the averments in Gudinas' brief, it appears that Ms. Vogelsang could have interviewed him and related the substance of that interview as a part of her expert opinion. In fact, the case worker (Al Ruiz) is on Ms. Vogelsang's list of people to interview. (R1332). One can only speculate why such an interview never took place.

[8]Despite the hyperbole of Gudinas' brief, the mental state expert who testified at both his trial and the evidentiary hearing, Dr. Upson, did not change his opinion based upon anything presented at the evidentiary hearing. (R191-199). There was no abuse of discretion in denying the motion to continue.

To the extent that Gudinas complains that the court should have granted him a continuance because he had not yet been able to have a PET scan conducted, the record is clear that the trial court expressly stated that it would order Gudinas transported for the purpose of conducting a PET scan so long as the Department of Corrections was given notice of the request to allow consideration of security issues. (R106). Gudinas never followed up by requesting a transport order, and the court should not be placed in error based upon Gudinas' inaction.[9] This "claim" has no factual or legal basis.

The second component of this claim is Gudinas' argument that it was error for the collateral proceeding trial court to deny his motion for DNA typing. Insofar as the substantive claim relating to the denial of the request for DNA typing is concerned, the collateral proceeding trial court correctly followed this Court's *Zeigler v. State,* 654 So.2d 1162 (Fla. 1995) decision, and denied the motion.

In *Zeigler,* this Court stated:

> Zeigler argues on appeal that his due process rights were violated when the trial court denied his request for DNA testing because the tests might reveal exculpatory evidence establishing his innocence. Asserting that DNA typing was unavailable to him at trial or before the deadline to file a challenge to his conviction, Zeigler

[9]As the trial court pointed out, no medical doctor had suggested that Gudinas undergo a PET scan, which is a medical test. (R106). Further, there was no showing that the PET scan, as Gudinas apparently sought to use it, could meet the *Frye* standard.

> argues that his request was not time barred. Zeigler contends that it was reasonable for him to wait to request DNA testing until DNA evidence was given scientific sanction and standards were established regarding the admissibility of the specific DNA typing technique that he requested be used in his case.
>
> Zeigler asserts that the DNA testing method that would most likely be used in his case is the polymerase chain reaction method (the PCR method), a method that is preferred when the DNA sample is very small or very degraded. Contending that the PCR method was just coming into use when *Andrews* was decided and that *Andrews* ruled solely on the admissibility of the restriction fragment length polymorphism method (the RFLP method) of DNA testing, Zeigler asserts that he was therefore justified in waiting until now to request DNA testing.
>
> We agree with the trial court that Zeigler's DNA claim is procedurally barred. Assuming for the sake of argument that the more sophisticated PCR method was not in use when *Andrews* was decided, Zeigler concedes that the method was available in 1991. Therefore, he should have raised the claim in his pending motion for postconviction relief in order to avoid the procedural bar of successive motions. Instead, he waited in excess of two years before first raising the claim in 1994. *See Adams v. State*, 543 So.2d 1244 (Fla. 1989) (motions for postconviction relief based on newly discovered evidence must be raised within two years of such discovery).

Zeigler v. State, 654 So.2d 1162, 1164 (Fla. 1995). In *Gudinas*, the procedural bar (or time bar) is even more striking -- the method of DNA typing sought by Gudinas (the PCR method) was available, and in fact was used in his case. (R799-800). Moreover, to the extent that Gudinas' current claim relates to untested samples, his defense attorney testified that he was well aware of the existence of DNA typing, but that he did not want to use it because Gudinas had admitted guilt to his attorney. (R244). Defense counsel can hardly be criticized for not helping to convict his client. The trial

court properly denied Gudinas' motion for DNA typing.

To the extent that the DNA claim includes a "newly discovered evidence" component, the collateral proceeding trial court correctly found that neither the evidence at issue nor the potential DNA test results would qualify as such because both were known and available at the time of trial. (R1409). To the extent that this DNA claim includes an ineffective assistance of counsel component, the collateral proceeding trial court found:

> ... Mr. Irwin testified that he thought the forensic evidence was a double-edged sword, and that he did not want to bring out any more forensic evidence which would have implicated the Defendant. (E88). Mr. Irwin testified that he did not feel that it would have been worth the risk even to attempt to have a confidential analysis of the evidence. (E93).
>
> Furthermore, at the evidentiary hearing, both defense counsel testified that their decisions as to what trial strategy would be and whether they should pursue the testing of the physical evidence for DNA were influenced by the statements that the Defendant made to them. Mr. Irwin recalled the Defendant making the statement that Michelle McGrath's body was heavy as it was being pulled into the alleyway. (E117). Mr. LeBlanc testified that the Defendant made the statement that he recalled waking up in the presence of Ms. McGrath's body. (E235). This information must be considered in evaluating the strategic decisions of defense counsel.
>
> The Court finds that defense counsel made a strategic decision to avoid further testing of the physical evidence which could have been damaging to the Defendant's case. In light of the evidence implicating the Defendant, the decision of defense counsel was certainly reasonable.

(R1396). This claim is not a basis for relief, and the collateral proceeding trial court's denial of relief should be affirmed in all

respects.

II. THE PROSECUTORIAL MISCONDUCT CLAIM

On pages 22-35 of his brief, Gudinas argues that the trial court erroneously denied "this claim" of ineffective assistance of counsel without an evidentiary hearing. The claim at issue is Claim IV of the petition as amended[10], and the collateral proceeding trial court's denial of that claim without an evidentiary hearing was proper because even if Gudinas can establish the deficient performance prong of *Strickland*, he cannot demonstrate prejudice. The ineffective assistance of counsel component of this claim is reviewed *de novo*. *Stephens v. State*, 748 So.2d 1028 (Fla. 1999). This claim is not a basis for relief for the reasons set out below.

The first component of Gudinas' brief is his complaint about what he describes as a "Golden Rule" argument. *Initial Brief*, at 22-23. This argument is not contained anywhere in Gudinas' Rule 3.850 motion (R1035-37), nor was it orally raised at the *Huff* hearing.[11] (R47-48). Instead, this claim is raised for the first time on appeal from the denial of Rule 3.850 relief, a strategy which, under long-settled Florida law, is not allowed. *Doyle v. State*, 526 So.2d 909, 911 (Fla. 1988). Gudinas is, literally,

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[10]This claim, as pleaded by Gudinas, is found at R1035-38.

[11]Gudinas' present counsel was also his attorney at the *Huff* hearing, as well as being the attorney who prepared the Rule 3.850 motion. (R54-80, 537, 867, 1063). Unlike some cases, this one does not present the circumstance of multiple defense counsel, each of whom approaches the case in a slightly different fashion.

asking this Court to place Judge Perry in error for not conducting an evidentiary hearing on a claim that was never pleaded in his Court. That result would be absurd, and this Court should not encourage such a practice. The "Golden Rule" claim should be denied.

Moreover, the argument set out on pages 24-26 (which is based on the argument found at ST305 of the trial record), was neither pleaded in Gudinas' Rule 3.850 motion nor argued at the *Huff* hearing. As with the "Golden Rule" claim , this claim is raised for the first time on appeal from the denial of relief -- that is improper under settled law. *Doyle v. State*, 526 So.2d at 911.

