

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00954

LOWER TRIBUNAL NO. CR 94-7132

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THOMAS GUDINAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

---

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

---

INITIAL BRIEF OF THE APPELLANT

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**PRELIMINARY STATEMENT**

This is the appeal of the circuit court's denial of Thomas Gudinas' motion for post conviction relief which was brought pursuant to the Florida Rule of Criminal Procedure 3.850.

Citations shall be as follows: The record on appeal concerning the original court trial proceedings shall be referred to as "R \_\_\_\_" followed by the appropriate volume and page numbers. The record on appeal concerning the original court penalty phase proceedings shall be referred to as "ST \_\_\_\_" followed by the appropriate volume and page numbers. The postconviction record on appeal will be referred to by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

**REQUEST FOR ORAL ARGUMENT**

Thomas Gudinas has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Thomas Gudinas, through counsel, accordingly urges this Court to permit oral argument.

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### **STATEMENT OF CASE**

On July 15, 1994, an Orange County grand jury indicted Tommy Gudinas of first degree murder, two counts of sexual battery, attempted sexual battery, and attempted burglary with an assault (V8, 441-43). The crimes occurred on May 24, 1994 (V8, 441-43). Mr. Gudinas was tried by a jury May 1-4, 1995, and found guilty of all counts (V8, 538-542). After a penalty phase conducted on May 8-10, 1995, the jury recommended death by a vote of ten to two (R. V5, 562). On June 16, 1995, the trial court sentenced Tommy Gudinas to death (V8, 444-66).

On direct appeal, this Court affirmed Tommy Gudinas' convictions and sentences. Gudinas v. State, 693 So. 2d 953 (Fla. 1997). The United States Supreme Court denied certiorari on October 20, 1997. Gudinas v. State, 522 U.S. 936 (1997).

### **STATEMENT OF FACTS**

Tommy Gudinas filed a shell post-conviction motion on June 5, 1998, before his one-year date, in order to toll Federal time periods. On May 18, 1999, Tommy Gudinas filed a motion directing the state to release certain physical evidence for DNA testing (V9, 776-78). The court denied that motion on June 23, 1999 (V9, 799-802). On July 19, 1999, Tommy Gudinas filed an amended 3.850 motion for postconviction relief (V9-V10, 808-68). The state filed its response on August 18, 1999 (V10, 869-994). Tommy Gudinas filed a second amended motion for postconviction relief on

September 30, 1999 (V10-V11, 1002-64). On October 14, 1999, Tommy Gudinas filed a motion for continuance because his expert, Jan Vogelsang, could not be prepared to testify until February, 2000 (V11, 1065-69). On October 26, 1999, the court denied the motion and scheduled the evidentiary hearing for December 17, 1999 (V11, 1071-75). Tommy Gudinas filed a motion for continuance on December 1, 1999 (V12, 1325-29). In that motion, counsel stated they needed a continuance because: they had another two-day evidentiary hearing scheduled the same week as Mr. Gudinas', Jan Vogelsang could not complete her work on the case before early summer of 2000, as a result of Ms. Vogelsang's preliminary findings, Dr. Lipman recommended a pet scan which could not be conducted before December 17, 1999, and counsel did not have time to prepare for the hearing (V12, 1325-29). The court denied the motion on December 3, 1999 (V12, 1337-38). Tommy Gudinas filed a motion to release physical evidence for DNA testing on December 6, 1999, and the court reserved ruling on the motion on December 7, 1999 (V12, 1352-53).

Despite counsel's assertions that neither they nor their witnesses were prepared and needed more time to ensure an adequate evidentiary hearing, the court held a limited evidentiary hearing on December 17, 1999 (V6 131-32, V7, 391-92). Before testimony, Tommy Gudinas renewed his motion to continue the evidentiary hearing (V7, 131). The court denied the motion (V7, 132).

Fred Harris, Tommy Gudinas' cousin, testified that Tommy had

an abnormally violent reaction to LSD when he was fourteen years old (V6, 134-39).

Ellen Evans, Tommy's aunt, testified that she lived with or near Tommy Gudinas' family during the majority of Tommy's childhood (V6, 143-44). Tommy's mother was a chronic drug user and abused drugs and alcohol throughout her pregnancy with Tommy and during his childhood (V6, 145, 148, 151, 155, 160, 164, 169). Tommy's father also abused drugs and alcohol throughout Tommy's early childhood (V6, 148, 155). Both Tommy's mother and father, as well as his mother's boyfriends, brutally abused Tommy (V6, 149, 152, 153, 154, 161, 162, 164, 170). Tommy's parents were sexually deviant, participating in cross dressing, homosexual activity, and prostitution (V6, 155, 156-58, 166). Tommy's mother was hatefully verbally abusive and facilitated many of his problems and placements with the Massachusetts Department of Youth Services (DYS) (V6, 170-72).

Tommy was an abnormally small child and suffered feet problems which affected his movement (V6, 175-76). Because of this, Tommy was ridiculed by other children (V6, 175-76). Both Ellen Evans and Fred Harris testified that Tommy has blackouts (V6, 139, 171-72).

Ellen Evans testified that Tommy was raped while in DYS custody (V6, 173-74). Mrs. Evans also grew up in the DYS system, and testified that children in the system must learn to fight to survive (V6, 175-76).

Dr. Upson, the psychologist who testified at Tommy Gudinas' penalty phase, testified that trial counsel could have provided him with more information to substantiate and strengthen his opinions (V6, 186). Dr. Upson testified that much of his penalty phase testimony was based on assumptions, and he needed more information to substantiate those assumptions (V6, 186). Dr. Upson also testified that a social worker would have been helpful during the penalty phase, because social workers are trained in family dynamics and development and may be able to gather more relevant data (V6, 205).

Trial counsel Michael Irwin testified that he tried one penalty phase before representing Tommy Gudinas (V6, 208). He and co-counsel, Robert LeBlanc, who had no penalty phase experience, shared all duties of representation (V6, 211-12). Tommy Gudinas did not want an insanity defense (V6, 212-13). Irwin testified that Tommy told him the victim's body was heavy to drag, so Irwin decided to avoid investigating forensic evidence at the crime scene because it might inculcate Tommy (V6, 245-48). Counsel attempted to hire a neuropharmacologist who could confirm Tommy's drug use through hair testing (V6, 216-20). In an off-the-record meeting in chambers, the county attorney and the court determined the neuropharmacologist's fees were excessive, and counsel could not hire that neuropharmacologist (V6, 216-20). Counsel failed to find another neuropharmacologist who would work for the approved fees

(V6, 220). Irwin testified his guilt phase strategy was to suggest reasonable doubt and, to do so, he introduced into evidence Detective Griffin's testimony and four composite drawings (V6, 220-27). Irwin was flabbergasted at trial when Jane Brand, a state witness who previously could not identify Tommy Gudinas, identified Tommy Gudinas at trial as the person she saw near the crime scene (V6, 227-29). Irwin did not consider Jane Brand's surprising new identification a discovery violation, so he did not object or move for a mistrial (V6, 228). Irwin thought Dr. O'Brien should have heard witness testimony or read witness' transcribed testimony, but could not remember why Dr. O'Brien did neither (V6, 230-31). Irwin did not think he was responsible for directing expert witnesses in their evaluations, "and I certainly wouldn't have time to hover over every single expert and tell them specifically everything they need to do" (V6, 231). In another in chambers off-the-record conversation, Judge Dawson and the county attorney objected to a mitigation specialist's fees, so counsel hired a general investigator (V6, 232-33).

Irwin felt obligated to let Tommy's sister testify during the penalty phase (V6, 233). Irwin failed to object to the prosecutor's misconduct during the penalty phase closing arguments because he thought the court told him to save objections until the prosecutor finished (V6, 234). He felt constrained throughout the trial because Court TV broadcast the proceedings live (V6, 236).



Every time counsel needed to confer with Tommy, they pressed a kill switch, otherwise the conversation was broadcast live nationwide (V6, 236). Though he found Court TV a distraction and would have preferred not to have them at the trial, counsel did not attempt to eliminate or minimize the distraction (V6, 271-72). Tommy did not always cooperate with the mental health experts (V6, 249-50). Irwin chose not to use two mental health experts, Dr. Appel and Dr. Danziger, because he felt they were not sympathetic (V6, 249, 256, 280-81). Irwin felt Tommy's background was a double edged sword, and chose not to "dwell" on it during the penalty phase (V6, 261-62). However, counsel did present Tommy's background as mitigation (V6, 284-85, 289). Irwin investigated Tommy's background by reading documents the Public Defender's Office procured (V6, 262). He did not think a social worker could help with mitigation (V6, 288). Irwin believed the state of Massachusetts gave Tommy psychiatric and psychological help (V6, 288-89). Irwin did not know if he spoke to Ellen Evans and did not ask Fred Harris about mitigation because he felt Fred was a hostile witness (V6, 290-91).

Dr. Lipman, a neuropharmacologist, testified at the evidentiary hearing. Dr. Lipman testified that Tommy Gudinas has a documented and confirmed history of neurodevelopmental problems, serious poly-drug abuse history, and adverse and idiosyncratic reactions to LSD (V7, 303, 316-18, 324-25). Tommy suffers an attention deficit disorder which rendered him pathologically

impulsive and minimally educable (V7, 304). Tommy's attention deficit disorder, depraved social environment, and poly drug abuse combined to impact his neurological maturation (V7, 312-15). Children with attention deficit disorders are driven to drug use as self-medication (V7, 315, 327, 331). Though diagnosed numerous times, Tommy was never treated for his attention disorder or any other problems (V7, 332).

Robert LeBlanc, Tommy Gudinas' other trial attorney, also testified at the evidentiary hearing. Tommy's was Mr. LeBlanc's first capital case, and he deferred most decisions to Irwin (V7, 344). Though he was responsible for the penalty phase, Mr. LeBlanc did not remember ever speaking to penalty phase witness Dr. O'Brien, and he believed that Irwin spoke with Dr. O'Brien (V7, 345, 370). Mr. LeBlanc spoke to Ellen Evans and noted she had good mitigation information, but he could not remember why they did not present her testimony (V7, 346-47, 370-71, 374). Because this was Mr. LeBlanc's first case, he did not know how helpful a social worker could be (V7, 347). Mr. LeBlanc testified that, if he had Tommy's case now, he would hire a social worker (V7, 347, 372). He also testified that counsel should have contacted someone who could explain how the Massachusetts Department of Youth Services (DYS) handled Tommy Gudinas (V7, 349). Mr. LeBlanc testified that Tommy told him he remembered waking up near the victim (V7, 363). Irwin made the decision not to pursue forensic evidence (V7, 366).

Jeffery Lee Ashton, one of Tommy's prosecutors, testified that he would not have agreed to allow Tommy to plea guilty and receive a life sentence if he waived the 25 year parole provision (V7, 375-77).

Jan Vogelsang, a licenced social worker, testified at the evidentiary hearing. Ms. Vogelsang testified she did not have time to complete her work on Tommy Gudinas' case, and Tommy Gudinas again moved to continue the evidentiary hearing (V7, 391-2). The court denied the motion (V7, 392). As a result, Ms. Vogelsang could only testify to provisional opinions and initial impressions. (V7, 392).

Ms. Vogelsang testified that both of Tommy's parents were raised in very violent and alcoholic families and began abusing drugs and alcohol at an early age (V7, 400-401). Tommy's mother, Karen Goldthwaite, drank alcohol while she was pregnant with Tommy (V7, 402). Tommy's parents fought ferociously and separated frequently (V7, 402-03). Tommy's home was "that kind of chaos and that kind of unpredictability [which] produces a great deal of anxiety and fear" (V7, 405). On both sides of the family, there was incest or inappropriate sexual behavior across two or three generations (V7, 402-3, 427-8).

Ms. Vogelsang explained that Tommy Gudinas' records document his escalating fear, anxiety, depression and, correspondingly, his escalating discontrol. Ms. Vogelsang opined that because there was

no medical explanation, trauma in Tommy's home caused his discontrol (V7, 416). Ms. Vogelsang explained Tommy's escalation of fear, anxiety, and depression, which school officials first noted when Tommy attended first grade (V7, 407-28). Tommy's escalating discontrol was recorded in school and mental health records until Tommy was nineteen years old (V7, 407-28). Treatment, especially long-term psychiatric care, was continually recommended, but never given (V7, 407-28).

Tommy was first placed in the Massachusetts Department of Youth Services system when he was thirteen years old (V7, 422). DYS placed Tommy in approximately fifteen different programs, over one hundred times (V7, 422). Ms. Vogelsang spoke to Tommy's DYS case worker and learned that none of the placements offered treatment, and all were merely detention units (V7, 424). During some placements, Tommy lived at home with his mother, and a case worker monitored him (V7, 425). Tommy never received psychiatric care (V7, 425).

Ms. Vogelsang concluded that DYS failed Tommy Gudinas. DYS should have taken Tommy from his violent and abusive parents and placed him in protective custody, where he could receive long-term treatment (V7, 418). Instead, DYS shuffled Tommy between detention units and his violent and abusive mother and step-father (V7, 422). Mental health professionals should have medicated Tommy (V7, 419). In addition to the emotional problems resulting from the trauma of

his violent and abusive home, Tommy suffered an attention deficit disorder (V7, 420). The attention disorder, in combination with his emotional problems, drove Tommy to use alcohol and drugs as a form of self-medication (V7, 421).

The court denied Tommy Gudinas' Second Amended Motion To Vacate Judgments Of Conviction And Sentence on March 20, 2000. This appeal follows.

#### **SUMMARY OF ARGUMENT**

1. The lower court prevented Tommy Gudinas from presenting his case during the postconviction evidentiary hearing by refusing to grant a continuance for his counsel and expert witness to effectively prepare and refusing to allow Tommy Gudinas to test the evidence found at the scene for DNA to prove his innocence.

