

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00954

LOWER TRIBUNAL NO. CR 94-7132

THOMAS GUDINAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF THE APPELLANT

PETER J. CANNON
FLORIDA BAR NO. 0109710
ASSISTANT CCRC

LESLIE ANNE SCALLEY
FLORIDA BAR NO. 0174981
STAFF ATTORNEY

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

COUNSEL FOR APPELLANT

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REPLY TO APPELLEE'S STATEMENT OF FACTS

Appellee complains that Mr. Gudinas' Statement of Facts is "argumentative in all respects and is denied" and relies on its own statement of facts (AB 8-9). However, Appellee's Statement of Facts is not only argumentative, it is conclusory and misleading.

Specifically, Appellee mischaracterizes Mr. Irwin's testimony. Appellee asserts that Mr. Gudinas confessed to counsel and his mental health expert that he committed the crime (AB 13-14). In fact, Mr. Gudinas made some statements that Mr. Irwin characterized as "essentially" a confession (V6, 244). However, the specific statement Mr. Irwin recalled was that Mr. Gudinas told him the victim's body "was heavy as it was being drug into the alleyway" (V6 245). Despite Appellee's assertion otherwise, Mr. Gudinas never confessed to Dr. Danziger (V6, 245). The portion of the record Appellee cites actually recites a letter from Dr. Danziger to Mr. Irwin, which reflects the statement Irwin perceived as a confession (V6 244-45). The only physical evidence that was consistent with that statement was physical evidence placing Mr. Gudinas at the scene of the crime; no physical evidence directly inculpated Mr. Gudinas as the killer (AB 14) (V6, 272-73).

Because Appellee's Statement of Facts is argumentative and misleading, Mr. Gudinas relies on the Statement of Facts in his initial brief.

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.

Appellee argues that the lower court properly denied Mr. Gudinas' motions for continuance. However, in supporting this position, Appellee disingenuously mischaracterizes Jan Vogelsang's testimony when asserting:

[G]iven the nature of the testimony from the "unprepared" social worker-witness, and the testimony of that witness that given time to "finish" her work in this case, she might well find information that would **weaken** her opinion (R432), it strains credulity to suggest that Gudinas is entitled to any relief based on the claimed unpreparedness of this witness. In other words, the social worker's testimony was as good as it was likely to be, and that the only result of a continuance would be further delay for no purpose.

(AB 20-21).

* * *

Because that is the state of the record, it makes no sense to suggest that it was correct to deny the motion to continue because the only thing that could happen to change the social worker's opinion would be the discovery of records showing that Gudinas **did** receive treatment, a fact that would wholly under cut the basis of the testimony.

(AB 22).

Ms. Vogelsang did not testify that, if given time to complete the psycho-social assessment, her impressions could only weaken. Appellee fails to note that the testimony he referenced was a response to the question, "If you had been allowed sufficient time to complete the psychosocial assessment, is there anything that you can find that would weaken these impressions?" (V7, 431). Ms. Vogelsang also testified that, if given time, she might also have found information which would strengthen and specifically document her impressions (V7,433-34).

As Appellee correctly stated, the standard of review this Court uses in reviewing the denial of a continuance is abuse of discretion (AB 18). An abuse of discretion occurs when the denial of a continuance results in undue prejudice to the movant. Fennie v. State, 648 So.2d 95, 97 (Fla.1994).

The trial court's denial of the December 17, 1999, Motion to Continue belies a reasoned consideration of the prejudice caused by his failure to grant Tommy Gudinas' Motion to Continue.

I ask this rhetorical question: What is the purpose of a 3.850 motion, a post conviction relief motion? Thomas Lee Gudinas has had a full and fair opportunity to appeal his conviction and sentence to the Florida Supreme Court.

After a lengthy review by the Florida Supreme Court, the judgment and sentence of the trial court was [sic.] affirmed. Mr. Gudinas has had more than an ample and fair opportunity to file a 3.850, which he has filed.