On page 26 of his brief, Gudinas argues that counsel was ineffective for not objecting to the State's argument with respect to the "extreme emotional disturbance" mitigator.[12] The collateral proceeding trial court denied relief on this claim:

> ...the Defendant's ineffective assistance contention stemming from defense counsel's failure to object to the State's characterization of the extreme mental or emotional disturbance mitigating factor is rejected because the Defendant has not made any claim of prejudice. Furthermore, these comments would not have altered the jury's sentencing recommendation, and the court accepted the presence of this mitigating circumstance in the sentencing order.

(R1411). In light of the collateral proceeding trial court's finding that, under the facts of this case, the comment at issue

[12]This claim, unlike the previous components of this issue, was contained in the Rule 3.850 motion. (R1037).

would not have affected the outcome, considering that the sentencing court **found** the extreme mental or emotional disturbance mitigator, and in light of Gudinas' failure to even allege prejudice, this claim was properly denied without an evidentiary hearing. Because the mental mitigator was found by the court, there can be no prejudice, even if one assumes that it was somehow deficient performance not to object to the prosecutor's argument.[13] There is no need to remand this case for an evidentiary hearing on this claim, and the collateral proceeding trial court should be affirmed in all respects.

On page 28 of his brief, Gudinas complains that the prosecutor referred to him as a "monster" and an "evil human being." With respect to the reference to Gudinas as a monster, the collateral proceeding trial court stated:

> ... defense counsel's failure to object to these characterizations [as a maniac and a monster] and to seek curative instructions was deficient performance. Nonetheless, the Defendant has not alleged how the outcome of his trial would have been different had counsel properly objected to the State's comments. After hearing evidence of the vicious nature of the crime and the numerous injuries inflicted upon the victim, in addition to the overwhelming evidence of the Defendant's guilt, there is no reasonable possibility that these comments affected the jury's recommendation of death. Furthermore, defense counsel responded to these

[13]Under the facts of this case, which, at best, are horrible, it makes no sense to argue that the jury's sentencing recommendation was affected in any way by the prosecutor's argument at issue here. In any event, the jury was properly instructed (R332), and it is axiomatic that juries are presumed to follow their instructions.

> characterizations of the Defendant during closing arguments. (ST318, 325). Because the Defendant cannot show prejudice under *Strickland*, this claim was rejected without an evidentiary hearing. *See Strickland,* 466 U.S. at 687.

(R1410). As the court found, a reference to Gudinas as a monster cannot have affected the result, assuming that it was actually deficient performance to allow that comment to pass without objection.[14] Moreover, this Court described the injuries inflicted on Gudinas' victim in the following terms:

> Dr. Hegert, the medical examiner, testified that the cause of death was a brain hemorrhage resulting from blunt force injuries to the head, probably inflicted by a stomping-type blow from a boot. He found severe cerebral edema and determined that Michelle died thirty to sixty minutes after the fatal injury, the forceful blow to the head. Dr. Hegert also found defensive wounds on one of Michelle's hands and two broken sections of a stick, one inserted two inches into her vagina and the other inserted three inches into the area near her rectum. In addition, Dr. Hegert also determined that Michelle had been vaginally and anally penetrated by something other than the sticks, as indicated by trauma to her cervix. He also found that Michelle had a blood alcohol content of .17% at the time of her death. While Michelle might have lived longer without that amount of alcohol in her system, Dr. Hegert testified that the head injury would have been fatal anyway.

Gudinas v. State, 693 So.2d at 957. Against that factual backdrop, a marginal reference to the defendant by the prosecutor cannot have had any effect on the jury's recommendation. There is no basis for an evidentiary hearing, nor is there any basis for relief.

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[14]An objection to this comment would not have resulted in a mistrial, and a curative instruction would have served no real purpose.

On pages 29-35 of his brief, Gudinas again argues that he should have been afforded an evidentiary hearing on claims that were never before the circuit court.[15] Florida law is well-settled that it is improper to raise claims for the first time on appeal from the denial of Rule 3.850 relief. That well-settled rule compels denial of this claim. The circuit court should be affirmed in all respects.

Alternatively and secondarily, without waiving any procedural defense asserted above, none of the "instances" of "misconduct" argued by Gudinas are a basis for relief on ineffective assistance of counsel grounds because thee is no prejudice -- in other words, the jury would have recommended death with or without the complained-of comments. The only relief Gudinas has requested is a remand for an evidentiary hearing. Such is unnecessary and inappropriate, even if the clear procedural bars are overlooked, because there was no prejudice as *Strickland* requires. All relief should be denied.

III. THE PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS[16]

On pages 35-77 of his brief, Gudinas raises a multi-part claim that the collateral proceeding trial court erred in denying relief

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[15]These claims are that the prosecution argued that he had a "pathological hatred of women", and that the argument concerning the heinous, atrocious, or cruel aggravator was improper.

[16]The penalty phase ineffective assistance of counsel claims are found in claim II of the motion. (R826).

on his penalty phase ineffective assistance of counsel claims. This claim is reviewed *de novo*. *Stephens v. State, supra*.

THE LEGAL STANDARD

A claim of ineffective assistance of counsel is governed by the two-part *Strickland v. Washington* standard, which the Florida Supreme Court has summarized as follows:

> A claim of ineffective assistance of counsel, to be considered meritorious, must include two general components. First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Downs v. State*, 453 So.2d 1102 (Fla. 1984). **A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.**

Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986). (emphasis added). As *Maxwell* makes clear, the *Strickland* test is in the conjunctive, and, unless the petitioner establishes both deficient performance and prejudice, the claim fails. Stated differently:

> In order to establish ineffective assistance of counsel, a defendant must prove two elements:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced

> the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Rutherford v. State*, 727 So.2d 216 (Fla. 1998); *Rose v. State*, 675 So.2d 567 (Fla. 1996); *Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985); *Johnson v. Wainwright*, 463 So.2d 207 (Fla. 1985). In determining deficiency, "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052; *see also Cherry v. State*, 659 So.2d 1069, 1073 (Fla. 1995). Moreover, counsel's deficiency prejudices defendant only when the defendant is deprived of a "fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

Shere v. State, 742 So.2d 215, 218-19 (Fla. 1999).

The analysis of a claim of ineffective assistance of counsel begins with the presumption that counsel's performance was constitutionally adequate. As the Eleventh Circuit Court of Appeals has stated, the infrequency of successful ineffectiveness claims is the result of

> deliberate policy decisions the Supreme Court has made mandating that "[j]udicial scrutiny of counsel's performance must be highly deferential," and prohibiting "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance." *Strickland*, 466 U.S. at 689-90, 104 S.Ct. at 2065-66. The Supreme Court has instructed us to begin any ineffective assistance inquiry with "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at

> 2065; *accord, e.g., Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992) ("We also should always presume strongly that counsel's performance was reasonable and adequate ...."). Because constitutionally acceptable performance is not narrowly defined, but instead encompasses a "wide range," a petitioner seeking to rebut the strong presumption of effectiveness bears a difficult burden. As we have explained:
>
> > The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.... We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.
>
> *White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir.1992).