2. The trial court erred in summarily denying Tommy Gudinas' claim that counsel's failure to object to the prosecutor's misconduct was ineffective assistance of counsel.

3. Tommy Gudinas proved at the evidentiary hearing that he received ineffective assistance of counsel at his penalty phase proceeding because counsel failed to investigate and prepare mitigating evidence. The trial court erred in not granting a new penalty phase.

4. The trial court erred in holding that counsel's failures to investigate evidence, cross-examine witnesses, and make appropriate objections and motions were not ineffective assistance

of counsel.

5. Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar unconstitutionally prevents Tommy Gudinas from investigating claims of juror bias and misconduct.

6. Because counsel performed ineffectively, Tommy Gudinas' death sentence is based on two unconstitutional aggravating circumstances and an unconstitutional instruction.

7. Cumulative error deprived Tommy Gudinas of his right to a fair trial and resulted in his death sentence.

## ARGUMENT I

**MR. GUDINAS WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING IN VIOLATION OF DUE PROCESS AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

- A. The lower court prevented Tommy Gudinas from presenting his case during the postconviction evidentiary hearing by refusing to grant a continuance for his counsel and expert witness to effectively prepare.**

On October 14, 1999, Tommy Gudinas filed a motion for a continuance to allow his expert witness, Jan Vogelsang, time to prepare (V11, 1065-69). The motion stated that Ms. Vogelsang had two other cases which prevented her from finishing work on Tommy Gudinas' case until February 2000 (V11, 1065-69). Though Ms. Vogelsang's testimony was imperative to Claim II, the court denied a mere two month continuance to allow her to finish work on the case.

On December 1, 1999, Tommy Gudinas filed a second motion for a continuance (V13, 1325-27). The motion gave many reasons why a continuance was necessary. Thomas Gudinas' counsel had a two-day post-conviction evidentiary hearing scheduled the same week the court scheduled his evidentiary hearing and another evidentiary hearing the month before (V13, 1325-27). Due to their frenzied schedule, Tommy Gudinas' counsel was not adequately prepared for his evidentiary hearing (V13, 1325-27). Ms. Vogelsang needed more time to complete her work on Tommy Gudinas' case (V13, 1325-27).

Additionally, after consulting with Ms. Vogelsang, Dr. Lipman recommended Tommy Gudinas have a PET scan to determine frontal lobe damage (V13, 1325-27). All of this work could not be completed before December 17, 1999. The court denied the motion on December 2, 1999 (V13, 1337-8).

On December 17, 1999, Tommy Gudinas renewed his motion to continue the evidentiary hearing (V7, 131). The motion gave many reasons why a continuance was necessary. His counsel did not have time to adequately prepare for the evidentiary hearing. Additionally, an imperative witness, Tommy Gudinas' Massachusetts Department of Youth Services case worker, was not able to fly to Florida to testify on December 17, 1999 (V7, 131). This case worker monitored Tommy Gudinas throughout his 105 DYS placements and personally knew what occurred in every placement. His testimony was imperative to explain the nature of the placements, how DYS handled Tommy Gudinas, and how the placements affected Tommy Gudinas. Ms. Vogelsang had not completed work on the case (V7, 131-2). Counsel was not able to procure the PET scan before December 17, 1999 (V7, 132). The court denied the motion (V7, 133). Tommy Gudinas again moved to continue the evidentiary hearing after Jan Vogelsang testified she did not have time to complete her work on Tommy Gudinas' case (V8, 391-2). Again, the court denied the motion (V8, 392).

The court's obdurate refusal to grant a continuance denied



Tommy Gudinas an adequate evidentiary hearing. The court granted a hearing on the issues:

- a. That defense counsel was ineffective for failing to hire a social worker to assist the jury in understanding the childhood treatment provided to the Defendant and the effects of the 105 childhood placements.

(V11, 1072).

\* \* \* \*

- d. that the Defendant's history of alcohol and drug abuse was not thoroughly investigated.
- e. that defense counsel did not adequately investigate the Defendant's background and life history for purposes of presenting mitigating evidence in the sentencing phase.

(V11, 1073-74). However, the court denied Tommy Gudinas the ability to present evidence regarding these issues because the court refused to grant a continuance to allow counsel, experts, and witnesses time to work on the case and even time to travel to Florida to testify. As a result, Tommy Gudinas was not able to present imperative evidence at his evidentiary hearing.

Because the court denied Tommy Gudinas a continuance, he was able to present only a fraction of the available mitigation his trial counsel should have presented. As a result, the court found the evidence presented cumulative or inadequate to result in a life recommendation, and denied Claim II of Tommy Gudinas' 3.850 motion (V12, 1401-09). The crux of Claim II was that trial counsel barely

scratched the surface of the available mitigation and were, therefore, ineffective. By refusing to grant a continuance, the court ensured that similar mitigation would be presented at the evidentiary hearing. The court repeatedly noted this and relied on it to deny Claim II.

The Defendant did not offer any significant evidence during the evidentiary hearing which trial counsel should have provided to Dr. Upson for sentencing. . . But, the Defendant was unable to establish that such evidence was available at the time of the original proceedings or even available now. . . . Thus, the Defendant's claim that trial counsel was ineffective for not providing further details on the Defendant's placements is without merit.

(V12, 1402).

\* \* \* \*

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.

(V12, 1403).

\* \* \* \*

The Defendant has not shown what further effort of defense counsel could have been exerted.

(V12, 1403).

\* \* \* \*

Significantly, the Defendant failed to present any evidence as to a plausible medical cause of the blackouts.

(V12, 1405).

\* \* \* \*

Ms. Vogelsang did not present any information or opinion which differed from that already presented at the earlier proceedings.

(V12, 1407).

\* \* \* \*

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.

(V12, 1407).

The court's refusal to grant a continuance denied Tommy Gudinas a full and fair evidentiary hearing because the court denied him the opportunity to present evidence needed to establish Claim II. Accordingly, this Court should remand the case for a full and fair evidentiary hearing. See e.g. Provenzano v. State, 751 So.2d 37, 40 (Fla. 1999) ("the goal of this proceeding is to seek the truth. The mere potential for delay should not divert us from this goal, especially in light of the severity of the

punishment in this case.").

**B. The lower court prevented Tommy Gudinas from presenting his case during the postconviction evidentiary hearing by refusing to allow him to test the evidence found at the scene for DNA.**

Tommy Gudinas' Second Amended Motion to Vacate Judgments of Conviction and Sentence alleged he is innocent of this murder and that counsel was ineffective for not testing the physical evidence for Tommy Gudinas' DNA (V10, 1006). However, the court denied Tommy Gudinas the opportunity to present evidence of his innocence and counsel's ineffective assistance at the evidentiary hearing.

Tommy filed a motion directing the state to release certain physical evidence for DNA testing on May 13, 1999 (V9, 776-78). That motion sought to test the semen and saliva found on the victim which were not tested at the time of trial. If tested, the semen and saliva samples could prove that Tommy Gudinas did not sexually assault the victim and kill her in the course of the assault and negate the circumstantial evidence from which the jury found Tommy guilty of first degree murder. Evidence presented in Tommy Gudinas' trial indicated that he was at the crime scene, however, the state presented no physical evidence which connected Tommy Gudinas to the victim. The court denied the motion on June 23, 1999 (V9, 799-802).

Denying the motion, the court noted:

Transcripts provided by the State show that the State actually performed both a

Restriction fragment Length Polymorphism ("RFLP") DNA test and a PCR DNA test on physical evidence recovered at the crime scene. (See attached transcript). The results were apparently inconclusive.

(V9, 800). The physical evidence the court relied on were a swabbing taken from a pushbar, the victim's blood sample, cuttings from a tee shirt, and Tommy Gudinas' blood sample (V13, 1349-50). The tests only proved that the blood on the tee shirt could have been the victim's (V13, 1350). Thus, this justification for denying Tommy Gudinas' motion is clearly erroneous; the semen and saliva were not tested.

The court also noted:

A transcript from a later proceeding shows that defense counsel recognized "that the State had come across some PCR DNA involving the [victim's] blood being found on a gray T-shirt which I believe was recovered in the apartment Mr. Gudinas was staying." (See attached transcript, page 782). Defendant had requested his counsel to breach the earlier stipulation and argue to the jury that the State failed to present any DNA evidence.

(V9, 800). This only shows that Tommy Gudinas' counsel did not understand the DNA testing upon which he stipulated not to argue DNA to the jury. The tests proved that the blood on the tee shirt could have been the victim's, but the results were not conclusive (V13, 1350).

The court justified his decision not to allow Mr. Gudinas to test the semen and saliva:

there was substantial objective evidence

inculcating Defendant . . . Defendant's fingerprints were found on a gate at the crime scene, Defendant was identified by a witness who had face-to-face contact with Defendant near the scene of the murder just prior to the killing, Defendant's fingerprints were found on a checkbook in the victim's car, Defendant was seen in possession of the victim's keys and driving away in the victim's car just after the murder, Defendant's roommates testified that Defendant boasted about killing the victim and having sex with her after she was dead.

(V9, 800). This conglomeration of circumstantial evidence fails to objectively link Tommy Gudinas to the murder. The fact that Tommy Gudinas was in the area of the crime is not alone inculpatory. Hours after the murder, Culbert Pressley found the victim's car keys and gave them to Tommy Gudinas, who then stole the car (RV2, 313-318). No physical evidence directly links Tommy Gudinas to the victim. Both Fred and Dwayne Harris testified that Tommy's comment about having sex with the victim was a joke and made in response to Dwayne's joking question (RV4, 653-55, 689-92, 693-94). This is not substantial objective evidence which inculpates Tommy Gudinas. It is all circumstantial, and none of it links Tommy to direct contact with the victim.

Noting that Zeigler v. State, 654 So.2d 1162 (Fla. 1995), did not directly apply to Tommy Gudinas' case because Zeigler, was a successive motion and Tommy Gudinas' request was not made in a successive motion, the court held the Zeigler rational applied to Tommy Gudinas' case (V9, 800-801).

The court finds that this case falls squarely within the bounds of Zeigler as distinguished from Dredge. Here, there was ample evidence of Defendant's presence at the scene of the crime in the absence of DNA evidence, and there is no indication that absence of Defendant's DNA would necessarily preclude a finding of his guilt.

(V9, 801). The court erred. The State's theory of this case was that the victim was killed during the course of the sexual assaults ( R. V5, 800, 806, 808-9, 812). The state argued that the person who sexually assaulted and beat her killed her. "She's brutally beaten and raped and left to die" (R. V5, 812). The state also argued that the victim's vagina was first penetrated by something other than the stick because it left an entrance wound (R. V5, 806). The first penetration likely left the semen, so the person who left the semen is, according to the state's theory, the killer. As well, the person who left saliva while biting and beating the victim is, according to the state, the killer. If the DNA tests proved that the semen and saliva were not Tommy Gudinas', he would be exculpated under the state's theory. An absence of Tommy Gudinas' DNA would necessarily preclude a finding of his guilt.

"[T]he use of DNA should be encouraged by our law as a tool serving the ends of justice as to both the not guilty and the guilty." Thorp v. State, 2000 WL 1707103, 811 (Fla. 2000). (Wells, C.J. dissenting). The semen and saliva directly link someone to the victim, however, that link remains undiscovered

because the court refused to release the semen and saliva for DNA testing. As a result, Tommy Gudinas was denied a full and fair evidentiary hearing because the court denied him the opportunity to present DNA evidence which could prove he is innocent of sexual battery and murder.

The court granted a limited evidentiary hearing on ineffective assistance of counsel issues, and one issue was whether counsel's failure to have the jeans tested for DNA evidence was ineffective assistance of counsel. Thus, Tommy Gudinas needed to have the jeans tested to prove his claim. On December 6, 1999, the court heard argument on Tommy Gudinas' motion to release physical evidence, the jeans found at the crime scene and the jeans found at the Harris apartment, for DNA testing (V5, 1-16). Though DNA testing was imperative to this claim, the court entered an order reserving ruling on the motion until after the evidentiary hearing (V13, 1352-53).

In his order denying relief on this issue, the court held:

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.

(V12, 1396). The court's orders are incongruous. In its June 22, 1999, and December 6, 1999, orders, the court refused to order the state to release the evidence so Mr. Gudinas could have it tested. Then, in its March 20, 2000, order the court faults Mr. Gudinas



for not showing the results of tests that the court precluded. Because the court prevented Tommy Gudinas from presenting the exact evidence it required to grant relief, the court denied Tommy Gudinas a full and fair evidentiary hearing. Accordingly, this court should remand this case with directions to release the evidence for DNA testing and a full and fair evidentiary hearing.

#### **ARGUMENT II**

#### **THE TRIAL COURT ERRED IN SUMMARILY DENYING TOMMY GUDINAS' CLAIM THAT COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S MISCONDUCT WHICH VIOLATED HIS FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WAS INEFFECTIVE ASSISTANCE OF COUNSEL.**

The trial court denied this claim without an evidentiary hearing, holding that Tommy Gudinas could not prove prejudice under Strickland v. Washington. Strickland v. Washington, 466 U.S. at 687; (V12, 1410). The trial court erred.

The sum of the prosecutor's improper remarks, when considered in totality, require a new penalty proceeding. Garron v. State, 528 So.2d 353 (Fla. 1988); Teffeteller v. State, 439 So.2d 840 (Fla. 1983). Counsel performed deficiently by failing to contemporaneously object to any of it.