(V1, 103-5). This harangue shows that the evidentiary hearing the court allowed Tommy Gudinas was a mere formality and not an opportunity to establish the constitutional flaws that occurred during his trial. Without hearing any evidence, the court determined that Tommy Gudinas had a full and fair opportunity to appeal his conviction and sentence, and denied him a full and fair evidentiary hearing.

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.

Appellee again wrongly asserts that Mr. Gudinas confessed to counsel that he committed the murder (AB 24). In fact, Mr. Gudinas never confessed to counsel that he killed the victim, he merely confessed to contact with the victim after she died (V6 244-45, V7 357-58). Irwin testified that Tommy told him the victim's body "was heavy as it was being drug into the alleyway" (V6 245). His reliance on that statement in deciding not to test the DNA in the physical evidence is not a reasonable strategic decision because the statement is inconsistent with the physical evidence. The state's medical examiner testified that the victim most likely was not dragged (RV3, 434, 459-60).

Appellee also wrongly asserts that the procedural bar this Court found in Zeigler v. State "is even more striking in Tommy Gudinas' case" because the method of DNA typing was available and used on certain evidence in this case (AB 24). Zeigler v.

State, 654 So.2d 1162-64 (Fla.1995). In fact, the procedural bar found in Zeigler clearly does not apply in this case. First, Tommy Gudinas' motion to release evidence for DNA testing was made during the course of investigating his first 3.850 motion (V9, 801). Therefore, unlike Zeigler, it cannot be time barred as a successive motion. Zeigler, 654 So.2d at 1164. Second, unlike Zeigler, the semen and saliva evidence at issue were never tested at the time of trial (V13, 1349-50). Id. Third, unlike Zeigler, the victim in this case was killed during the course of sexual assaults (R. V5, 800, 806, 808-9, 812). The person who assaulted the victim left the semen and saliva (R. V5, 806, 812). Thus, DNA evidence could exonerate Tommy Gudinas. Id.

To effectively present his claims that he was innocent and that defense counsel was ineffective for not testing the semen and saliva to prove he was innocent of this murder, Tommy Gudinas needed the results of the DNA tests. Because the court denied Tommy Gudinas the tests and the opportunity to present evidence regarding his innocence and counsel's ineffectiveness, the court denied Tommy Gudinas a full and fair evidentiary hearing ("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).

Tommy Gudinas relies on the argument outlined in his initial

brief. However, in light of the facts that DNA evidence has recently exonerated one Florida death row inmate, and this Court has urged the use of DNA evidence, the trial court's denials of Tommy Gudinas' motions to test DNA evidence were erroneous. See Smith v. State, 515 So.2d 182 (Fla.1987); Thorp v. State, 2000 WL 1707103, 811 (Fla.2000) (Wells, C.J. dissenting); Proposed Florida Statute §925.11 (2001).

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.

Both prongs of the Strickland test to determine whether counsel rendered ineffective assistance of counsel are mixed questions of law and fact, which this Court considers de novo. Stephens v. State, 748 So.2d 1028, 1033-34 (Fla.1999). Regarding the prejudice prong, this Court held:

An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. **The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.**

Stephens, 748 So.2d at 1033-34 (emphasis added).

Appellee first asserts that the trial court's denial of this claim was proper because Mr. Gudinas cannot prove prejudice (AB 26). The prosecutor, the state's representative who is charged with the duty to seek justice, urged the jury to recommend death based on Golden Rule violations, improper instructions which limited the jury's consideration of nonstatutory mitigation, improper instructions regarding statutory mitigation, name calling, appeals to bias and fear, improper argument of the heinous, atrocious, and cruel aggravator, and argument urging the jury to disregard the law. See Berger v. United States, 295 U.S. 78, 88 (1935). The extent of the prosecutor's revile prejudiced Tommy Gudinas given the absolute lack of contemporaneous objections or curative instructions. Without the prosecutor's improper comment, at least four more jurors probably would have recommended life. The jurors did not know the law and could only be expected to trust that the prosecutor, the state's representative, would argue justly.