Waters v. Thomas, 46 F.3d 1506, 1511-12 (11th Cir. 1995). With respect to presentation of mitigating evidence at the penalty phase of a capital trial, the *Waters* Court stated:

> we have never held that counsel must present all available mitigating circumstance evidence in general, or all mental illness mitigating circumstance evidence in particular, in order to render effective assistance of counsel. To the contrary, the Supreme Court and this Court in a number of cases have held counsel's performance to be constitutionally sufficient when no mitigating circumstance evidence at all was introduced, even though such evidence, including some relating to the defendant's mental illness or impairment, was available. *E.g., Darden v. Wainwright*, 477 U.S. 168, 184-87, 106 S.Ct. 2464, 2473-74, 91 L.Ed.2d 144 (1986); *Stevens v. Zant*, 968 F.2d 1076, 1082-83 (11th Cir. 1992), *cert. denied*, --- U.S. ----, 113 S.Ct. 1306, 122 L.Ed.2d 695 (1993); *Francis v. Dugger*, 908 F.2d 696, 702-04 (11th Cir. 1990), *cert. denied*, 500 U.S. 910, 111 S.Ct. 1696, 114 L.Ed.2d 90 (1991); *Stewart v. Dugger*, 877 F.2d 851, 855-56 (11th Cir. 1989), *cert. denied*, 495 U.S. 962, 110 S.Ct. 2575, 109 L.Ed.2d 757 (1990). In an even larger

> number of cases we have upheld the sufficiency of counsel's performance in circumstances, such as these, where counsel presented evidence in mitigation but not all available evidence, and where some of the omitted evidence concerned the defendant's mental illness or impairment. *E.g., Jones v. Dugger*, 928 F.2d 1020, 1028 (11th Cir.), *cert. denied*, 502 U.S. 875, 112 S.Ct. 216, 116 L.Ed.2d 174 (1991); *Card v. Dugger*, 911 F.2d 1494, 1508, 1511-14 (11th Cir. 1990), *cert. denied*, --- U.S. ----, 114 S.Ct. 121, 126 L.Ed.2d 86 (1993); *Bertolotti v. Dugger*, 883 F.2d 1503, 1515-19 (11th Cir. 1989), *cert. denied*, 497 U.S. 1031, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990); *Daugherty v. Dugger*, 839 F.2d 1426, 1431-32 (11th Cir.), *cert. denied*, 488 U.S. 871, 109 S.Ct. 187, 102 L.Ed.2d 156 (1988); *Clark v. Dugger*, 834 F.2d 1561, 1566-68 (11th Cir. 1987), *cert. denied*, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988); *Foster v. Dugger*, 823 F.2d 402 (11th Cir. 1987), *cert. denied*, 487 U.S. 1241, 108 S.Ct. 2915, 101 L.Ed.2d 946 (1988). Our decisions are inconsistent with any notion that counsel must present all available mitigating circumstance evidence, or all available mental illness or impairment evidence, in order to render effective assistance of counsel at the sentence stage. *See, e.g., Stevens v. Zant,* 968 F.2d at 1082 ("[T]rial counsel's failure to present mitigating evidence is not *per se* ineffective assistance of counsel.").

Waters v. Thomas, 46 F.3d at 1511. *See also, Brown v. State,* 755 So.2d 616 (Fla. 2000).

THE INDIVIDUAL CLAIMS

The first ineffective assistance of counsel claim contained in Gudinas' brief is his claim that trial counsel "performed deficiently" by not calling Ellen Evans to testify about Gudinas' background and early life. With respect to Ms. Evans' testimony, the court made the following findings:

> Ellan Evans further testified as to the following matters during the evidentiary hearing: that the Defendant's parents abused drugs and alcohol; that his mother used drugs and alcohol while pregnant with him; that he was

> beaten by his mother, his mother's boyfriends, and his father; that she walked in on the Defendant's father while he was in bed with another man; that his father wore women's undergarments; that the Massachusetts Division of Youth Services simply shuffled children around without treating them; and that the Defendant stated that he was sodomized while in a Massachusetts Division of Youth Services institution. In addition, Ms. Evans testified regarding the hand burning evidence and about the incident where the Defendant's father made him stand in the snow after he wet the bed.
>
> The Defendant alleges that defense counsel was ineffective for failing to adequately investigate the information that Ms. Evans could provide and also for not calling her as a witness during the sentencing phase. However, Mr. LeBlanc testified that his notes reveal that he spoke with Ellan Evans, the mother of Dwayne and Fred Harris, on November 16, 1994, while investigating the case. (E243). His notes state that Ms. Evans had good insights on how the Defendant was as a child. (E243-44). Moreover, Mr. LeBlanc testified that the information she could have provided would have been one of the things defense counsel considered in deciding what type of strategy to develop for the penalty phase of the case. (E246).
>
> In light of Mr. LeBlanc's testimony, the Defendant cannot satisfy either prong of the ineffective assistance analysis. However, even if Ms. Evans' testimony had been presented during the sentencing phase of the Defendant's trial, it is clear that very little would have been added to the sentencing presentation of defense counsel. The evidence of the abuse by the Defendant's father and the fact that the Defendant's father cross-dressed were presented. There was also substantial evidence presented as to the difficulty of the Defendant's childhood and his lack of treatment provided by the Massachusetts Youth Services. Any additional evidence that could have been provided by Ms. Evans would not have altered the outcome.

(R1405-06). Under settled law, decisions as to which witnesses should be called are among the quintessential strategic decisions which are virtually unchallengable. *Strickland, supra.* The "trial strategy" status of such a decision is unassailable when, as here,

counsel **knew** about and interviewed the witness and **then** made a decision not to present the testimony. *See, Jones v. State*, 528 So.2d 1171 (Fla. 1988). Unless **no** reasonable lawyer would have made the decision not to present the witness, counsel cannot have been ineffective. *Waters, supra.* The collateral proceeding court's denial of relief is correct as a matter of law, and should be affirmed.[17]

The second component of Gudinas' penalty phase ineffectiveness claim is his claim that counsel should have hired a "licensed social worker" to testify at the penalty phase proceedings. In denying relief on this claim, the collateral proceeding trial court found as follows:

> The Defendant also claims that defense counsel was ineffective for failing to hire a social worker. The Defendant states that a social worker would have been able to do an in-depth psychosocial assessment which would have provided the information needed to explain to the jury the impact of the 105 childhood placements. In addition, the Defendant claims that the social worker would have been able to assist the jury in understanding the difference between the treatment that the Defendant received and what he should have received. Mr. Irwin testified at the evidentiary hearing that he did not hire a social worker because he did not see where they could be of any help, and because as a matter of strategy he did not want to present all of the Defendant's placement history and

[17]As discussed above, the legal conclusion as to the effectiveness of counsel is reviewed *de novo.* The subsidiary factual findings by the circuit court are reviewed for clear error. *Cade v. Haley,* 222 F.3d 1298 (11th Cir. 2000).

background. (E160-61). Mr. LeBlanc testified that in light of his experience he would hire a social worker in the same circumstance today. (E219)

The Defendant was given the opportunity to present the testimony of Jan Vogelsang, a licensed social worker, at the evidentiary hearing. Ms. Vogelsang did not present any information or opinion which differed from that already presented at the earlier proceedings. A review of the record demonstrates that Dr. Upson made a thorough review of the Defendant's placement records and was able to offer testimony regarding the treatment, or lack thereof. (S49-110) This evidence was sufficient to allow the jury and the Court to reach a reasonable conclusion regarding the effect of the Defendant's numerous childhood placements. Furthermore, the lack of any long-term treatment provided to the Defendant was presented in Dr. Upson's testimony. (S53-79, 84-85, 106)

Based on the evidence at the penalty phase, the Court found that the Defendant had a personality disorder; that he was developmentally impaired as a child; that he was severely abused as a child; that the suffered from attention deficit disorder; that he was a sexually disturbed child; and that based upon his school, mental health, and placement histories, he was a very seriously emotionally disturbed young man. The testimony of Ms. Vogelsang would have been cumulative as to these issues, and her testimony at the evidentiary hearing did not establish what further input she could have provided. Thus, defense counsel was not deficient in failing to enlist a social worker to testify on the Defendant's behalf. In addition, the Court finds that Ms. Vogelsang's testimony would not have had any effect on the outcome of the earlier proceedings. The Defendant made no showing that he suffered any prejudice as a result of a social worker not testifying at the penalty phase.