In his closing argument, the prosecutor made a comment which was a variation on the Golden Rule, "the prohibition of such remarks has long been the law of Florida". Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). Remarks which violate the Golden

Rule are those which place "the jury in the position of the victim" and those which have the jurors imagine the victim's pain. Urbin v. State, 714 So.2d 411, 419 (Fla. 1998). The prosecutor told the jury, "you must probe the final hours and minutes of the life of Michelle McGrath." (ST281). While displaying slides of the bloody, bruised, and mutilated body at the crime scene, the prosecutor told the jury that, "any human being couldn't bear the pain of the insertion of those sticks, particularly the one in the rectal area, which you saw a huge hole in her body. . . She had time to think what this maniac was going to do to her in this dark and secluded alleyway. . . . The last moments of her life was [sic.] a living hell." (ST292). When the prosecutor told the jury to probe the the last few minutes of Michele McGrath's life, he essentially asked the jury to put themselves in the victim's place and feel the unbearable pain of the insertion of the sticks and the terror she felt during the time she had to contemplate what her attacker was going to do to her.

Though similar violations of the Golden Rule have caused this Court to admonish prosecutors and, in Garron, remand the case for a re-sentencing, defense counsel failed to object, and no curative instructions were given. (ST281-292) Garron, 528 So.2d 353 (Fla. 1988); Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985); Urbin v. State, 714 So.2d 411 (Fla. 1998).

The prosecutor improperly argued limiting statements to the

jury in their consideration of mitigation and Tommy Gudinas' background. The prosecutor told the jury:

**Even if his father did like to wear women's underwear, so what. What does that have to do with this crime or with what punishment the defendant should get for what he did in this case.**

No one has testified, "Oh, the fact that his father wore women's clothes really messed him up." No one can even say he saw the man doing that odd act. Remember the mother even said that they were in the house, but she didn't know if they ever saw it. The psychologist said the same thing. I don't know if he ever saw it.

**Nobody has said that has anything to do with Thomas Gudinas. Even if it is true, it isn't mitigating. It has nothing to do with him.**

You've heard that on three occasions that he was punished by his father for doing things wrong in ways that seem inappropriate.

The first was he was playing with matches, lit the rug on fire, burned the rug at least. And in response, his father took his hand and held it to a burner and burned his hand.

He showed you his finger. I looked at it. You can rely on your own observations as to whether there was much of anything there in the way of a scar or any kind of permanent disfigurement that would affect someone in their adult life.

Some parents think that that's a way to punish children. It's certainly not something that I would agree with. But so what. That didn't scar him for life. He was made to stand out - well, the story you've been given is, well, Michelle says, he was made to stand

outside with a sign on him because he wet the bed. His mother says it was his father. It was out in the snow, but you didn't really hear in detail about exactly how long he was out, if he was injured by it.

**Some people punish their children that way. But again, unless it somehow ties to what happened in this crime, it is simply a plea for sympathy,** feel sorry for him because someone was mean to him once.

She says his father - they were out playing by the lake, when they weren't supposed to, and his father slapped him around.

Again, inappropriate punishment of a child. **But again, if it doesn't tie in some way to something, then it really is not something that's mitigating.**

(ST305) (emphasis added). The same prosecutor replicated this argument in Hitchcock v. State, and this Court held it was error because the argument violated the United States Supreme Court's mandate that:

[T]he Eighth and fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death.

Hitchcock v. State, 755 So.2d 638, 642-43 (Fla. 2000) (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

In this case, the abuse Tommy Gudinas suffered at his father's hands "were circumstances that the jury could consider in mitigation and give to those circumstances whatever weight the

jury found to be proven by a preponderance of the evidence. Thus, it was erroneous for the prosecutor to say that these circumstances "isn't mitigating". Hitchcock v. State, 755 So.2d at 643; (ST304). Counsel deficiently failed to object and move for a mistrial after this flagrant violation of fundamental death penalty law.

Again, the prosecutor intentionally misled the jury in the consideration of mitigation. He argued that Tommy Gudinas did not suffer from an extreme emotional disturbance at the time of the crime because:

I would suggest to you that the word disturbance means that something is different then [sic.] its natural state. When you disturb something in a state of rest or a state of normalcy and you change it, you disturb it.

The reason that's important in this case is because the evidence that you've been given about Thomas Gudinas is that his mental state at the time of this crime was exactly what and precisely the way he normally is.

He is a man who is pathological.

(ST294-95).

This Court interprets extreme mental or emotional disturbance as "less than insanity, **but more emotion than the average man, however inflamed**". State v. Dixon, 283 So.2d 1, 10 (Fla. 1973) (emphasis added). Thus, the prosecutor should have known that the standard for disturbance is that of an average man, not an individual defendant's normal behavior. This Court upheld

findings of extreme mental or emotional disturbance in cases of organic brain damage and emotional immaturity, both of which affect an individual defendant's normal behavior. See Carter v. State, 560 So.2d 1166 (Fla. 1990); Amazon v. State, 487 So.2d 8 (Fla. 1986). This Court also requires that the disturbance exist at the time of the offense, as the state conceded it did in Tommy Gudinas' case. Geralds v. State, 674 So.2d 96, 101 (Fla. 1996); (ST294-95). Thus, the prosecutor knew Tommy Gudinas was extremely emotionally disturbed at the time of the crime, and he also should have known that this Court upheld individuals' normal behavior as extreme mental or emotional disturbance if it existed at the time of the crime. By arguing to the jury that Tommy Gudinas' extreme emotional disturbance was not mitigating because Tommy Gudinas is always extremely emotionally disturbed, the prosecutor again argued an illegal limiting instruction. Again, counsel failed to object and move for a mistrial. Because counsel failed to timely object and move for a mistrial, this Court held the issue was procedurally barred on direct appeal. Gudinas, 695 So.2d at 958.

Much of the prosecutor's closing argument was very similar to the closing argument this Court found improper in Urbin v. State, 714 So.2d 411 (Fla. 1998). Throughout his penalty phase closing argument, the prosecutor opprobriously argued to the jury that Tommy Gudinas was not even human and, therefore, he deserved the death penalty. The prosecutor referred to Tommy Gudinas as a

"maniac" (ST292). He continued, pointing to Tommy Gudinas, "[A]nd that the last human being she would ever see was **that.**" (ST292) (emphasis added). The prosecutor told the jury:

And **Thomas Gudinas is a monster. Deep into the heart and soul, he is a monster. That's what he was. That's what he is. That's part of him. If you take that away, there is no Thomas Gudinas.**

Just like **if you take away what is any of us, we are not our selves, that is him.**

(ST295-6) (emphasis added). The prosecutor described Tommy Gudinas, "[t]his is an **evil human being**, committing an evil and atrocious act." (ST296) (emphasis added). He continued:

Some people are just born bad. They're bad to the bone. **Thomas Gudinas is bad to the bone.** He has never done anything good in his life. He has never done one single thing to help himself or to help anyone else. All he has brought to our society is evil.

(ST303) (emphasis added).

Well, some people you just don't cure. There's some people you just can't cure.

(ST 306-7).

The prosecutor's derogatory statements, referring to Tommy Gudinas as a maniac, a monster, that, and something that is left when all humanity is taken away, was misconduct which violated the fundamental fairness and sole purpose of a penalty phase proceeding. The United States Supreme Court has repeatedly held that the death penalty is constitutional only when the sentencer

considers each defendant as an individual human being.

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate and mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as **uniquely individual human beings**, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (emphasis added). When the prosecutor told the jury that they should consider Tommy Gudinas as a monster and something not human when deciding whether Tommy Gudinas lives or dies, the prosecutor took from Tommy Gudinas the constitutional penalty phase to which he was entitled because the jurors most likely did not consider Tommy Gudinas as a uniquely individual human being. Again, counsel deficiently failed to contemporaneously object and move for a mistrial.

The prosecutor impermissibly injected argument calculated to arouse bias and fear and which was not supported by the evidence during his penalty phase closing argument. Although no expert or lay witness so testified, the prosecutor twice told the jury that Tommy Gudinas specifically hated The prosecutor told the jury Tommy Gudinas "has a pathological hatred for women", and "[a]nd even the doctor didn't say, well, these acts of child abuse are



related to his hatred of women." (ST295, 306). Six of the jurors trusted with the responsibility to determine whether Tommy Gudinas should live or die were women (R V1, 194). The prosecutor argued that Tommy Gudinas was a "maniac", "monster", "evil", and an incurable thing that pathologically hated women (and therefore, six of the jurors), injecting unfounded elements of fear, emotion, and bias into Tommy Gudinas' penalty phase (ST 292, 296, 256, 303, 306-7). women. Thus, the prosecutor's argument was improper. Garron, 528 So.2d 353, 359 (Fla. 1988); see also Robinson v. State, 520 So.2d 1, 5 (Fla. 1988). Again, counsel failed to object and move for a mistrial.

The prosecutor improperly argued to the jury that they should consider actions taken after the victim died or lost consciousness when deciding whether the heinous, atrocious, and cruel aggravator applied.

The Defendant's acts on the victim on this case, and the way he left her, show his enjoyment. This is what Thomas Gudinas wanted people to see when they opened the gate. That's the view that he created. This is not an accident that she was found that way. That's what he wanted to leave her as. He wanted to leave her the most degraded piece of human flesh imaginable because he enjoyed it. He gained enjoyment from what he put her through.

And that, ladies and gentlemen, is part of the definition of heinous, atrocious, and cruel.

(ST293). Counsel and the prosecutor knew that actions taken after the victim dies or loses consciousness are not relevant to the

heinous, atrocious, and cruel aggravator (ST36); Jackson v. State 451 So. 2d 458, 463 (Fla. 1984). However, the prosecutor expressly argued to the jury that heinous, atrocious, and cruel applied because of the manner in which the victim's body was arranged. Thus, the prosecutor knew this was improper, but he argued it. That argument was similar to the argument this Court found improperly misled the jury in Rhodes v. State, where the prosecutor argued that the jury consider that the victim's body was transported by dump truck in considering heinous, atrocious, and cruel. Rhodes v. State, 547 So.2d 1201, 1205 (Fla. 1989). Counsel failed to object or move for a mistrial.

Culminating his argument designed to obtain a death recommendation through any means, the prosecutor told the jury:

Do those few little facts outweigh what you saw on those slides and what you saw on that paperwork and what he did to her? That's what you have to ask yourself. **And that's an issue that's a moral issue. It's an issue of what's right. It is an issue of what's fair. It's not about legal principle.**

(ST308) (emphasis added). Not only did the prosecutor inject fear, emotion, and bias into Tommy Gudinas' penalty phase, he also encouraged the jury to disregard the law and recommend a verdict based on that fear, emotion, and bias. The Florida death penalty sentencing scheme requires sentencers to weigh aggravators and mitigators based on legal principles, not recommend a death sentence based on emotional and moral responses to the evidence

and argument. The prosecutor's argument was unconstitutional because it could only result in a standardless sentencing. Furman v. Georgia, 408 U.S. 238, 92 (1972). Again, counsel deficiently failed to object and move for a mistrial.

After the prosecutor finished his closing argument, counsel objected only to the prosecutor's characterization of Tommy Gudinas as a monster, his argument that the extremely emotionally disturbed aggravator should not apply because Tommy is always extremely emotionally disturbed, and the display of the slides. Counsel ineffectively failed to object to the prosecutor's dehumanizing, illegal, and misleading misconduct (ST309). In order to preserve an allegedly improper prosecutorial comment for review, defense counsel must object to the comment or move for a mistrial. Gutierrez v. State, 731 So.2d 94 (4<sup>th</sup> DCA 1999). At the evidentiary hearing, Irwin stated he did not object because he thought the court told him to save his objections until after the closing argument (V6, 106). The only statement the trial court made which could be interpreted as such an order, was to ask counsel to make their objection to the slides after the prosecutor's closing argument (ST268). The court did not direct counsel to waive Tommy Gudinas' right to appeal fundamentally erroneous prosecutorial misconduct by not objecting. Moreover, after the prosecutor's closing argument, counsel deficiently objected to only two instances of misconduct (ST309). Thus,

counsel was not only confused, counsel also failed to know case law regarding improper prosecutorial misconduct and fundamental death penalty law.

Because counsel did not contemporaneously object or move for a mistrial, this Court did not consider the prosecutor's fundamentally unethical and prejudicial misconduct on direct appeal. Gudinas v. State, 693 So.2d 953, 958 (Fla. 1997). Had counsel contemporaneously objected, the trial court would have granted a mistrial or given curative instructions, eliminating the fear and emotion that the prosecutor injected, and the jury would have returned a life recommendation. Counsel's failure to contemporaneously object or move for a mistrial was ineffective assistance.

In Florida, "prosecuting officers are clothed with quasi judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with a crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament." Stewart v. State, 51 So.2d 494 (Fla. 1951). The prosecutor's closing argument was riddled with improper comments, and not once did counsel contemporaneously object or the judge give a curative instruction. This misconduct was even more egregious than that in Stewart because, in capital cases, prosecutors "are charged with an extra obligation to ensure that the trial is fundamentally fair

in all respects". Gore v. State, 719 So.2d 1197, 1202 (Fla. 1998); Stewart v. State, 51 So.2d 494 (Fla. 1951). The cumulative effect of the prosecutor's numerous and overlapping improprieties constituted fundamental error which deprived Tommy Gudinas of the constitutional penalty phase to which he was entitled. Brooks v. State, 762 So.2d 879 (Fla. 2000).

In Berger v. United States, Justice Sutherland stated that a prosecutor:

is in the peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). In his effort to obtain a death sentence by any means, the prosecutor used a number of improper methods to strike foul blows, resulting in a ten to two death recommendation for Tommy Gudinas. "If the prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury, a new trial should be awarded regardless of the want of objection." Tyrus v. Apalachicola Northern Railroad Co., 130 So.2d 580, 587 (Fla. 1961). See also Brooks v. State, 2000 WL

674581 (Fla. 2000).