[E]xcessive vituperation or ridiculous epithets are out of place and should not be indulged in criminal prosecutions. The prosecuting attorney occupies a semijudicial position. He is a sworn officer of the government, with no greater duty imposed on him than to preserve intact all the great sanctions and traditions of the law. It matters not how guilty a defendant in his opinion may be, it is his duty under oath to see that no conviction takes place except in strict conformity with the law.

Washington v. State, 98 So.2d 605, 609 (Fla.1923).

Both Appellee and the trial court dismiss the prosecutor's misconduct, claiming that the facts of the case are so aggravated that it could not have affected the jury's recommendation (AB 28) (V12, 1410). However, both Appellee and the trial court failed to note that, in this case, there was substantial nonstatutory mitigation that the prosecutor's argument erroneously urged the jury not to consider (ST 294-95, 305). Hitchcock v. State, 755 So.2d 638, 642-43 (Fla.2000). See Gudinas v. State, 693 So.2d 953, 968 (Fla.1997) (Anstead, J. dissenting). The trial court found a small amount of mitigating evidence: Tommy Gudinas consumed alcohol and cannabis the evening of the crime, has the capacity to be rehabilitated, has an IQ of 85, is religious and believes in God, behaved acceptably at trial, his father dressed as a transvestite, suffers from personality disorders, was developmentally impaired as a child, was a caring son to his mother, was abused as a child, suffers from attention deficit disorder, and was diagnosed as a sexually disturbed child. Gudinas, 693 So.2d at 968 n.20. In addition, the jury heard evidence that Mr. Gudinas was only twenty years old at the time of the crime, had been psychologically disturbed since he was six years old and the records suggested never received the recommended treatment, was extremely emotionally disturbed at the time of the crime, and his capacity to conform his conduct was substantially impaired at the time of the crime. Even though the prosecutor's reprehensible argument continued without

objection, while the prosecutor displayed slides of the victim's mutilated body, two jurors recommended a life sentence. Had counsel contemporaneously objected and requested curative instructions or the trial court independently given curative instructions, it is very likely that at least four more jurors would have followed the proper legal instructions, weighed the mitigation, and recommended a life sentence.

Appellee also asserts that because specific arguments of prosecutorial misconduct were not quoted in Mr. Gudinas' 3.850 motion, the claim was not plead (AB 27). Appellee overlooks, however, that 3.850 claims, by statute, must contain "a *brief* statement of facts (and other conditions) relied on in support of the motion". § 3.850(c)(6) Fla. Rule. Crim. Pro. (emphasis added). Claim IV of Mr. Gudinas' 3.850 motion alleged that:

Defense counsel rendered prejudicially deficient performance in failing to object to the prosecutor's inflammatory and prejudicial closing argument. The prosecutor exceeded the bounds of proper argument.

(V10, 1035).

* * *

The prosecutor saw this as an opportunity to continue on with his attacks and name calling of Mr. Gudinas.

(V10, 1036).

* * *

Mr. Ashton made attacks on Mr. Gudinas to remove from the jury the notion that they

would be voting to put a human being to death.

(V10, 1036).

* * *

Defense counsel, LeBlanc, was doing the closing arguments in the penalty phase and failed to make any objections to the improper comments by Mr. Ashton.

(V10, 1037)

* * *

Mr. Ashton's closing argument, in both the guilt and penalty phases, improperly appealed to the jury's passions and prejudices. Such remarks prejudicially affect the substantial rights of Mr. Gudinas.

(V10, 1037).

Thus, the facts that the prosecutor committed egregious misconduct and that trial counsel utterly failed to contemporaneously object were plead (V10, 1035-37).