(R1407).

The factual findings of the circuit court are not clearly erroneous, and establish that counsel was not ineffective for "failing" to hire a social worker. Gudinas did not establish what a social worker could have brought to the defense presentation beyond evidence that was cumulative. Because that is the state of the record, Gudinas failed to carry his burden of proving deficient performance and prejudice -- both components must be established, and Gudinas proved neither. To the extent that Gudinas complains that the Court's finding that the evidence was cumulative was pre-ordained by the refusal to grant a continuance, the record refutes that claim. As set out in Claim I, above, the social worker testified that her opinion was essentially as favorable to Gudinas as it was going to be, and that further investigation could well undercut her testimony.[18] The collateral proceeding court's denial of relief on this claim should be affirmed in all respects. *See, e.g., Waters, supra.*

Moreover, in addition to the foregoing, Gudinas completely failed to prove that a social worker could have been found at the time of trial, and that the testimony presented by Ms. Vogelsang could have been presented at that time. This is a failure of proof that precludes relief on this claim and is an additional,

[18]To the extent that Gudinas asserts, on page 48 of his brief, that Ms. Vogelsang "did not have time" to obtain certain records, the record does not support that claim.

independently adequate, basis for affirmance. *See, Horsley v. Alabama,* 45 F.3d 1486 (11th Cir. 1995); *Elledge v. Dugger*, 823 F.2d 1439, *modified in unrelated part,* 833 F.2d 250 (11th Cir. 1987).

The next component of Gudinas' ineffective assistance of penalty phase counsel claim is his assertion that counsel were ineffective for failing to hire a neuropharmacologist. In the proceedings in the Circuit Court, the "failure to hire a neuropharmacologist" claim was pleaded in the context of a claim of ineffective assistance at the **guilt** phase of Gudinas' trial, not in the current penalty phase context. Because that is so, Gudinas seeks to place the trial court in error based upon a claim that was never fairly presented to it. However, despite that deficiency in pleading, which is a sufficient basis for this Court to affirm the denial of relief, the Circuit Court made explicit findings with respect to the guilt phase ineffective assistance of counsel claim, which overlap into the penalty phase issues:

> The Defendant also challenges defense counsel's decision to not seek the evaluation of a neuropharmacologist. Actually, defense counsel attempted to hire Dr. Siegel, a neuropharmacologist, but his billing rates were objected to by the County Attorney. Defense counsel could not find another neuropharmacologist whose rates were within the county guidelines. Since a neuropharmacologist did not testify at trial, the Defendant was given the opportunity at the evidentiary hearing to establish his claim.
>
> At the evidentiary hearing, the Defendant offered the testimony of Dr. Joseph Lipman, a neuropharmachologist. Neuropharmacology is

the field of expertise dealing with the effects of drugs on nerves, the brain, and on behavior. Dr. Lipman reviewed the extensive documentation of the Defendant's past; he interviewed the Defendant; he reviewed some of the previous testimony; he spoke with Dr. Upson and the social worker hired for purposes of the evidentiary hearing; and he conducted tests on the Defendant.

Dr. Lipman testified that the Defendant's treatment records and the Defendant's statements led him to conclude that the Defendant had neurodevelopmental problems and attention deficit. (E175) The doctor stated that people with attention deficit can have abnormal reactions to drugs. The doctor then recounted the Defendant's history of drug and alcohol abuse which began at age ten. The Defendant used marijuana, LSD, hallucinogens, mushrooms, hasheesh, heroine, and cocaine. It was alleged that the Defendant drank alcohol until unconscious approximately once a week at age 14; that by age 15, this was increased to twice per week; and that around age sixteen, he was drinking and using drugs until unconscious three times per week. (E190, 193). Dr. Lipman further testified that the Defendant's reports of chronic headaches and excruciating pain while using cocaine may be an indication of a neurovascular disorder. (E191-92).

As for the night of the crime, Dr. Lipman testified that the Defendant reported substantial consumption of alcohol, in addition to the use of ecstasy and LSD. The doctor admitted that he did not understand the Defendant's violent reaction to LSD, but reported that it could have just been an idiosyncratic reaction. (E202). On cross examination the doctor admitted that the only evidence that he had that the Defendant used LSD on the night of the crime was the Defendant's confirmation, the statements of the Defendant to Dr. Danziger and defense counsel, and the statement of Fred Harris. (R208).

Finally, the doctor testified that with proper drug treatment, real nurses, real doctors, real counselors, special education teachers, and in an environment without abuse and where he could not act out, there is the possibility that treatment could have turned the Defendant around.

After a careful review of the testimony provided by Dr. Lipton, [sic] the Court finds that the outcome of the earlier proceedings would have been unchanged as a result of his testimony. Dr. Upson conducted an extensive psychological evaluation on the Defendant and testified as to the results of the testing at the sentencing phase. (S55-67). Dr. Upson testified that the Defendant's records indicated that several professionals felt that the Defendant had attention deficit disorder. (S62) Dr. Upson noted that although there was no confirmed diagnosis or medication prescribed, that the attention deficit "was clearly there and observed." (S62) Dr. Upson also testified that the Defendant's performance on several tests was consistent with attentional-type difficulties and impulsivity, and on one test the Defendant fell in the impaired range of attention. (S63)

During the sentencing phase, Dr. Upson testified that he had ruled out any neuropsychological impairment, and at the evidentiary hearing, the doctor stated that there was no sign of any cognitive dysfunction. (S66, E63) Thus, Dr. Lipman's testimony that attention deficit is caused by underlying neuronal damage and that the defendant has a developmental brain problem would have been inconsistent with Dr. Upson's testimony. In light of the extensive testing conducted by Dr. Upson, his testimony is more credible than that offered by Dr. Lipman.

As to the night of the crime, although Dr. Lipman accepted the Defendant's statement as to his use of LSD, the defense attorneys attempted to substantiate this statement, but were unable to do so. Fred Harris apparently

> gave conflicting information on this issue, and defense counsel decided that they could not risk calling the Defendant as a witness. Defense counsel thoroughly considered the possible methods of introducing testimony as to the Defendant's LSD use on the night of the crime and could find no viable means of doing so. Thus, there was no ineffective assistance as to this issue.
>
> Accordingly, the only new evidence that would have been provided by a neuropharmacologist such as Dr. Lipman was the Defendant's extensive history of drug and alcohol abuse and an explanation of the effect of drugs and alcohol on a person who suffered from attention deficit. Mr. LeBlanc testified that he was aware that the Defendant's background included a lot [of] alcohol and drug use. (E223) This extensive history of substance abuse may have actually been damaging to the Defendant, and would not have altered the outcome of the jury's verdict. Moreover, the testimony that the use of drugs and alcohol by a person with attention deficit may have produced uncontrollable behavior is unpersuasive. The evidence clearly established that prior to the attack on Michele McGrath, the Defendant was attempting to conceal himself when stalking Rachele Smith, and he fled when Ms. Smith honked the horn. This evidence shows that the Defendant was able to control himself. As such, the Court finds that the Defendant cannot demonstrate any prejudice which occurred as a result of the failure of defense counsel to present the testimony of a neuropharmacologist.