Competent counsel would have objected to the prosecutorial misconduct that injected elements of fear and emotion into the jury's verdict, misled the jury, violated the Golden Rule, and was nothing more than blatant name calling throughout the course of the penalty phase. The cumulative effect of the misconduct denied Tommy Gudinas his right to a fair trial. Counsel did not contemporaneously object or move for a mistrial after any of the prosecutor's improper comments. Allen v. State, 662 So.2d 323, 328 (Fla. 1995). Had counsel acted effectively to stop the prejudicial effect to the prosecutor's misconduct, there is a reasonable probability that four more jurors would have recommended life. Rose v. State, 675 So.2d 567, 570-71 (Fla. 1996). Counsel was deficient, and the prejudice is Tommy Gudinas' death sentence. The trial court erred when it denied this claim without an evidentiary hearing (V12, 1410).

### ARGUMENT III

**THE TRIAL COURT ERRED IN DENYING TOMMY GUDINAS' CLAIM THAT COUNSEL WAS INEFFECTIVE AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS.**

In order to ensure that a fair trial occurs, defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."

Strickland v. Washington, 466 U.S. 668, 685 (1984). Through their failure to investigate, prepare their experts, and even hire experts, Tommy Gudinas' counsel failed to provide a reliable adversarial testing process, and were therefore, ineffective. Specifically, Tommy Gudinas' counsel failed to hire a neuropharmacologist, failed to hire a licensed social worker, failed to provide the experts they did retain with enough information to adequately prepare for trial, failed to investigate Tommy's drug use on the night of the incident, failed to investigate Tommy's history of drug abuse, failed to investigate Tommy's background, and failed to develop mitigation witnesses. Counsels' failures resulted in Tommy's death sentence. Had counsel effectively investigated and prepared, Tommy Gudinas probably would have been sentenced to life.

**A. The trial court erred in holding that counsel's failure to effectively investigate and present mitigation was not ineffective assistance of counsel.**

**1. Counsel deficiently failed to investigate Tommy Gudinas' family and background.**

Counsel performed deficiently by failing to present Tommy's Aunt Ellen Evans who had rich and powerfully mitigating testimony.

Ellen testified at the evidentiary hearing that Tommy's parents and step-parents raised Tommy while abusing drugs and alcohol. Tommy's father, Tom Sr., abused drugs and alcohol during the majority of Tommy's early childhood (V6, 148). Tommy's mother,

Karen Goldthwaite, was drunk or high during the majority of the time she cared for Tommy (V6, 148). Karen drank alcohol until she passed out and used mescaline and marijuana while pregnant with Tommy (V6, 145-46). Her drug and alcohol abuse continued, unabated, after Tommy was born (V6, 147-48). At least three nights a week, Karen drank until she passed out (V6, 148-49). After Tommy's parents separated for the first time, Karen began using cocaine as well (V6, 151). During this time, she abused the drugs and alcohol at least three times a week, and Tommy was always with her (V6, 151-2). After a while, Tommy's parents reunited, and Karen stopped using mescaline and cocaine, but her alcohol and marijuana abuse continued (V6, 154-55). Again, Tommy's parents separated. Karen dated Jim Callahan, a bouncer at massage parlor where she worked (V6, 159). Callahan was a cocaine addict, and he and Karen routinely abused cocaine, marijuana, and alcohol in front of Tommy (V6, 160). Tommy's parents reunited (V6, 163). Tom Sr. stopped using marijuana but still drank alcohol, and Karen used marijuana and routinely drank until she passed out (V6, 164). When Tommy was seven, his parents divorced, and Karen married Brian Golthwaite (V6, 166). Karen and Brian abused alcohol and smoked marijuana (V6, 169).

Karen and Brian went to California, leaving Tommy with Ellen (V6, 167). Tom Sr. picked up Tommy for visitation and kept him for two years during the time Tommy was eight and nine years old



(V6, 167-68). After a court battle, Karen regained custody of Tommy (V6, 168-69).

Throughout Tommy's childhood, Karen lived in poverty (V6, 175). Ellen testified that Tommy's growth was so retarded, she feared he would be a midget (V6, 175). Tommy was ridiculed because of his height and small stature (V6, 175). Additionally, Tommy suffered a foot infection for many years. The open, jungle-rot type lesions on Tommy's feet hindered everything he did (V6, 175).

Both Tommy's mother and father beat him almost daily with sadistic gusto (V6, 164-5). Ellen described the beatings Tommy received when he was about three years old, "It was brutally hard. I mean, it's a three-year-old. Yes, he got the living shit kicked out of him by his dad" (V6, 150). Karen also brutally beat Tommy when he was three years old, and usually, she hit his head or face (V6, 149). Ellen described the constant abuse Tom suffered.

Anytime there was sibling arguments or anything, it was always Tom. What are you doing Tom? Tom would get whooped no matter what. If it was my boys doing it or Michelle doing it, it's Tom. Harry would snatch him up, what are you doing? He was always smacking Tommy. Tom, unfortunately- sorry baby. Tom was a piece of shit when he was a kid in that family.

(V6, 154).

Karen's boyfriends also brutally beat Tommy. Ellen saw Jim Callahan throw Tommy across a room when he was only six years old

(V6, 161). Karen told Ellen of other abuse suffered at Callahan's hands (V6, 161). Ellen described Karen and Tommy's involvement with Callahan as a "life threatening situation" (V6, 163). The authorities prosecuted Callahan's massage parlor, and Callahan checked Karen into a mental hospital (V6, 161-62). During that time, Tommy stayed with Callahan, who "couldn't tolerate kids. He didn't even like them.", until Tom Sr. picked him up (V6, 162). After Karen married Brian Golthwaite, Brian beat Tommy at his mother's orders. "Tom would get the shit kicked out of him from time to time, yeah. Most of the time it was, you deal with him Brian. You deal with him. Karen had a way of saying that." (V6, 170). Tommy's mother continually verbally abused him. Whenever Tommy returned home from DYS detention, he was beat and verbally abused (V6, 171). "No matter what he did, it was wrong. Even if it wasn't wrong, it was wrong." (V6, 171). Karen "called him things like you shouldn't be here. You should go back. You ruin our family, you little bastard." (V6, 170). In response, Tommy cried and hid (V6, 171). After enough of the abuse, Tommy did something to return to a DYS facility (V6, 171). "She was the reason he was always back in" (V6, 171). Ellen testified that she too grew up in the DYS system where she learned that she had to fight to avoid sexual abuse and beatings (V6, 178). Thus, between home and DYS, Tommy was placed in situations of unrelenting abuse.

Ellen testified that Tommy was sexually abused and introduced

to deviant sexual behavior at a young age. Tom Sr. routinely wore women's lingerie (V6, 156-57). Tom Sr. was unemployed and playing Bingo every night while Karen worked with Ellen in a massage parlor where the employees performed oral sex for tips (V6, 155-6, 158). One night, when Ellen and Karen returned from giving strangers oral sex, Ellen found Tom Sr., wearing a purple negligee, in bed with a man who wore only bikini briefs (V6, 155-57). Tommy was home with his father, as he always was while Karen worked (V6, 156). Karen stayed at that particular massage parlor for three or four years and later worked at Callahan's massage parlor (V6, 158). Later, Tommy's parents slept in the living room where Tommy could easily observe anything they did and wore (V6, 165). Tommy told Ellen that during the two years he lived alone with Tom Sr., Tom Sr. forced Tommy to sleep with him while Tom Sr. wore women's nylon stockings (V6, 168). When Tommy returned from the two years with his father, he behaved differently. "Tom was withdrawn. He was angry. He was just - he wouldn't listen to you. It was like he was there and he was staring at you but he wasn't there." (V6, 167-68). Tommy told Ellen he was raped while in DYS custody when he was fourteen years old or younger (V6, 173-74). Tommy was probably left alone with his maternal grandfather, who sexually abused Ellen and other children (V6, 174).

Mr. LeBlanc spoke to Ellen Evans and made a note that:

I spent a half-hour on the phone with Ellen Harris. She is in Vermont and the mother of

Dwayne and Fred. Has very good insights on how Tommy was as a kid. I asked her if he was very aggressive and fought with other kids. Mrs. Harris came up with the opposite description, that he was quite sensitive, that he never fought.

(V7, 371). Though he believed Ellen could testify to mitigation, Mr. LeBlanc could not remember why they did not present her testimony (V7, 347). Ellen Evans would have testified at Tommy Gudinas' trial (V6, 178).

The circuit court denied this subclaim, holding:

[E]ven if Ms. Evan's testimony had been presented during the sentencing phase of 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 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 by Massachusetts Youth Services. Any additional evidence that could have been provided by Ms. Evans would not have altered the outcome.

(V12, 1406). The court erred.

Counsel failed to present the majority of the evidence Ellen Evans offered. Because counsel failed to investigate and present this evidence, the jury that sentenced Tommy Gudinas did not know Tommy's history, and the events that shaped his personality before this incident. The jury did not know that Tommy's parents raised him while chronically abusing drugs and alcohol. The jury heard of three instances of Tom Sr.'s abuse but did not know of the

savage physical abuse inflicted almost daily by Tommy's father, mother, and his mother's boyfriends. The jury did not know of the majority of Tommy's parents' perverse sexual behavior. The jury did not know that Tommy's mother supported the family by working in a massage parlor or that, for two years, Tommy's father forced Tommy to sleep with him while he wore women's stockings. Nor did the jury know that Tommy was raped at the age of fourteen while in DYS custody.

At the evidentiary hearing, Irwin testified he chose not to present Tommy Gudinas' institutional history as a matter of strategy (V6, 160-61). However, counsel did not testify that they chose not to present Tommy's family background as a matter of strategy. In fact, counsel presented Tommy's mother and sister to explain his background, either ignoring or failing to investigate the above valuable mitigation. Had counsel presented Ellen Evans' valuable mitigation, the mitigation already presented would carry more weight, the additional mitigation would allow the jury to truly understand why Tommy Gudinas was in trouble and placed with DYS, and at least four more jurors probably would have voted for life.

**2. Counsel failed to hire a licensed social worker.**

The circuit court denied this subclaim, holding the testimony:

would have been cumulative . . . and 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.

(V12, 1407). The circuit court erred.

Counsel deficiently failed to hire a social worker to explain to them, their experts, and to Tommy's jury and sentencing judge the effects of Tommy's home environment and the 105 DYS placements on Tommy's personality. When faced with 105 placements that they could not decipher or even determine whether they were residential or community control, competent counsel would have hired a licensed social worker who could help investigate the institutions and experiences that shaped Tommy's life and personality.

At the evidentiary hearing, the court accepted Janet Vogelsang as an expert in the field of licensed social work and psychosocial assessments (V7, 389-90). Ms. Vogelsang described her expertise as completing psychosocial assessments, in which she compiles and analyzes a client's health, physical, behavioral, mental, emotional, cultural, and environmental history to determine how those experiences impacted that client to form his personality, reactions, and impulses (V7, 384-85). In conducting psychosocial assessments, social workers never rely on one source, such as documents (V7, 385). Social workers contact other sources to evaluate the accuracy and content of each source (V7, 385).

At the time of the evidentiary hearing, Ms. Vogelsang had not contacted and found all of the sources necessary for a complete

psychosocial assessment. However, she interviewed Tommy Gudinas, his mother and father, Ellen Evans, Fred Harris, Tommy Gudinas' DYS case worker, and three doctors (V7 392, 394-95). Ms. Vogelsang also visited the area in which Tommy Gudinas lived in Massachusetts (V7, 394). She spoke with these people and visited Massachusetts to interpret and determine the accuracy of the documents she evaluated (V2, 395). At the evidentiary hearing, Ms. Vogelsang had not finished Tommy Gudinas' psychosocial evaluation, and the court refused to grant a continuance so she could complete it, but Ms. Vogelsang testified to some preliminary conclusions (V7, 391-92) (see Claim I).

Ms. Vogelsang testified that both of Tommy's parents were raised in very violent and alcoholic families (V7, 400-401). Both parents began abusing drugs and alcohol at an early age (V7, 401). Tommy's mother, Karen Golthwaite, drank alcohol while pregnant with Tommy (V7, 402). "She was a mean drinker who would become vicious, fight, have a blackout, and then the next day not remember any of it." (V7, 400). Tommy's parents fought violently and separated frequently until they divorced (V7, 402-03). "This was not typical marital strife. This was throwing a sugar bowl and splattering blood on the wall and 60 stitches in the back of the head type of combat in this home. This went on for a number of years." (V7, 402-3).

My impression, my initial impression is this was a combat zone in terms of the environment

in the home. That it was unrelenting, it was unrelieved. It's not that there was a fight once a week when mom and dad got drunk on Saturday night, that the drinking and drug abuse was pretty constant. And that for a child, that kind of chaos and that kind of unpredictability produces a great deal of anxiety and fear. My impression about that is confirmed by the records which use those terms to describe Tommy after the evaluations. That he seemed to be a very frightened, anxious, fearful, frustrated young boy.

(V7, 405-6). Tommy's father, Tom Sr., was often unemployed, and Karen had no work skills (V7, 407). On both sides of the family, there was incest or inappropriate sexual behavior across two or three generations (V7, 402-3, 427-8). Tommy's parents neglected him as well.

Well, Tommy ran away a lot very early on. . . . But Tom would run to other friends' homes. He might be gone three or four days before it seemed to even be noticed that he wasn't there. So that behavior started pretty early.

(V7, 404).

Ms. Vogelsang explained that Tommy Gudinas' records document his escalating fear, anxiety, and depression and, correspondingly, his escalating discontrol. Ms. Vogelsang opined that because there was no medical explanation, trauma in Tommy's home caused this discontrol (V7, 416).

In first grade, school officials noted that Tommy had poor hygiene, auditory processing problems, socialization problems, anxiety with discipline, and trouble following instructions. They recommend counseling (V7, 407). Ms. Vogelsang explained that



auditory processing problems severely affect learning abilities (V7, 407-8). Mental health records noted that, in first grade, Tommy was anxious, angry, frustrated, extremely confused about normal family relationships, and did not view adults as a source of love and affection (V7, 415). Ms. Vogelsang testified that Tommy's behavior was "consistent with the things that I've learned so far about the family environment and some of the sexual behavior in the family and sexual acting out." (V7, 415). Tommy saw himself as a bad child (V7, 415). Mental health experts evaluated and assessed Tommy, but the records revealed no intervention or treatment (V7, 415).

At seven years old, Tommy was expressing inappropriate sexual behavior. Ms. Vogelsang opined:

But starting at seven years old, I think a lot of his confusion about normal family relationships is related to the fact that in my opinion and my initial impressions, that there was incest in his family across two or three generations. And so certainly children are confused by normal family relationships when you have the sex and the violence.

Seven years old Tommy doesn't know how to socialize. He pats female students on the fanny, sings obscene songs. He's already demonstrating a lot of what he's hearing at home.

(V7, 428).

When Tommy was eight years old, mental health experts noted that he had socialization problems and needed ongoing therapy (V7, 416). The experts believed that Tommy's emotional problems

interfered with his learning ability (V7, 416).

In fourth grade, Tommy attended three different schools and special education classes (V7, 409). Tommy's school attendance was extremely inconsistent (V7, 409). School officials noted aggressive behavior and anger problems (V7, 409-10). They tried to teach Tommy the meaning of certain emotions and feelings (V7, 410). At this time, Karen told school officials that Tommy behaved better at home, though the records prove otherwise (V7, 410).

In fifth grade, school officials noted that Tommy had problems with word skills, was disruptive and out of control, and severely disturbed (V7, 411).

He's described as explosive, that he's having trouble handling anger and stress, lack of self control. And also that he appears unhappy and depressed with emotional problems. And certainly that is consistent with what I've learned about the kind of environment that will produce those kind of symptoms and reactions in a child.

(V7, 410). The records note Tommy showed no emotional growth, and he actually regressed (V7, 411). Tommy tried to buy marijuana (V7, 411).

In sixth grade, Tommy's behavior worsened, he was more difficult to handle, and his auditory processing problems continued (V7, 412). Mental health experts noted Tommy was chronically depressed and lacked impulse control (V7, 416). They recommended that Tommy be hospitalized for observation and further

assessment (V7, 416).

When Tommy was twelve, mental health experts noted he suffered severe and debilitating stress (V7, 417). He received high scores on tests that showed socialized aggression, fear, anxiety, depression, and conduct disorder (V7, 417).

When Tommy was thirteen, a physician recommended long-term residential treatment over several years (V7, 409). Mental health professionals noted that Tommy needed an adult male role model, from whom he could learn about normal masculinity and sexuality (V7, 428).

Mental health professionals continued to evaluate, test, and recommend long-term residential treatment for Tommy, but the records reveal no treatment (V7, 419).

Ms. Vogelsang did not have the time to acquire Tommy's complete school records from sixth grade until Tommy was nineteen years old (V7, 412). However, mental health officials recommended a human sexuality group for Tommy when he was seventeen (V7, 420, 427). "[I]n these records it's clear that Tommy has a lot of confusion, a lot of sexual identification problems." (V7, 420). DYS noted that Tommy used cocaine, LSD, and alcohol while living with his mother and recommended alcoholics anonymous counseling (V7, 427). At nineteen years old, Tommy was in a school program and his reading and math skills were at fifth and sixth grade levels (V7, 413). The records indicate delayed physical

maturation and attention problems (V7, 413).

Ms. Vogelsang testified that Tommy was first placed in the Massachusetts Department of Youth Services system when he was thirteen years old (V7, 422). Though the records show over one hundred placements, there were only approximately fifteen different programs, but Tommy was placed in them over one hundred times (V7, 422). Ms. Vogelsang spoke to Tommy's DYS case worker, Al Ruiz, and learned:

[I]n terms of every one of these programs that there absolutely was no psychiatric treatment, that they were all detention units. The fact that they have a name like shelter care, the fact that they have a name like Key, the fact that they have a name like Lady of Providence makes no difference. That these are all detention units.

(V7, 424).

The Key program, in which Tommy participated the longest, five consecutive months, was not a residential treatment program (V7, 425). While Tommy participated in the Key Program, he lived at home with his mother, and Mr. Ruiz came by to check on him (V7, 425). There was no psychiatric care (V7, 425).

Ms. Vogelsang concluded that the Massachusetts system devastatingly failed Tommy Gudinas. An effectual system would have taken Tommy from his violent and abusive parents and placed him in protective custody, where he could receive long-term treatment (V7, 418). Tommy showed some improvement in placements away from his mother but, when Massachusetts returned Tommy to his

mother and her chaotic home environment, Tommy regressed (V7, 419). The state of Massachusetts, in effect, created a perpetual cycle from which Tommy could not receive the help he desperately needed (V7, 422).

Ms. Vogelsang testified that the mental health professionals should have tried to medicate Tommy (V7, 419). In addition to the emotional problems resulting from the trauma of his violent and abusive home, Tommy suffered an attention deficit disorder, which prevented him from learning and analyzing information (V7, 420). The attention disorder, in combination with his emotional problems, drove Tommy to alcohol and drugs as a form of self-medication (V7, 421).

Because Tommy Gudinas grew up in a social services institution, counsel was obligated to hire a licensed social worker or other expert who could explain to them how the social services institutions affected Tommy and how that environment, combined with his home environment and physical and psychological frailties, affected Tommy's development. This information, as with that in the rest of Tommy's psycho-social assessment, should have been provided to Dr. Upson and Dr. O'Brien so they could adequately diagnose Tommy Gudinas.

Tommy's attorney, Robert LeBlanc, testified that, though he failed to hire a social worker, "I certainly would now. I'm not sure if I knew to then. It was my first case, I just don't think

I knew to." (V7, 347, 372) Dr. Upson testified that a licensed social worker would have brought "interviews, statements from various individuals that they contacted which would give more credence to what I found in the records" (V6, 75-6). Dr. Upson also testified that a licensed social worker would better investigate a client such as Tommy because, "a social worker is trained to have an understanding not only of family dynamics, development, and an investigator may not be, yes, they may be better able to get more relevant data" (V6, 205).

Counsel failed to investigate Tommy Gudinas' background and present evidence of his background to the jury. Counsel ineffectively failed to investigate and provide Dr. Upson and Dr. O'Brien with information regarding Tommy Gudinas' background, both medical and environmental. Counsel merely relied on the incomplete set of records the public defender's office received from DYS as their investigation of Tommy Gudinas' background. Though counsel was aware that DYS placed Tommy more than 105 times at approximately 15 different institutions, counsel did not know the character of those institutions; whether they were inpatient or outpatient facilities, or whether they offered counseling or psychiatric help. Counsel could not effectively represent Tommy and did not provide adequate information to expert witnesses because counsel relied on documents to learn of Tommy's background without learning who wrote the documents, what kind of treatment

Tommy received, and the situations in which DYS placed Tommy Gudinas.

The court also erred in holding, "[t]he 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." (V12, 1404). Ms. Vogelsang did testify that further mitigation could have been established if the court had granted a continuance so she could complete her work on the case.

In this particular case, I think talking to teachers and placement workers in Massachusetts would be important. So there certainly are a significant number of people that need to be located and interviewed.

(V7, 393).

\* \* \*

Q. Do you believe you need to make visits to the communities where he grew up?

A. Yes, I do. Particularly to the placements that are still existing, and I believe those are located in the communities where he grew up.

(V7, 394).

\* \* \*

His mother did drink during the pregnancy with Tommy, after he was born and, again, I would like pediatric records from Dr. Bram (phonetic spelling) on this. Tommy had to have some blood drawn due to a condition he had, and apparently had breathing difficulties for much of the first year of his life, and that could be significant.

(V7, 402).

\* \* \*

When I met Mr. Gudinas in Massachusetts, he did describe burning Tommy's hand. My experience as a clinical social worker has been that when that kind of abuse is going on, if you have one incident like that, you have many others. This is not a parent losing control, whipping too hard leaving a mark. This is a much more brutal type abuse behavior.

(V7, 403-4).

\* \* \*

Q. Do you believe there's more information out there or documentation that could help you support the information that you have on Tommy's early background.

A. I do. One of the reasons is that there is an AFDC record, and it is incomplete. My experience has been that if there is a cover sheet for AFDC, there is usually a pretty good stack of paperwork on the family. And often eligibility workers make comments and notes when they go to the home, and I would like to make sure that if those records are there, that I can get those.

(V7, 404).

\* \* \*

I think that there are neighbors available up there, people who knew the family during those years who would be willing to talk about some of those times. Again, often police officers who were around during that period of time will remember a family, especially a child like Tommy. And I'm convinced there's a good probability that there is some officers who knew these families. Even though I learned that officers came to the homes frequently, so



far there's no documentation of that.

(V7, 405).

\* \* \*

And my experience with these kinds of placements is that each individual one should have its own files with progress notes. I think we've got a little bit of paperwork from four or five of them, some classification updates, where Mr. Ruiz gives the case history, that sort of thing. But the kind of records I'm used to seeing from placements like these, we do not have.

(V7, 423).

\* \* \*

Q. Is it too early to draw any final conclusions in this case?

A. Yes, it is.

(V7, 429).

Ms. Vogelsang did establish that there was much more mitigation and corroboration available, if she had the time to find it. This mitigation would not have been cumulative, as the court held, because it would have established that Tommy's mother and father fought violently, Tommy's mother physically abused and neglected him, physical illnesses caused by his mother's substance abuse while pregnant with him, and the extent to which the Massachusetts DYS program failed Tommy Gudinas. Trial counsel presented none of that mitigation, so it would not have been cumulative. The trial court erred.

**3. Counsel failed to hire a neuropharmacologist.**

The court held that counsel's failure to hire a neuropharmacologist was not ineffective assistance of counsel because the court felt the neuropharmacologist's testimony at the evidentiary hearing would not have changed the outcome of Tommy Gudinas' trial (V12, 1399-1401).

Accordingly, the 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 drug and alcohol 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 Michelle McGrath, the Defendant was attempting to conceal himself when stalking Rachelle 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.

(V12, 1021). The court erred.

Irwin testified that he and Mr. Le Blanc attempted to hire Dr. Siegal, a neuropharmacologist, but, because the county attorney objected to the cost and Judge Dawson concurred in an

off-record proceeding, counsel did not hire Dr. Siegel (V6, 218-19). Though counsel realized a neuropharmacologist would be imperative to Tommy Gudinas' case, counsel, without strategy, deficiently failed to find another neuropharmacologist who would work within the budget or appeal this decision to Judge Perry when the case was transferred to him (V6, 220).

Dr. Lipman, a neuropharmacologist, testified at Tommy Gudinas' evidentiary hearing. From Dr. Upson's testimony, Dr. O'Brien's testimony, numerous DYS records, some of which trial counsel did not obtain, and tests he performed, Dr. Lipman found that Tommy's neurodevelopmental problems resulted in an attention deficit problem which rendered Tommy pathologically impulsive, craving stimulation, unable to sustain attention for any length of time, and minimally educable (V7, 304, 306-10). Through witnesses, Dr. Lipman established that Tommy drank excessive amounts of beer and took LSD the night of the incident (V7, 327-28). The LSD and alcohol Tommy ingested hours before the incident marked the point where Tommy became uncontrollably impulsive and violent (V7, 329-30, 332-33).

Because counsel deficiently failed to hire a neuropharmacologist and other experts or investigators to investigate and explain Tommy's drug use that night and throughout his life, this information was not presented to the jury or considered by the experts who evaluated Tommy. As part of his

duties as a neuropharmacologist, Dr. Lipman conducted interviews and investigation that both Dr. Upson and Dr. O'Brien failed to do. The prejudice resulting from counsel's failure to hire a neuropharmacologist is clear. A neuropharmacologist was crucial in Tommy's case to determine the impact of the combination of alcohol and LSD on Tommy Gudinas' fragile psyche. Both Dr. O'Brien and Dr. Upson never considered the effects of the LSD, because both were unaware that Tommy took it that night. Moreover, Dr. Upson and Dr. O'Brien were not informed of Tommy's violent reactions to LSD and the blackouts he suffered, especially those while on alcohol and LSD.

The evidence did not show that Tommy Gudinas could control himself. Smith admitted that when she first saw Tommy Gudinas hiding, she laughed to herself because he was so obvious (RV7, 270). Moreover, when he followed Smith to her car, which was parked next to another car full of people, the people in the next car watched Tommy (RV7, 257-58). Hiding in a manner so obvious that someone laughs and following someone to attack them while a car full of people watch establish that a person cannot intelligently control himself. Such flagrant and foolish actions indicate a sufficiently impaired capacity to control oneself. Clearly, the drugs and alcohol Tommy ingested that night combined with his underlying attention deficit to produce Tommy's uncontrollable behavior.

Had the jury heard uncontroverted expert testimony such as Dr. Lipman's, the aggravating and mitigating factors would have weighed differently, and the jury probably would have found Tommy Gudinas guilty of an offense less than first degree murder or sentenced Tommy Gudinas to life. The trial court erred.

**4. Counsel's failed to present Tommy Gudinas' ten year history of drug and alcohol abuse.**

The circuit court denied this claim, holding:

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.

(V12, 1409). The circuit court erred.

This Court has held that failure to prepare and present evidence of chronic substance abuse can constitute ineffective assistance of counsel. Heiney v. State, 620 So.2d 171 (Fla. 1993); See also, People v. Wright, 488 N.E.2d 973 (Ill. 1986). In Ross v. State, this Court held that a defendant's past drinking problems, among other things, were "collectively a significant mitigating factor". Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). Unrebutted evidence that the defendant's "reasoning abilities were substantially impaired by his addiction to hard drugs" is "significantly compelling" mitigation. Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989).