(R1399-1401).

When this claim is stripped of its pretensions, all that remains is a bare claim that current counsel would have presented the penalty phase differently that did trial counsel. However, that is not the standard, *Waters v. Thomas, supra* -- Gudinas has failed

to establish deficient performance or prejudice, and the denial of relief should be affirmed in all respects.

To the extent that further discussion of this claim is necessary, the linchpin of Gudinas' claim is that counsel were ineffective for not trying to "find another neuropharmacologist who would work within the budget or appeal this decision to Judge Perry when the case was transferred to him." *Initial Brief*, at 56. The true facts, which Gudinas ignores, are that counsel tried unsuccessfully to find a neuropharmacologist whom they could afford. (R1399). (217-20). Because counsel did what Gudinas claims they did not do (which is the foundation of this claim), the fact that counsel were unable to find a cheaper expert does not implicate *Strickland's* deficient performance component.[19] Further, as the Circuit Court found, Gudinas cannot establish the prejudice component of *Strickland*, either. Because the subsidiary factual findings as to the lack of prejudice are not clearly erroneous, there is no basis for reversal of the denial of relief. In any event, as the court found (with respect to the penalty phase ineffective assistance of counsel claim):

> As to the testimony of Dr. Lipman, it was primarily attributable to discussions the doctor had with the Defendant. Defense counsel stated that they did not think it was wise to call the Defendant to the stand based on the information they had regarding the crime and the Defendant's statement to them. The Defendant did not

[19]In other words, counsel is not constitutionally ineffective because he fails to accomplish some undertaking.

> present evidence as to any other means through which defense counsel could have presented evidence regarding the Defendant's substance abuse. Furthermore, as discussed above, any evidence on this issue probably would have been damaging to the Defendant. The Defendant has failed to show that the performance of defense counsel was deficient, or that any prejudice resulted.

(R1408-09). The denial of relief should be affirmed in all respects.[20]

The next component of Gudinas' penalty phase ineffective assistance of counsel claim, which is set out on pages 58-60 of his brief, is also focused on the neuropharmacologist's testimony at the evidentiary hearing. That issue has already been briefed at pages 39-43, above. The same responses and defenses apply to this sub-claim, which is equally meritless. However, the references to the neuropharmacologist's testimony set out in connection with this claim suggest that the testimony of that witness exceeded the bounds of his expertise, and reached into the area of psychiatry, a field in which he was not qualified as an expert. Because that is so, such testimony would have been properly subject to objection, and would not, as Gudinas suggests, have been heard by the jury.

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[20]To the extent that this claim can be construed as a claim that counsel was rendered ineffective by some outside factor, such a claim should have been raised on direct appeal, and is procedurally barred here because it was not. To the extent that this claim can be construed as a due process-based claim, that claim is also procedurally barred because it could have been raised on direct appeal. In any event, Gudinas has no **right** to a neuropharmacologist, and cannot identify any due process he did not receive. *See, Clisby v. Jones,* 960 F.2d 925 (11th Cir. 1992) *en banc*.

The next component of Gudina's ineffective assistance of counsel claim is that "counsel failed to investigate [defendant's] institutional background". The circuit court's extensive findings on this sub-claim are set out below:

> The Defendant has raised numerous claims alleging that he received ineffective assistance of counsel during the penalty phase of his trial. Several of these claims relate to the alleged failure of his attorneys to provide Dr. Upson, the defense's mental health expert, with information on his background. Specifically, the Defendant contends that Dr. Upson was not given specific details of the approximately 105 placement facilities which cared for the Defendant between the ages of twelve and seventeen; that the doctor did not have sufficient evidence to support his opinion that the Defendant had not received long-term residential care; and that an insufficient investigation was conducted to allow Dr. Upson to make an adequate assessment of the Defendant's condition.
>
> However, Dr. Upson was provided with documents from the placement facilities that cared for the Defendant for a ten-year period beginning when the Defendant was seven years of age. (S68) In addition, Dr. Upson testified at trial that he received a very thorough set of documents and that it is somewhat unusual to have so much information on a person. (S78) Dr. Upson selected thirty reports on the Defendant out of the numerous documents he received, and then presented certain portions of these records during sentencing to demonstrate the Defendant's long-standing behavioral and mental problems. The records discussed aggression; sexual problems; acting out; poor peer relationships; inner conflict; paranoia; delayed maturation; anxiety regarding sexuality; unmet primitive needs; and abuse. Based on the information he received, Dr. Upson testified during sentencing that the Defendant was a very

seriously disturbed young man prior to the crime and at the time of the crime. (S77)

The Defendant did not offer any significant evidence during the evidentiary hearing which trial counsel should have provided to Dr. Upson for sentencing. Dr. Upson testified that further evidence would have been helpful in filling in gaps in his testimony. (E57) But, the Defendant was unable to establish that such evidence was available at the time of the original proceedings or even available now. Dr. Upson testified that nothing has been uncovered since the trial which was new and unusual and that he thought had been missed at the original proceedings. (E66) The doctor also stated that virtually all of the records used in preparation for the evidentiary hearing had been reviewed previously. (E67)

In fact, the doctor testified that although the information provided to him for the evidentiary hearing did make him feel more comfortable with his earlier analysis, it did not change his opinion from what he had testified to at the penalty phase. (E57) Dr. Upson stated that he still supported the following conclusions; that the Defendant did not have any significant cognitive dysfunction; that he was severely disturbed and extremely frightened; that he was caught up in a perpetual cycle of being punished; that at least two instances of pretty severe abuse had occurred; and that he had a very disruptive childhood. (E63) Finally, Dr. Upson testified that he felt that he had a good picture of what sort of person the Defendant was in 1995 based on his testing and the records that he reviewed. (E65) Thus, the Defendant's claim that trial counsel was ineffective for not providing further details on the Defendant's placements is without merit.

The Defendant's next ineffective assistance claim is that defense counsel failed to provide sufficient information to Dr. Upson to

> allow him to determine whether the Defendant had ever received long-term treatment during his various placements. Dr. Upson testified during sentencing that he found no indication of long-term treatment. (S55, 78, 106) Dr. Upson supported his conclusion with the fact that the records included repeated recommendations for long-term treatment, which he did not think would be included if this type of treatment was attempted. (S55, 84-85) Furthermore, Dr. Upson stated that if long-term treatment was attempted, he would expect records detailing the Defendant's status, which were not present. (S79, 106)
>
> On cross-examination, the State sought to show that the placement records were unclear as to whether the Defendant had ever received any long-term residential treatment. However, the doctor consistently stated that, based on the records, he did not believe that the Defendant received any long-term treatment. During the evidentiary hearing, the Defendant did not demonstrate what further evidence was available to support the doctor's opinion regarding the lack of long-term treatment, nor was there any showing of prejudice necessary to establish ineffective assistance.

(R1401-03). Those findings of fact are not clearly erroneous, and compel the denial of relief. Given that the mental state expert who testified at trial did not change his opinion based upon any recently-provided evidence, there is simply no basis for relief because there can be no prejudice.[21] The most that is argued in Gudinas' brief is his continuing quarrel with the result of his trial. However, his evident dissatisfaction does not provide a

[21]There was no deficiency in counsel's performance, either. The mental state expert, Dr. Upson, testified that Gudinas was "very seriously disturbed". (R1402).

legal basis for relief. The trial court should be affirmed in all respects.