Dr. Lipman learned that Tommy Gudinas consistently abused marijuana and alcohol from the time he was 10 years old (V7, 316).

At thirteen, Tommy first used LSD (V7, 317). At fifteen, Tommy first used hallucinogenic mushrooms (V7, 318). At sixteen, Tommy discovered cocaine and used LSD weekly for eight months (V7, 319-21). Tommy also abused heroin (V7325-26). Ellen Evans and Fred Harris confirmed that Tommy Gudinas has abnormally violent reactions to LSD, and that Tommy blacked out during his violent reactions and could not remember what occurred (V7, 317, 325). Tommy also reacted unusually to cocaine and heroin, which indicates he suffers neurological and rage problems (V7, 319-21, 325-26).

Dr. Lipman explained that the LSD impacted Tommy's maturation.

The use of hallucinogens will inevitably impact upon his neural maturation within the brain and the psychological constructs that develop from that, and, therefore, interact with the social forces that mold him which in his case were absolutely abysmal. However, could I point out, for instance, that if he wasn't hyperactive attention deficit and impulsive, he probably wouldn't have been punished as much as he was.

(V7, 314). Dr. Lipman testified that alcohol is also very detrimental to children with attention deficit disorders.

Attention deficit disorder children are impulsive anyway, and they are attention seeking. They are thirsty for experience, novelty particularly. Now, that is going to get the child into trouble. If you add alcohol, which disinhibits them, it will unleash that kind of experimental craving. The thrill of stealing a car, the fun of burglarizing a house, alcohol will unleash

that. They cannot be allowed to drink. And to add LSD is a very bad idea also.

(V7, 332).

Dr. Lipman explained that Tommy did not use drugs, cause trouble, and commit crimes because he was simply, as the prosecutor argued, an evil person (ST 296). Dr. Lipman explained that children who suffer attention deficits like Tommy's are driven to use drugs and alcohol, "[t]hey seem to have a drug seeking thirst." (V7, 315). With such children, their biological predispositions combine with their environments and cause them to misbehave (V7 314-15, 332).

Thus, the trial court erred in holding, "any evidence on this issue probably would have been damaging to the Defendant". The circuit court did not know the law. This Court has repeatedly held that evidence of long term substance abuse is mitigation. Heiney v. State, 620 So.2d 171 (Fla. 1993); Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985); Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989). Dr. Lipman explained that the seemingly negative information, of which the jury heard prejudicially incomplete portions throughout Tommy's penalty phase, was not simple evidence of bad character. It was caused by not treating a debilitating condition exacerbated by Tommy's environment (V7, 314-15, 332). Had the jury heard Dr. Lipman's testimony, they probably would have returned a life recommendation.

**5. Counsel failed to investigate Tommy Gudinas' institutional background.**

Counsel's failure to investigate the nature of the approximately 15 institutions where Tommy Gudinas spent one third of his life resulted in counsel's failure to investigate Tommy Gudinas' life. As a result of counsel's failure to investigate, expert witnesses were unaware of this facet of Tommy's life, and it was not presented to the jury. Irwin testified that he chose not to present the details of Tommy's life spent in institutions to the jury because he did not want the jury to think that no institution in Massachusetts could treat Tommy Gudinas (V6, 261, 284, 288-9). However, Irwin made this decision without investigating the nature of these institutions or even contacting Tommy's case worker to find out whether these institutions even treated Tommy Gudinas. Instead, counsel merely relied on the documents the Orange County Public Defender Office received from Massachusetts Department of Youth Services, the very institution that failed Tommy Gudinas for eight years (V6, 262). Because counsel made the decision not to present Tommy's institutional background without investigating what occurred in the institutions, that decision was made without investigation and is not, therefore, a strategic choice under Strickland. Strickland, 466 U.S, at 691.

Had counsel investigated these institutions or contacted Al Ruiz, Tommy's caseworker, counsel would have discovered that all



of these institutions were detention programs which provided no psychiatric treatment (V7, 424). Counsel could have presented to the jury that numerous psychiatrists, psychologists, and caseworkers recommended long term psychiatric care for Tommy Gudinas, but the state of Massachusetts did not provide that care. Instead, the state of Massachusetts shuffled Tommy Gudinas between detention facilities and his abusive home environment for nearly one half of his life, causing Tommy Gudinas more emotional harm and trauma (V7, 414-24). Had counsel investigated, they would have realized and presented witnesses to explain that none of those institutions could help Tommy Gudinas, because none were equipped to do so. Counsel would have explained to the jury that, had the state of Massachusetts properly intervened and removed Tommy Gudinas from the environment causing his extreme emotional disturbance, this crime probably would not have happened (V7, 333). Thus, the jury would not see Tommy as a sick person who could not be treated, the jury would see Tommy as a sick young man who has been acting out for help from the time he was seven years old, and the state of Massachusetts utterly failed to give him the help he needed.

**6. Prejudice from counsel's failures to investigate and present mitigation.**

Because "[c]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary", counsel's failure to

investigate Tommy's background and family, with the exception of talking to Tommy's mother and sister, cannot be considered strategy. Under Strickland, such a strategic choice must be made after the relevant investigation. Strickland, 466 U.S. 691. Counsel's deficient performance to research Tommy's background and uncover other sources to support what little information they had prejudiced Tommy Gudinas because the experts hired to help Tommy and the jury and judge who sentenced Tommy Gudinas to death never heard the horror and abuse Tommy endured his entire life. This was not a case in which counsel made a reasoned decision not to present the circumstances for tactical or strategic reasons. The circumstances were not presented to the experts and jury simply because counsel never took the time to develop them.

In a capital case, the test for determining whether counsel's deficient performance prejudiced the defendant is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Strickland, 466 U.S. at 695. A reasonable probability is one which undermines confidence in the outcome of the sentencing. Strickland, 466 U.S. at 694.

Because counsel failed to investigate Tommy's placements in the Massachusetts DYS system, counsel failed to adequately prepare the few witnesses they did contact. Counsel failed to contact

and procure information from DYS so their experts could know that DYS never provided Tommy the long-term treatment doctors and mental health professionals recommended. This lack of information made Dr. Upson's testimony worthless.

The prosecutor destroyed the mitigation Dr. Upson offered because, on cross examination, Upson was forced to admit he did not know whether Tommy actually received the help that was continually recommended for twelve years (ST 80, 81, 84, 96, 107, 108, 109). Dr. Upson testified he concluded that Tommy never received the recommended treatment because the computer printout counsel gave him reflected, "[n]one of those were identified as long-term treatment facilities. . . .I know because the people writing the reports at that time keep requesting treatment." (ST 79). Dr. Upson had no actual knowledge, he only made assumptions after reading a computer printout. The prosecutor used Dr. Upson's lack of knowledge to insinuate to the jury that the five months Tommy spent in the Key program was long term treatment (ST 108-9). Had counsel effectively investigated, Dr. Upson could have answered that during the five months in the Key program, Tommy lived at home with his alcoholic, violent, and abusive mother and step-father while a case worker occasionally checked on him (V7, 425).

The prejudicial effect of counsel's failure to investigate and present evidence of Tommy's tragic background is undeniable,

and it is evident in the questions a juror submitted to the court. After the first day of the penalty phase, Juror 53 submitted the following written questions to the court:

1. Is there documentation and medical records for Mr. Gudinas or his mother, Mrs. Gudinas for the condition of fluid on the brain at his birth? If yes, what was the treatment.

2. Did Mr. Gudinas at the time of the burn incident receive or require medical treatment or was any other medical treatment received at a later time? If yes, when, what.

3. Has Mr. Gudinas been prescribed or received medical medication for ADD? If yes, what , when? If yes was it effective.

4. The Indictment/Charge charges against Mr. Gudinas are confusing as read by counsel, State of Massachusetts. Could they be explained clearly as the jury instructions in the State of Florida? What is the punishment of each charge? Minimum versus maximum? And what was the actual time served in each charge by Mr. Gudinas and where was it served, i.e. type of institution?

5. What was the earliest age at which Mr. Gudinas had any complaints, charge of sexual aggression? Was it recognized and treated?

6. What does life imprisonment without possibility of parole mean?

A) Can Mr. Gudinas be released before the age of 46 for; one, prison overcrowding; two, good behavior, three; credit for chain gang or other similar duties?

B) What is the average time served in the State of Florida for Murder One?

C) What is the percentage of time served average?

D) Is there a Florida State institution requiring hard labor?

E) What services are available to life

inmates, i.e. T.V., porn, bodybuilding, education, dress code, sex with visitors, telephone privilege? Is there any actual physical work required? Treatment, i.e., long-term imprisonment for Mr. Gudinas as needed to return him to society.

7. Upon release of a sexual offender/murderer, is the community notified.

8. Question number eight: What is the average time in Florida until execution?

Thank you. Juror Number 53.

(ST 269-72). The court refused to answer the questions and instructed the jurors to rely on the evidence presented and closing arguments (ST 272-73). Questions 1, 2, 3, 4, and 5 concern relevant mitigation that counsel should have investigated and explained to the jury during their presentation of mitigation. Had counsel investigated and hired a social worker or a neuropharmacologist, counsel could have presented evidence that, though both experts would have expected medication as basic treatment, but Tommy Gudinas was never given the medication which could have treated his attention disorder and, perhaps, prevented this incident (V7, 331, 419). Counsel also could have explained that Tommy never received treatment for his sexual problems or any other psychological problems.

Additionally, had counsel investigated, counsel could have prevented much of the prosecutor's improper and prejudicial closing argument. The prosecutor used counsel's failure to explain that Tommy never received psychological treatment as a

non-statutory aggravating circumstance, appealing to the juror's emotions and fears, and the jury recommended death. The prosecutor argued Tommy Gudinas deserved the death sentence because:

People have tried to help him throughout the years. The State of Massachusetts, despite the fact that they may be criticized by people that don't really know, by Dr. Upson who didn't know what treatment he was given or not given. He never took it.

(ST 301-2).

Dr. Upson says, "I don't know what treatment he was or wasn't given in Massachusetts."

We have this list of all these different places he's been. All these different places he's been to. And he says, "I don't know what treatment was given in any of these. I have no records from them. I assume no treatment was given because he continues to need treatment."

Well, some people you just don't cure. There's some people you just can't cure. And the fact that he ends up the way he is, is not the fault of the state of Massachusetts. You heard his own mother say that the State of Massachusetts used every institution they had on Thomas Gudinas.

(ST 306-7). Had counsel investigated, procured records from the institutions, and contacted Tommy's case worker, counsel and Dr. Upson could have precluded this argument by presenting the readily available evidence that the State of Massachusetts did not give Tommy Gudinas the treatment he desperately needed, and in fact, put Tommy Gudinas in a cycle of physical and mental torture which

worsened his psychological troubles.

Counsel's decision not to present the above mitigation was not strategy. Irwin explained his failure to present this information:

I felt his past was a double-edged sword. There were certainly things to present to a jury which we tried to present, and there were things that I really did not want to leave the jury with. . . . The fact that he had been -- had the benefit of practically every institution in the state of Massachusetts. Psychiatric help, psychological help, and apparently Mr. Gudinas just continued on a path where he became worse and worse.

(160-61). Counsel admitted he failed to investigate. Had counsel investigated, he would have learned that Tommy Gudinas' past was not a double-edged sword; he never received the psychiatric and psychological treatment that was recommended. Had counsel presented this mitigation, the jury probably would have recommended a life sentence. The circuit court erred in denying this claim. Counsel's failure to investigate and present Tommy's background rendered the penalty phase impotent, and it was ineffective assistance of counsel.

**B. The trial court erred in holding counsel's failure to investigate and present evidence of Tommy Gudinas' mental and emotional immaturity was not ineffective assistance of counsel.**

The trial court denied this claim, holding:

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.

(V62, 1403). The trial court erred. Tommy Gudinas' 3.850 claim was not that the court should reconsider its decision not to find the age mitigator established, but that counsel was ineffective for failing to investigate and present evidence of Tommy Gudinas' mental and emotional immaturity, from which the trial court and jury could find the age mitigator.

During the penalty phase, counsel presented no evidence of Tommy Gudinas' mental and emotional immaturity, and relied solely upon Tommy's chronological age to prove this mitigator. Counsel's reliance solely on Tommy's chronological age was ineffective assistance of counsel. At the time of Tommy Gudinas' trial, this Court held "the fact that a murderer is twenty years of age, without more, is not significant." *Garcia v. State*, 492 So.2d 360, 367 (Fla. 1986). "If age is to be accorded any significant weight, it must be linked with some other characteristic of the



defendant or the crime such as immaturity or senility" Campbell v. State, 679 So.2d 720, 726 (Fla. 1996) (quoting Echols v. State, 484 So.2d 568, 575 (Fla. 1985)). Thus, counsel should have known they had to present additional evidence of mental or emotional immaturity in order to establish this mitigator. However, counsel failed to know the law or counsel failed to investigate because counsel presented no evidence.

At the evidentiary hearing, Dr. Lipman testified that he gave Tommy a battery of tests in September 1999 (V7, 308-9). Although he was twenty five years old, Tommy performed at a lower level than a seventeen year old (V7, 309). Dr. Lipman testified that Tommy likely would have tested at a lower age if he was tested at the time of his trial (V7, 309-10). Jan Vogelsang testified that, at nineteen years old, one year before this incident, school records revealed Tommy's reading and math skills were at fifth and sixth grade levels (V7, 413). This information was available for counsel to find and present, however counsel failed to do so (V6, 220, 288; V7, 347, 363).

Counsel's failure to investigate and present evidence of Tommy Gudinas' mental and emotional immaturity prejudiced Tommy Gudinas. If counsel had presented such evidence, the jury and judge probably would have found that mitigator established. The balance of aggravating and mitigating circumstances would weigh differently, and the jury probably would have recommended a life

sentence.

- C. The trial court erred in holding that counsel did not perform deficiently by failing to provide Dr. O'Brien with the testimony necessary to substantiate his opinion that Tommy Gudinas' ability to conform his conduct to the requirements of the law was substantially impaired.**

Counsel performed deficiently by failing to provide Dr. O'Brien with the testimony he needed to substantiate his opinion that Tommy Gudinas' ability to conform his conduct to the requirements of the law was substantially impaired. During the penalty phase, Dr. O'Brien, a medical doctor and a pharmacologist, testified that the alcohol Tommy ingested the night of the incident removed his inhibitions, leaving his severely disturbed personality uncontrolled, without the capacity to conform his conduct to the requirements of the law (ST 119, 140-41).

Unfortunately for Tommy Gudinas, Dr. O'Brien based his opinion on counsel's statements, not on interviews with witnesses or their sworn statements, and Dr. O'Brien's testimony was thoroughly discredited on cross-examination:

- Q. So the factual basis that you are going from then, as to the state of intoxication, is based upon statements from his cousins and people that were with him at the bar?
- A. That's correct. I've been told that there's testimony saying he was intoxicated. If I take that as the basis, then I can give you the levels and how much he took and whatnot.
- Q. Have you read the testimony of those

individuals?

A. No, I have not.

(ST 133).

\* \* \*

Q. You were not given the testimony of witnesses; correct?

A. That's correct sir.

Q. Who told you that the witnesses said he was intoxicated?

A. His attorney.

Q. And your opinion assumes that correctness of that representation?

A. My opinion to assume, that's correct, and court documents determined that.

(ST 145).

Because counsel deficiently failed to give Dr. O'Brien witness testimony or depositions on which he could base his opinion that Tommy Gudinas lacked the ability to conform his conduct to the requirements of the law, both the jury and the judge easily disregarded Dr. O'Brien's testimony. This prejudiced Tommy Gudinas because the trial court dismissed this mitigator.

The Court, after carefully evaluating and analyzing the testimony of Dr. O'Brien, finds that his testimony is not sufficient to establish this mitigating factor. Dr. O'Brien's opinion is too heavily based upon unsupported facts and what he was told other witnesses were going to testify about concerning the issue of intoxication.

(V12, 1410-11).

At the evidentiary hearing, Mr. LeBlanc testified he did not remember speaking with Dr. O'Brien, instructing him to contact witnesses, or providing him with witness testimony (V7, 217-18). Irwin testified he would have preferred to have Dr. O'Brien sit through the testimony, but could not remember why he did not (V7, 231). Irwin testified he thought he gave Dr. O'Brien witness depositions, but Dr. O'Brien's penalty phase testimony proves otherwise (V7, 231); (ST 133, 145). Irwin admitted he did not ask Dr. O'Brien to speak with the witnesses, stating, "Some of these experts, I like to hope that they know how to do their job, and I certainly wouldn't have the time to hover over every single expert and tell them specifically everything they need to do." (V7, 231). Counsel admitted he failed to do his job-- provide his expert witness with the information needed to substantiate his opinions-- because he did not think he should have to "hover" and inform the expert witness what his client needed.

The circuit court dismissed this claim:

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.

(V12, 1404). The court ignored one half of the sentencing process. Although the court claims he would not have believed Dr. O'Brien's testimony if Dr. O'Brien had substantiated his claims,

he ignores the probability that the jury would have considered the substantiated testimony. The state presented no evidence to refute Dr. O'Brien's opinion. Thus, had counsel provided Dr. O'Brien with the information to substantiate his opinions, the jury probably would have been reasonably convinced that Tommy Gudinas could not conform his conduct to the requirements of the law. The aggravating and mitigating circumstances would have weighed differently, and the jury probably would have recommended life. The circuit court erred.

**D. Calling Michelle Gudinas during the penalty phase was ineffective assistance of counsel.**

Trial counsel deficiently presented Michelle Gudinas, Tommy's sister, during the penalty phase. Michelle testified that Tom Sr. burned Tommy's hand as punishment. Michelle's testimony lacked credibility because she was less than two years old at the time of the incident (ST148, 178). Tommy's mother testified to the same incident, so Michelle's testimony was duplicitous. By calling Michele, counsel deficiently gave the prosecutor the opportunity to question Michele about an incident during which Tommy allegedly sexually assaulted her (ST 151-52, 156-7, 159). Although Michelle recalled that Tommy was actually protecting her from others, and that the Orlando police pressured her to say anything inconsistent, this testimony severely damaged Tommy Gudinas' case (ST 151-52, 159). To rebut her testimony, the State called an Orlando police officer who testified Michelle told him she went

into a room with Tommy and the next thing she remembered Tommy was on top of her and her swimming suit was ripped (ST 166). A cousin was also in the room (ST 166). Had counsel not presented Michelle Gudinas, and investigated and presented other people, such as Ellen Evans, who could testify about the abuse Tommy suffered at his father's hands, this alleged incident would not have been admissible. Ellege v. State, 346 So.2d 948 (Fla. 1978).

Irwin testified he presented Michelle Gudinas' testimony because he felt obligated to let her testify during the penalty phase (V6, 233). Rather than deciding, as a matter of strategy, that her testimony would benefit Tommy Gudinas, Irwin chose to present Michelle Gudinas' testimony to please her (V6, 233). Thus, Irwin's decision to present Michelle Gudinas' testimony was not strategy, a decision made from his duty to zealously represent Tommy Gudinas, it was an effort to please Tommy's sister. It was deficient performance which prejudiced Tommy Gudinas.

The circuit court denied this claim, holding "[b]ecause this information had already reached the jury during the State's cross-examination of Dr. Upson, this claim can be rejected. (S102)." (V12, 1406). The trial court erred. Though Dr. Upson mentioned this once during his lengthy testimony, this incident became the focus of the penalty phase during Michelle Gudinas' and the police officer's testimony. Further, the police officer's testimony carried an extra indica of credibility because he is an authority

figure. Had counsel not presented Michelle Gudinas, the jury never would have heard the police officer and probably would have forgotten this incident in the bulk of Dr. Upson's testimony, not considered it when weighing the aggravating and mitigating circumstances, and recommended a life sentence.

#### **E. Conclusion**

Counsel never meaningfully investigated mitigation, violating their duty to "conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence". Rose v. State, 675 So.2d 567, 572 (Fla. 1996), quoting Baxter v. Thomas, 45 F.3d 1501 (11<sup>th</sup> Cir. 1995). Counsel had a duty to investigate the substantial mitigation available, namely, the physical abuse inflicted by Tommy's mother, father, and his mother's boyfriends, the mental abuse inflicted by both, the sexual abuse his father inflicted, Tommy's ten year history of drug and alcohol abuse, and the fact that, despite officials knew Tommy Gudinas needed long term treatment, the Massachusetts DYS never provided it and, instead worsened Tommy's psychological problems by shuffling him in between situations in which he was raped and physically and mentally abused by his mother and her boyfriends. Copious mitigation was available, but counsel did not investigate or present it. Irwin testified he felt Tommy's background was a "double edged sword" and chose not to present it, but he made that decision without investigating

Tommy's background (V7, 160-61). Counsel failed to contact the case worker assigned to Tommy during his 105 placements. Thus, counsel could not know whether it was a "double edged sword". Counsel's deficient performance becomes more egregious in light of the mitigation counsel presented. Counsel presented a minute and superficial portion of Tommy's background even though counsel claimed their lack of investigation convinced them Tommy's background would hurt him in the penalty phase (V1, 160-61). This resulted in counsel's, the prosecutor's, and the jury's prejudicial and wrong assumption that Tommy Gudinas received the help he needed but could not be cured. Through cross-examination of Dr. Upson and Michelle Gudinas and presentation of the Orlando police officer, the prosecutor used counsel's failure to investigate and present Tommy's background as a non-statutory aggravating circumstance, and Tommy Gudinas was sentenced to death. Counsel's failure to investigate and properly supply his experts with crucial information also resulted in an unsubstantiated statutory mitigator and focus on an alleged sexual assault of Michelle Gudinas. But for counsel's errors, Tommy Gudinas probably would have received a life sentence. The trial court erred in denying this claim.



## ARGUMENT IV

THE CIRCUIT JUDGE ERRED IN FINDING THAT TOMMY GUDINAS' COUNSEL WAS NOT INEFFECTIVE AT THE GUILT PHASE OF THE TRIAL UNDER SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT STANDARDS. COUNSEL FAILED TO INVESTIGATE EVIDENCE, PROPERLY QUESTION JURORS, CROSS EXAMINE WITNESSES, AND CHALLENGE INADMISSIBLE EVIDENCE IN THE GUILT/INNOCENCE PHASE OF THE TRIAL.

### A. Failure to investigate evidence.

Counsel deficiently failed to test the semen and saliva found on the victim for DNA. The state tested the blood on the t-shirt found at the Harris apartment for DNA, but the results were inconclusive (V13, 1350). The test only proved that the blood could have been the victim's (V13, 1350). The semen and saliva were not tested. No evidence directly linked Tommy Gudinas to the victim or the murder. Tommy Gudinas was only identified as being in the area and stealing the victim's car.

At the evidentiary hearing, Irwin testified he decided to avoid investigating forensic evidence at the crime scene because Tommy told him the victim's body was heavy to drag (V6, 245-48). Counsel's decision not to investigate DNA evidence was not strategy because it was not a reasonable decision. Irwin also testified that he believed that Tommy should have presented an insanity defense (V7, 212-14). The state's medical examiner testified that the victim most likely was not dragged (RV3, 434, 459-60). Tommy Gudinas consistently told his mental health

experts that he was innocent (V6, 279). Irwin made the decision not to investigate DNA evidence because his client, who he believed might be insane, made a comment inconsistent with the evidence and other comments. Accordingly, his decision not to investigate forensic evidence was not a reasonable limitation on investigation. Strickland, 466 U.S. at 691.

Counsel's failure to DNA test the semen and saliva resulted in counsel's failure to present evidence that Tommy Gudinas did not sexually assault the victim. Had counsel presented such evidence at trial, the jury probably would have acquitted Tommy Gudinas of first degree murder and two counts of sexual battery. Thus, counsel was ineffective.

**B. Failure to adequately cross-examine witnesses.**

Counsel failed to adequately cross examine Jane Brand. The state called Brand to establish Tommy Gudinas' presence at the scene of the crime (V7, 290-308). Brand testified she saw a young man sitting on the stairway at her school, and she told him to leave (V7, 295, 296). The young man then jumped over the school wall into the alley where the victim's body was found (V7, 295, 296). Though the young man never faced her, Brand described him as "about 18 years old, short brown hair, very average looking" (V7, 293, 294). Brand then testified that after seeing Tommy Gudinas on television one month before trial, she recognized him as the young man at her school (V7, 302-3). On cross-examination,

counsel elicited that she could not describe the young man in enough detail for a police composite (V7, 304). Counsel asked how long she looked at the young man, the time of morning, whether she noticed an accent, and whether Tommy resembled any of the composite sketches (V7,303-6). On re-direct, Brand stated she did not recognize Tommy's face, she recognized the way he moved (V7, 307). Counsel deficiently chose not to recross-examine her (V7, 307). Counsel deficiently failed to ask how much movement she saw on television, and how it allowed her to definitively identify Tommy Gudinas; Brand testified the young man climbed four steps and jumped over the wall (V7, 295). Counsel failed to ask what exactly she recognized from the four steps she observed, and how she recognized it. Counsel failed to emphasize the highly prejudicial setting in which Brand viewed Tommy Gudinas on television nearly 11 months after she saw the person in the alley.

Trial counsel failed to object to Brand's testimony as a discovery violation. Counsel deposed Brand approximately six months before the trial and five months before she identified Tommy Gudinas. Long after the deposition, when Brand informed the state that she could now identify Tommy Gudinas as the young man she saw, the State was obligated to turn this information over to defense counsel. Fla. R. Crim. P. 3.220. Had the state revealed this new evidence, as it was required to do under its continuing discovery obligation, counsel would have filed a motion to

suppress identification or prepared for an effective cross-examination. Brand's identification was inherently unreliable and extremely prejudicial. She saw Tommy Gudinas on television in a highly prejudicial setting eleven months after the incident. Brand's identification was crucial because it placed Tommy Gudinas in the alley where the body was discovered. Counsel was obligated to investigate and refute her identification. Counsel's failure to object and effectively cross-examine Jane Brand prejudiced Tommy Gudinas because the jury was led to believe Brand's identification was credible.

At the evidentiary hearing counsel testified that, although he was shocked that Brand identified Tommy Gudinas, he did not object to Brand's new testimony (V6, 228). Irwin did not consider Jane Brand's surprising new identification a discovery violation, so he did not object or move for a mistrial (V6, 228). Counsel's failure to know the law and object and move for a mistrial was deficient performance which prejudiced Tommy Gudinas Fla. R. Crim. P. 3.220.

Counsel failed to adequately cross-examine Frank Wrigley. At trial, Wrigley testified that Tommy Gudinas "looked like he had a buzz on" and carried a cup in his hand (V3, 583). Counsel failed to elucidate what Wrigley considered a buzz. At deposition, Wrigley described Tommy's state of intoxication:

Oh, yeah. I know he did. He had a big old smile on his face. He was walking kind of

wobbly. And he said, let's go smoke a joint. And I had some, and I said, sure, why not. And we all went out and smoked the joint.

Counsel should have used the deposition testimony to establish what Wrigley meant by "buzz" to further establish intoxication. Because counsel deficiently failed to establish that Tommy could not walk well and was intoxicated, the court and jury easily dismissed the statutory mitigating circumstance that Tommy could not conform his conduct to the requirements of the law.