On pages 68-70 of his brief, Gudinas argues that counsel was ineffective for not investigating and presenting evidence of his "mental and emotional immaturity". The Circuit Court denied relief on this claim:

> The Defendant's claim that defense counsel failed to develop the age mitigating factor with Dr. Upson was addressed by the Supreme Court, and therefore it is procedurally barred. On direct appeal, the Defendant argued that the trial court should have given more weight to this evidence. This issue was disposed of by the Supreme Court. *See Gudinas*, 693 So.2d at 967. The Defendant cannot raise the issue again under the guise of an ineffective assistance claim. Nonetheless, the Supreme Court pointed out that, "the fact that a murderer is twenty years of age, without more, is not significant." *Id.* at 962 (quoting *Garcia v. State,* 492 So.2d 360, 367 (Fla. 1986), *cert. denied,* 479 U.S. 1022 (1986). The Defendant has not stated what information other than his mere age would allow him to overcome this hurdle. For these reasons, this claim is rejected.

(R1403). The collateral proceeding trial court correctly applied Florida law, and refused to allow relitigation of a procedurally barred claim under the guise of a claim of ineffective assistance of counsel. *Medina v. State*, 573 So.2d 293 (Fla. 1990); *Kight v. Dugger*, 574 So.2d 1066 (Fla. 1990). In addition to the procedural bar to review of this claim, it has no factual support, as the Circuit Court found. In his brief, Gudinas asserts that the testimony of his neuoropharmacologist and social worker support a claim of "mental and emotional immaturity" -- that is not an accurate characterization of that testimony. As to the

neuropharmacologist, Lipman, he is not a psychologist, and is not qualified to testify about "mental and emotional immaturity". That is not within the scope of his expertise, and any "testing" done by Lipman was not for the purpose of expressing an opinion on psychological issues. This is not competent (or even legal) evidence on this issue. Likewise, Ms. Vogelsang's testimony that Gudinas had reading and arithmetic skills at the fifth and sixth grade level does not equate to "mental and emotional immaturity" -- it means he is not good at reading and arithmetic. Those facts do not affect the application and consideration of the statutory age mitigator. The Circuit Court properly denied relief. To the extent that further discussion of this claim is necessary, this Court stated, on direct appeal, that:

> Although Gudinas is certainly correct that he had a troubling past and had always been small for his age, there was no evidence presented that he was unable to take responsibility for his acts and appreciate the consequences thereof at the time of the murders. We find substantial, competent evidence exists in the record to support the trial court's finding that Gudinas was mentally and emotionally mature enough that his age should not be considered as a mitigator.

Gudinas v. State, 693 So.2d at 967.

On pages 71-74 of his brief, Gudinas complains that the Circuit Court should have granted relief on his claim that trial counsel did not provide sufficient evidence to Dr. O'Brien. In the order denying relief, the Circuit Court stated:

> The next argument is that Dr. O'Brien, who testified as to the possible effects of the

Defendant's consumption of alcohol and drugs, was not provided with the testimony of the witnesses regarding the Defendant's level of impairment on the night the crimes were committed. In actuality, there was very little information presented during the trial with respect to this issue because the three witnesses who attended the club with the Defendant only saw him intermittently throughout the night. Frank Wrigley testified that the Defendant looked like he had a "buzz-on," and that at some point during the evening he left the club to smoke a joint with the Defendant. (T580, 583) Todd Gates didn't recall the Defendant leaving the club to smoke a joint, but he did see the Defendant mingling and drinking twice at the club. (T609, 618) Fred Harris also saw the Defendant drinking a few times at the club. (T637, 661) Dwayne Harris was the only witness who testified that the Defendant appeared "pretty drunk." (T699)

In addition, the following exchange which occurred between defense counsel and Dr. O'Brien illustrates that defense counsel informed Dr. O'Brien of the testimony of the witnesses who had observed the Defendant:

> Mr. LeBlanc: Were you also provided with some information as far as testimony of witnesses who observed Mr. Gudinas on the evening of May 23rd, and the early morning of May 24th, as to his consumption of alcohol?
>
> Dr. O'Brien: It's my understanding the four individuals testified that he was intoxicated, one his cousin [in] particular, the attempted victim, and, I believe, at least two other people said that he showed signs of intoxication on that evening.

(S118-119)

Although during cross-examination the doctor

> admitted that he had not reviewed the exact testimony of the witnesses, there was no further evidence presented at trial which would have provided a better foundation for his opinion. (S133) Thus, there is no basis for this claim, and it is rejected.
>
> The Defendant alleges that if Dr. O'Brien had spoken with Fred and Dwayne Harris, he would have learned the following: (1) that the Defendant drank 3 to 4 beers at the apartment and 5 or 6 more at the club; (2) that the Defendant smoked marijuana before going to the club and in the truck on the way to the club; (3) that Fred Harris learned that someone gave the Defendant acid while the Defendant was in the club; (4) that the Defendant was drunk and slurring his words; and (5) that the Defendant had a beer in each hand while dancing in the club. The Defendant also claims that Fred Harris and other witnesses knew that the Defendant had previously suffered from blackouts.
>
> At the evidentiary hearing, the Defendant failed to present any evidence in support of his allegations as to items (1), (3), (4), and (5). These claims are therefore rejected. As to item (2), there was testimony at trial that the Defendant used marijuana on the night of the crime, but no further evidence was presented on this issue during the evidentiary hearing. On the subject of the Defendant's prior drug use, Fred Harris did testify during the evidentiary hearing as to one incident in which the Defendant used LSD and exhibited bizarre behavior. (E6-10) But, since no evidence has ever been presented to establish that the Defendant used LSD on the night of the crime, this testimony as to the earlier LSD episode would not have had any impact on the earlier proceedings.

(R1404-05). The factual findings contained therein are not clearly erroneous, and compel the denial of relief in all respects. The most that this claim has shown is that present counsel would handle

the case differently, a fact which has no bearing on this Court's disposition of this issue. Gudinas has not demonstrated deficient performance or prejudice, and all relief should be denied. *Strickland, supra.*

On pages 74-76 of his brief, Gudinas complains that the Circuit Court should have granted relief on his claim that it was ineffective assistance of counsel to call his sister, Michele, to testify at the penalty phase of his capital trial. The Court denied relief on this claim, stating:

> The Defendant also claims defense counsel was ineffective for calling the Defendant's sister, Michele Gudinas, as a witness during the penalty phase. The Defendant claims that his error allowed the jury to hear about an incident where the Defendant allegedly sexually assaulted her. (S151-52) Because this information had already reached the jury during the State's cross-examination of Dr. Upson, this claim can be rejected. (S102) The Defendant also claims that since Michele Gudinas was called, defense counsel should have developed all the mitigating evidence within her knowledge. However, the only specific example the Defendant provides is that Michele Gudinas could have testified to an incident where his father beat him and threw him against a wall. The jury heard about the Defendant's father making him stand in the snow because he urinated in his bed; that his father punished the Defendant by burning his hand on an electric stove; that the Defendant's father smacked the Defendant across the face after finding him by the water while on a family camping trip; and that the Defendant's father was a cross-dresser. (S148-50, 176-80, 183-84) Thus, it appears that the jury had sufficient information regarding the Defendant's difficult childhood. Counsel's failure to present one more beating incident

> is not deficient performance, and the Defendant has not demonstrated prejudice. As such, this claim can be rejected.

(R1406). Gudinas has not demonstrated either deficient performance or prejudice with respect to this claim, nor has he demonstrated that no reasonable lawyer would have presented the testimony of the defendant's sister. *Waters, supra.* In any event, given the facts of this case, the fact that Gudinas had attempted to sexually assault his sister at some time in the past would have had no effect on the jury's recommended sentence.[22] There is no ineffective assistance of counsel, and no basis for relief.

IV. THE INEFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL CLAIM[23]

On pages 78-84 of his brief, Gudinas argues that he received ineffective assistance of counsel at the guilt phase of his capital trial. As was the case with the penalty phase ineffectiveness claims, the Circuit Court's legal conclusion is reviewed *de novo*, while the subsidiary factual findings are reviewed for clear error. For the reasons set out below, the denial of relief should be affirmed in all respects.

The first sub-claim contained in Gudinas' brief is a claim that trial counsel were ineffective for "fail[ing] to test the semen and saliva found on the victim for DNA." The Circuit Court

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[22]In fact, the sister's willingness to testify despite this incident is helpful, rather than harmful, to Gudinas.

[23]This claim is Claim I in the Motion as amended. (R812).

made extensive findings of fact with respect to this issue:

> As to the Defendant's claim that his defense attorneys were ineffective for failing to have physical evidence tested, the Defendant did not produce any evidence as to what the results of such testing would have been or how such testing would have impacted the earlier proceedings. Moreover, Mr. Irwin testified that he thought the forensic evidence was a double-edged sword, and that he did not want to bring out any more forensic evidence which would have implicated the Defendant. (E88) Mr. Irwin testified that he did not feel that it would have bene worth the risk even to attempt to have a confidential analysis of the evidence. (E93-93)
>
> Furthermore, at the evidentiary hearing, both defense counsel testified that their decisions as to what their trial strategy would be and whether they should pursue the testing of the physical evidence for DNA were influenced by the statements that the Defendant made to them. Mr. Irwin recalled the Defendant making the statement that Michele McGrath's body was heavy as ti was being pulled into the alleyway. (E117) Mr. LeBlanc testified that the Defendant made the statement that he recalled waking up in the presence of Ms. McGrath's body. (E3235) This information must be considered in evaluating the strategic decisions of defense counsel.
>
> The Court finds that defense counsel made a strategic decision to avoid further testing of the physical evidence which could have been damaging to the Defendant's case. In light of the evidence implicating the Defendant, the decision of defense counsel was certainly reasonable. Further, the Defendant did not make any showing of how the testing of the evidence would have resulted in any different outcome at trial or at sentencing. Thus, the Defendant is not entitled to any relief.
>
> On a similar note, the Defendant has made two other claims alleging ineffective assistance

> of counsel with respect to DNA evidence which can be resolved in conjunction with the instant claim. The Defendant was given the opportunity to present evidence as to these issues at the evidentiary hearing. First, the Defendant alleged that it was ineffective assistance for defense counsel to agree not to argue the lack of DNA evidence if the State did not use any DNA evidence at trial. Mr. Irwin testified that, after considering the statements that the Defendant made to him, he didn't want to do anything to move the DNA testing process along. (E119-120) By agreeing not to argue the DNA issue, Mr. Irwin was attempting to prevent further DNA testing by the State. This was a logical, strategic decision under the circumstances, and it cannot be the basis for an ineffective assistance claim as counsel was not deficient.
>
> Secondly, the Defendant asserts that defense counsel was ineffective for failing to have the semen and saliva samples found on the victim tested for DNA. As discussed above, because the Defendant's statements put him at the scene, Mr. Irwin avoided any DNA testing of this type of forensic evidence. Interestingly, the Defendant presented no evidence as to what the results of such testing would have been, nor what effect they would have had on the proceedings. Counsel's actions in attempting to avoid further incriminating evidence was not deficient.

(R1396-97). As those findings make clear, trial counsel had clearly developed and well-articulated reasons for **not** seeking DNA typing -- chief among those reasons were Gudinas' inculpatory statements to them. (R243, 244, 272, 274, 279, 358, 361). Counsel's decision to avoid generating inculpatory evidence does not amount to deficient performance, nor did it result in prejudice to the defendant.

To the extent that further discussion of this claim is necessary, the state of the record is that Gudinas had made statements to his counsel which were highly inculpatory, and, when considered in light of the known evidence and facts, led counsel to determine that it would be "devastating" to the defense to seek DNA typing. (R246). Gudinas has not shown that no reasonable lawyer would reach that conclusion, and, because that is so, cannot prevail on his ineffective assistance of counsel claim. *Waters, supra.*

The next component of Gudinas' guilt phase ineffectiveness claim is his claim that counsel failed to adequately cross-examine Jane Brand and Frank Wrigley. With respect to this sub-claim, the Circuit Court held:

> The Defendant alleges that defense counsel failed to adequately cross examine Jane Brand, who was called by the State to establish the Defendant's presence at the scene of the crime. Ms. Brand testified that she briefly saw a person on the steps leading into the school where she worked. (T292) This school is adjacent to the alley in which the victim's body was found. Ms. Brand also testified that she recognized the Defendant as the person she saw on the steps after seeing him on television one month prior to the trial. (T302-03) The record clearly refutes the Defendant's claim that defense counsel was ineffective in cross examining Ms. Brand. During dross examination, defense counsel was able to elicit testimony from Ms. brand that the individual on the steps had his back o her and that the entire encounter lasted only one to two minutes. (T303) It was also established that Ms. Brand did not get a good look at the person's face and that she was unable to

> provide sufficient information to allow an artist to complete a composite of the suspect. (T303-04) Further, when the person spoke, the witness did not notice an accent. (T305) The jury had already heard during the direct examination that the person Ms. Brand saw stood with his back to her and appeared to be rearranging his clothing, and that Ms. Brand turned away to give him privacy. (T294) Thus, defense counsel was not ineffective for failing to revisit this issue. With respect to the identification after seeing the Defendant on television, defense counsel pointed out that Ms. Brand had seen composites of the suspect prior to the television broadcast of the Defendant. (T306) From the record, it is apparent that defense counsel's cross examination was not deficient. Moreover, the Defendant cannot demonstrate prejudice.

(R1393-94). The resolution of these claims by the Circuit Court is correct, and should not be disturbed. The most that Gudinas has done is suggest that present counsel would have handled the cross-examination of these witnesses differently. That is not the standard by which ineffective assistance of counsel claims are evaluated, and there is no basis for relief.

On pages 82-84 of his brief, Gudinas asserts that counsel was ineffective for failing to object to the introduction of a bloody shirt and to certain testimony given by Frank Wrigley. With respect to this sub-claim, the Circuit Court stated:

> The Defendant claims that defense counsel was ineffective for failing to object to the introduction into evidence of a tee shirt found in Defendant's apartment. (T707) This argument is based on the allegation that it wasn't proven that he was wearing the shirt on the night of the incident, and the blood on

> the shirt was never established to be his nor the victim's. In fact, Dwayne Harris testified that the Defendant was wearing the shirt with the blood stains when he returned to the apartment on the morning following the murder. (T685) Dwayne Harris also testified that the shirt was taken into evidence by the police. (T692) The Defendant is correct that the testing of the blood stains was inconclusive. However, the Defendant does not explain how this would result in the evidence being irrelevant. The fact that a murder suspect returned home a few hours after the murder with blood stained clothes is certainly relevant evidence. Thus, the Defendant has not established that defense counsel's performance was deficient for failing to object to the admission of the tee shirt, nor does he demonstrate prejudice.
>
> The Defendant's next argument is that defense counsel did not make a timely objection and move for a mistrial immediately after Frank Wrigley testified that he would call the police if Fred Harris thought the Defendant had committed the crime. (T579) After Mr. Wrigley's testimony was completed, defense counsel moved for a mistrial. (T600) Defense counsel and the State presented arguments outside the presence of the jury, and the motion for a mistrial was denied. (T600-004) Instead, a curative instruction was given. (T606) The failure of defense counsel to object contemporaneously did not result in any prejudice to the Defendant because the motion for a mistrial was heard despite the lack of a contemporaneous objection. In addition, Mr. Wrigley's comment was addressed by a curative instruction. The comment did not affect the fairness and reliability of the proceeding or the outcome.