**C. Counsel failed to make objections and appropriate motions.**

Counsel failed to move to suppress the blood stained t-shirt found at Fred Harris' apartment. The state used the t-shirt to attempt to link Tommy Gudinas to the murder (V4, 707). However, the state only proved that it came from the Harris apartment and that it was stained with human blood (V4, 707, 723-25). The state did not link the blood to Tommy Gudinas or the victim. Had counsel filed a motion to suppress, pointing out that the state failed to link the blood stains to Tommy Gudinas or the victim, it would have been error if the court failed to grant the motion. Counsel, however, failed to object when the court admitted the irrelevant, inflammatory, and prejudicial shirt. This prejudiced Tommy Gudinas because the shirt was the only physical evidence the state could argue linked Tommy Gudinas to the crime.

The court denied this claim holding, "In fact, Dwayne Harris testified that the Defendant was wearing the shirt when he returned

to the apartment on the morning following the murder." (V12, 1397). Dwayne Harris also testified that the shirt was taken into evidence by the police (R. V4, 692)." (V12, 1397). The court erred. Because the state failed to conclusively link the blood to the victim, the shirt was irrelevant, inflammatory, and highly prejudicial.

Counsel deficiently failed to contemporaneously move for a mistrial after Frank Wrigley testified he intended to call the police if Fred Harris thought Tommy Gudinas was involved in the murder (R. V3, 579). Counsel did object, and the court admonished Wrigley, but only after the devastating comment (R. V3, 579). At this point, counsel should have moved for mistrial. Irwin, who was not cross-examining this witness, felt restrained from making a timely objection because of the court rule that only the attorney questioning the witness could make objections (R. V3, 602). This highly prejudicial statement should not have come into evidence and, if objected to timely, the judge might have granted a mistrial or, at the very least, would have given a timely curative instruction. The trial court erred in denying this claim holding, "[t]he comment did not affect the fairness and reliability of the proceeding or of the outcome." (V12, 1398). The curative instruction the court gave after counsel later moved for a mistrial was ineffectual, because the court did not give the instruction until after cross examination and an intervening twenty minutes

recess (V3, 600-606).

**D. Conclusion**

Cumulatively, counsel's deficient performance deprived Tommy Gudinas of effective assistance of counsel and was not harmless error because the prejudicial impact of counsel's deficient performance probably caused the jury to return a verdict of guilty of first degree murder instead of not guilty or guilty of a lesser offense. State v. DiGuilio 491 So. 2d at 1129 (Fla. 1986). Tommy Gudinas is entitled to relief; the court erred in denying this claim.

**ARGUMENT V**

**THE TRIAL COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING SO MR. GUDINAS COULD PROVE THE RULES PROHIBITING HIS LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. GUDINAS ADEQUATE REMEDIES.**

The Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 21 of the Florida Constitution, require that Tommy Gudinas receive a fair trial. However, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar<sup>1</sup> prevents Tommy

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<sup>1</sup>The rule expressly prohibits counsel from directly or indirectly communicating with jurors. The rule states that

A lawyer shall not . . . after dismissal of

(continued...)

Gudinas from determining whether he received a fair trial. Tommy Gudinas can only discover jury misconduct through juror interviews. To the extent it precludes undersigned counsel from investigating and presenting jury bias and misconduct that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional. Because the circuit court denied Tommy Gudinas this opportunity to investigate and present a claim of juror misconduct, the court denied his rights to due process and access to the courts; the reliability and integrity of Tommy Gudinas's capital sentence is questionable. The circuit court erred in denying this claim without an evidentiary hearing.

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(...continued)

the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict is subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist.

Rule 4-3.5(d)(4), R. Regulating Fla. Bar.



## ARGUMENT VI

THE TRIAL COURT ERRED BY FAILING TO GRANT AN EVIDENTIARY HEARING SO MR. GUDINAS COULD ESTABLISH FLORIDA STATUTE 921.141(5) IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE UNCONSTITUTIONALITY WAS NOT CURED BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. GUDINAS' DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, TRIAL COUNSEL WAS INEFFECTIVE.

The jury was instructed on three aggravating factors in this case: 1) prior violent felony conviction, 2) felony murder, and 3) heinous, atrocious, and cruel. (ST331-32). The instructions the jury received did not narrow the application of these vague and overbroad aggravators, and the jury's verdict of death is therefore, unreliable. Though the jury's verdict in the penalty phase is only advisory, the sentencing judge is required to give "great weight" to the jury's recommendation. Thus, the trial court indirectly weighed the unconstitutional aggravating factors the jury is presumed to have found. Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992); Kearse v. State, 662 So.2d 677 (Fla. 1995). These errors were not harmless.

### **A. During the commission of a felony instruction.**

Tommy Gudinas' jury was instructed, "[t]he crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of sexual battery." (ST332). This

aggravator is unconstitutional because it automatically applies to every felony murder. Tommy Gudinas entered the penalty phase automatically eligible for the death penalty. Other similarly, or worse, situated petitioners are not automatically eligible for the death penalty. Tommy Gudinas' death penalty was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. A state cannot use such aggravating factors "which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 503 U.S. 527 (1992). This automatic aggravating circumstance did not "genuinely narrow the class of persons eligible for the death penalty," and therefore, the sentencing process was rendered unreliable. Zant v. Stephens, 462 U.S. 862, 876 (1983). The jury's deliberation was obviously tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 504 U.S. 527 (1992).

The Wyoming Supreme Court addressed this issue in Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991). In Engberg, the Wyoming court found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance violates the Eighth Amendment:

In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying

robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.

820 P.2d at 89-90. See also United States v. McCullah, 76 F.3d 1087 (10th Cir. 1996); Davis v. Executive Director of Department of Corrections, 100 F.3d 750 (10th Cir. 1996).

Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black, 503 U.S. 527 (1992). The use of the "in the course of a felony" aggravating circumstance is unconstitutional. As the Engberg court held:

[W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery, and pecuniary gain aggravating circumstances found had in the weighing process and in the jury's final determination that death was appropriate.

820 P. 2d at 92. This error cannot be harmless in this case:

[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing

process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 504 U.S. at 534.

The jury received unconstitutional instructions regarding two of the three aggravating circumstances (ST331-32). In both instances the instructions failed to channel and narrow the sentencers' discretion. Cumulatively, they resulted in a death sentence that violates the Eighth Amendment.

Because counsel deficiently failed to contemporaneously object, Tommy Gudinas' jury was unconstitutionally instructed to consider an automatic aggravating factor. The jury's consideration of this aggravating circumstance violated Tommy Gudinas's Eighth and Fourteenth Amendment rights because it allowed the jury to consider an aggravating circumstance which applied automatically after the jury convicted Tommy Gudinas under the theory of felony murder during the guilt phase of the trial. Had counsel objected, the jury probably would not have heard this unconstitutional instruction, the balance of aggravating and mitigating circumstances would have weighed differently, and Tommy Gudinas probably would have received a life sentence. The trial court erred in summarily denying this claim.

**B. Shifting the burden of proof during the penalty phase.**

Under Florida law, a capital sentencing jury must be:

[T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .

[S]uch a sentence could be given *if the state showed the aggravating circumstances outweighed the mitigating circumstances.*

State v. Dixon, 283 So. 2d 1 (Fla. 1973) (emphasis added). The court instructed Tommy Gudinas' jury, "Should you find sufficient aggravating circumstances to exist, it will then be your duty to determine **whether mitigating circumstances exist that outweigh the circumstances.**" (ST332). The jury was later told: "You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations." (ST334) Defense counsel rendered prejudicially deficient assistance in failing to object to the errors.

Because Tommy Gudinas's sentencing jury was instructed that it could consider Florida's felony murder aggravating circumstance, and the same jury convicted him of sexual battery, Tommy Gudinas was eligible for death upon conviction. Thus, Tommy Gudinas entered the penalty phase of his capital trial with the burden of proving that death was not the appropriate penalty.

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted

the burden of proof to Tommy Gudinas on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Tommy Gudinas's Due Process and Eighth Amendment rights. Mullaney v. Wilbur, 421 U.S. 684 (1975). See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon. Second, the instruction essentially told the jury that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987).

This error was not harmless. Tommy Gudinas entered the penalty phase with an automatic aggravating factor. Because counsel was ineffective in the penalty phase, Tommy Gudinas's sentencing jury heard only a small fraction of the available mitigation. The unconstitutional instructions precluded the jurors from considering the insufficient mitigating evidence that was presented, Hitchcock, and from evaluating the "totality of the circumstances." State v. Dixon, 283 So.2d at 10. The jurors would reasonably have incorrectly understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Tommy Gudinas is entitled to relief in the form of

a new sentencing hearing in front of a jury because his sentencing was tainted by improper jury instructions.

**C. Heinous, Atrocious, and Cruel**

The court instructed the jury:

The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

"Heinous" means extremely wicked and shockingly evil.

"Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of the other. The kind of crime intended to be included is as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

You are instructed that the actions of the defendant which were taken after the victim was dead cannot be considered in determining whether the murder was especially wicked, evil, atrocious or cruel.

(ST331-32). Though counsel filed a proposed instruction including the proper limiting construction that the jury could not consider actions taken after the victim was unconscious, counsel deficiently failed to object when the prosecutor urged the court to deviate from that instruction ( R. V3, 448). During the first penalty phase charge conference, the court suggested the heinous, atrocious, and cruel instruction with the limiting construction that the jury could not consider actions taken after the victim was unconscious (ST 35-36). The prosecutor objected, "because physical

pain can be felt after unconsciousness" (ST 36). Though caselaw entitled Tommy Gudinas to the limiting construction that actions taken after the victim is unconscious are not relevant to HAC, counsel failed to bring the caselaw to court, and the court failed to give the limiting construction. Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984).

Counsel deficiently failed to cite the case law which mandates this limiting construction and merely told the court he thought the victim was in a state of deep unconsciousness (ST 36). Counsel failed to bring the appropriate case law to the first charge conference (ST 36). Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984). During the second charge conference, counsel again failed to object to the instruction without the limiting construction that the jury could not consider events after the victim lost consciousness (ST 226).

The instruction was unconstitutional because it did not instruct the jury that it could not consider actions after the victim was unconscious. "Actions taken after the death of the victim are irrelevant in determining this aggravating circumstance. Also, when the victim becomes unconscious, the circumstances of further acts contributing to his death cannot support a finding of heinousness." Jackson v. State 451 So. 2d 458, 463 (Fla. 1984). Tommy Gudinas was constitutionally entitled to that limiting construction to narrow the overbroad application of the heinous,



atrocious, and cruel aggravating factor.

Tommy Gudinas's sentencing jury is presumed to have found this aggravator established. Jackson, 451 So.2d 458 (Fla. 1984); Espinosa, 112 S. Ct. 2926, 2928 (1992). Under these circumstances, erroneous instruction presumably tainted the jury's recommendation and, in turn, the judge's death sentence in violation of the Eighth and Fourteenth Amendments. Espinosa, 112 S.Ct. 2926. Tommy Gudinas's jury was inadequately guided and channeled in its sentencing discretion.

Because counsel deficiently failed to litigate this issue and the jury is presumed to have found this aggravator, Tommy Gudinas was denied a reliable and individualized sentencing determination in violation of the Sixth, Eighth, and Fourteenth Amendments. The error cannot be harmless in this case. Stringer v. Black, 112 S. Ct. at 1137. In light of the weight given the automatic felony murder aggravator, the unconstitutional shifting of the burden of proof, and the evidence of mitigation, the consideration of the two unconstitutional aggravating factors cannot be held harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). If the unconstitutional instructions had not been given, the jury probably would have recommended life. Tommy Gudinas is entitled to a new penalty phase hearing.

The circuit court denied this claim.

The Defendant raised the identical substantive claim in Claim X of his initial brief on

appeal to the Florida Supreme Court. Since the Florida Supreme Court found this claim to be procedurally barred, it can be rejected. As to the ineffective assistance claim, the Defendant cannot show prejudice.

(V12, 1415). In fact, this Court held the erroneous instruction was procedurally barred because "the jury instruction issue was not raised at trial." Gudinas v. State, 693 So.2d 953, 958 (Fla. 1997). Thus, the trial court erred. Counsel's failure to preserve this issue by presenting the case law that entitled Tommy Gudinas to the unconscious limiting construction was deficient performance.

The trial court erred in holding counsel's deficient performance did not prejudice Tommy Gudinas. On direct appeal, this Court noted that, "[w]e 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." Gudinas v. State, 693 So.2d 953, 966 (Fla. 1997). Because the evidence was so broad, and the state offered no evidence which proved the victim was conscious during the assault, the jury could have determined the victim was unconscious during the attack, and concluded the state did not prove this aggravating circumstance beyond a reasonable doubt. The balance of aggravating and mitigating circumstances would weigh differently, and the jury probably would have recommended a life sentence.

## ARGUMENT VII

WHEN VIEWED AS A WHOLE, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED TOMMY GUDINAS OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

Tommy Gudinas did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Tommy Gudinas's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. The errors have been revealed in this brief, Tommy Gudinas's 3.850 motion, habeas corpus petition, and direct appeal. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and the trial court's numerous errors significantly tainted Tommy Gudinas's trial and penalty phase. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Tommy Gudinas his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Ray v. State, 403 So. 2d 956 (Fla. 1981); Taylor v. State, 640 So. 2d 1127 (Fla. 1st DCA 1994); Stewart v.

State, 622 So. 2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So. 2d 1099 (Fla. 4th DCA 1993).

**CONCLUSION AND RELIEF SOUGHT**

Based on the forgoing, the lower court improperly denied Tommy Gudinas's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the case for such relief as the Court deems proper.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing *Initial Brief of the Appellant*, which has been typed in Font Courier New, Size 12, has been furnished by U.S. Mail to all counsel of record on this *30<sup>th</sup> day of November, 2000.*

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