(R1397-98). Those findings establish that this sub-claim has no legal basis. The Circuit Court's finding that trial counsel was not ineffective should not be disturbed.

V. THE JUROR INTERVIEW CLAIM

On pages 84-85 of his brief, Gudinas argues that he was entitled to an evidentiary hearing on his claim that the "rules prohibiting his lawyers from interviewing jurors" are unconstitutional. This claim is procedurally barred under well-settled Florida law, as the collateral proceeding trial court found. That ruling is supported by the record, and should not be disturbed.

The Circuit Court held that this claim is procedurally barred because it could have been but was not raised on direct appeal to the Florida Supreme Court. *See, Ragsdale v. State,* 720 So.2d 203,205 (Fla. 1998); *see also, Arbelaez v. State*, 25 Fla. L. Weekly S586 (Fla. 2000); *Kearse v. State*, 25 Fla. L. Weekly S507 (Fla. 2000). That finding is correct.

To the extent that further discussion of this claim is necessary, all of the "facts" which could have provided arguable support for this claim were known at the time of the direct appeal. (R1417). Further, as the Circuit Court pointed out, Gudinas did not meet his burden of pleading because he did not allege, under oath, factual allegations which, if true, would require the granting of a new trial. (R1417). The trial court's ruling is correct and should not be disturbed.

VI. THE CONSTITUTIONALITY OF THE

DEATH PENALTY ACT CLAIM[24]

On pages 86-95 of his brief, Gudinas raises three separate claims concerning the constitutionality of the death penalty act. Specifically, he claims that the collateral proceeding trial court erred in not granting an evidentiary hearing on his claims concerning the "during the commission of a felony jury instruction", the jury instruction on the weighing of aggravation and mitigation, and the jury instruction on the heinous, atrocious, or cruel aggravator. Given that these claims are purely legal in nature, the collateral proceeding trial court did not abuse its discretion in deciding these claims without an evidentiary hearing.[25] Moreover, the record does not establish that Gudinas asked for an evidentiary hearing on these claims -- in fact, at the *Huff* hearing, counsel stated that Gudinas would rely on what was contained in the motion as to these claims (Claims VIII, IX, and X). It is, a best, disingenuous to represent to the Circuit Court that no hearing is requested, and then seek to place that court in error on appeal because no hearing was held. At best, this is a

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[24]These claims are Claims VIII, IX and X of the Motion as amended.

[25]Because these claims are purely legal in nature, no evidentiary development of them is possible. Because Gudinas has framed this issue as a denial of an evidentiary hearing issue, the impossibility of such a hearing, and the absence of an abuse of discretion in its denial, is dispositive of the claim. While that is a sufficient basis for denial of relief, the State has set out other bases for denial, as well.

claim of invited error.

To the extent that further discussion of the claims contained within this issue is necessary, the various substantive claims are meritless for the following reasons. As to the "automatic aggravator" claim, the trial court stated:

> This claim could have been raised on direct appeal, and since it was not, it is procedurally barred. The Defendant makes no claim of ineffective assistance as to this issue.

(R1414). That result is in accord with settled Florida law, and should not be disturbed. Alternatively and secondarily, this claim lacks merit. *Lowenfeld v. Phelps,* 484 U.S. 231 (1988). *Hudson v. State,* 708 So.2d 256, 262 (Fla. 1998)(rejecting argument that the murder in the course of a felony aggravator is an invalid, automatic aggravator); *Sireci v. State,* 25 Fla. Law Weekly S673 (Fla. 2000); *Johnson v. State,* 660 So.2d 637, 647 (Fla. 1995) (finding no merit to claim that instruction on murder in the course of a felony acts as automatic aggravator).

The second component of Gudinas' claim is his claim that the jury instruction on the weighing of the aggravators and mitigators "shifts the burden of proof". As the trial court found, this claim is procedurally barred because it could have been but was not raised on direct appeal to the Florida Supreme Court. (R1415). Alternatively, as the trial court also found, this claim is meritless. *SanMartin v. State*, 705 So.2d 1337, 1350 Fla. 1997); *Johnson v. State*, 660 So.2d 637, 647 (Fla. 1995).

The final component of this claim is Gudinas' claim concerning the jury instruction given on the heinous, atrocious, or cruel aggravator. This Court found this claim procedurally barred on direct appeal, and the Circuit Court properly applied a procedural bar to relitigation of this claim on collateral attack. (R1414-15). Further, with respect to the fact-based component of this claim, this Court stated:

> Over the course of twelve pages, the trial court exhaustively laid out the aggravating circumstances, mitigating circumstances, supporting facts, and relevant testimony in its sentencing order. Regarding HAC, the trial court devoted three pages to Dr. Hegert's testimony detailing the injuries to Michelle McGrath. The testimony supports the State's theory that many if not all of the injuries, were inflicted before a blow to the head caused unconsciousness and eventually death. We believe the evidence is broad enough that a trier of fact could reasonably infer that the victim was conscious during the sexual batteries and other injuries that were inflicted upon her before her death. Therefore, we agree with the State that the trial court did not abuse its discretion in finding that the HAC aggravator was proven beyond a reasonable doubt. As in *Wuornos v. State*, 644 So.2d 1012, 1019 (Fla. 1994), we affirm this finding since "the State's theory ... prevailed, is supported by the facts, and has been proven beyond a reasonable doubt."

Gudinas v. State, 693 So.2d at 966. There is no basis for relief.

VII. THE CUMULATIVE ERROR CLAIM

On pages 96-97 of his brief, Gudinas raises a claim of "cumulative error". The trial court found this claim procedurally barred, stating:

> This claim is procedurally barred because it could have been, but was not, raised at trial or on direct appeal. Even if the claim was not procedurally barred, the Florida Supreme Court has provided that where allegations

> of individual error are found to be without merit, a cumulative error argument based thereon must also fail. *See Bryan v. State,* 24 Fla. L. Weekly S516 (Fla. October 26, 1999).

(R1418). That disposition is correct under settled law, and should not be disturbed. *Occhicone v. State,* 768 So.2d 1037 (Fla. 2000) ("any claim that cumulative errors committed at trial prejudiced the outcome of his case must be raised on direct appeal; therefore, Occhicone is procedurally barred from raising this claim here."); *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1323-24 (1994); *Asay v. State,* 769 So.2d 974 (Fla. 2000) ("we affirm the trial court's denial of claim XX regarding cumulative error because we have considered the individual alleged errors and find them to be without merit."); *Downs v. State*, 740 So.2d 506, 509 n. 5 (Fla. 1999).

CONCLUSION

Wherefore, based upon the foregoing, the State respectfully submits that the denial of post-conviction relief should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of the Appellee, has been furnished by U.S. Mail to Julius J. Aulisio and Leslie Anne Scalley, Capital Collateral Regional Counsel - Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, on this _____ day of March, 2001.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 Point.

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