Tommy Gudinas was entitled to an evidentiary hearing on this ineffective assistance of counsel claim because the motion and record do not clearly show that he was not entitled to relief. Gaskin v. State, 737 So.2d 509, 515 (Fla.1999). This Court has held:

While the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a *conclusive* demonstration that the defendant is entitled to no relief. In essence, the burden is upon the state to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief. The rule was never

intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion.

Gaskin, 737 So.2d at 516. The state made no such demonstration in Mr. Gudinas' case.

In summarily denying this claim, the court found that counsel performed deficiently (V12, 1410). When determining whether prosecutorial misconduct was prejudicial, the proper inquiry is whether the cumulative impact of the misconduct deprived Tommy Gudinas of a fair penalty phase. Garron v. State, 528 So.2d 353, 359 (Fla. 1988). The trial court was obligated to consider all misconduct on the record when denying this claim. The trial court erred in summarily denying this claim(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.

Throughout its brief, Appellee misstates the Strickland standard for determining whether counsel's performance was deficient. Appellee repeatedly states, "Unless **no** reasonable lawyer would have made the decision not to present the witness, counsel cannot have been ineffective." (AB 36)(emphasis in original)(see also AB 53, 56). In fact, Strickland mandates an objective standard for determining deficient performance. "[A]

defendant must show that counsel's representation fell below an objective standard of reasonableness". Strickland, 466 U.S. 688. Appellee's professed standard, that "[u]nless **no** reasonable lawyer would have made the decision not to present the witness, counsel cannot have been ineffective.", makes the standard outlined in Strickland subjective. See Williams v. Taylor, 529 U.S. 362 376-78 (2000) ("reasonable lawyers and law givers regularly disagree with one another. Congress surely did not intend that the views of one such judge who might think that relief is not warranted in a particular case should always have greater weight than the contrary, considered judgment of several other reasonable judges.") The issue is whether the *decision* was reasonable, not whether a lawyer is reasonable.

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's failure to investigate Tommy Gudinas' family and background was ineffective assistance of counsel.

Appellee asserts that, after finding the mitigating evidence of Tommy Gudinas' background that Ellen Evans could establish, counsel made a strategic decision not to present that testimony (AB 35) (V12, 1405-6). Again, Appellee mischaracterizes the evidence. Counsel never testified that their failure to present this mitigation was a strategic decision (V7, 243-46, 373-74). Bob LeBlanc, who spoke to Ellen Evans, could not remember what they

spoke about, why they did not present this testimony, or even whether it was a strategic decision (V7, 243-45). Even if, from a total lack of evidence, strategy is assumed, the strategic decision must be objectively reasonable. Strickland, 466 U.S. at 688. Counsel decided to present Tommy's family background of abuse; counsel presented his mother and sister. The evidence Ellen Evans established could not have hurt Tommy Gudinas, it explained his lengthy and unsuccessful involvement with the DYS system, and it is the type typically relied on as mitigating evidence. If, indeed, counsel investigated and found this evidence, discussed it, and decided not to present it, that decision fell "outside the wide range of professionally competent assistance". Strickland at 690.

Ellen Evans' evidentiary hearing testimony established that Tommy's mother brutally abused him from the time he was in her womb. While pregnant with Tommy, his mother abused marijuana, mescaline, and alcohol (V6, 145-46). This drug use grew to include cocaine and continued throughout Tommy's childhood (V6, 147-9, 151, 154-55, 160, 164, 169). Tommy's mother sadistically beat him throughout his life (V6, 149, 154). When she tired of beating Tommy herself, she directed her current boyfriend or husband to beat Tommy for her (V6, 161, 170).

Tommy's mother also introduced him to deviant sexual behavior at a young age. She worked in a massage parlor, where the employees provided oral sex for money (V6, 155-56, 158). She

allowed her husband to wear women's lingerie and entertain a boyfriend in Tommy's presence, she left Tommy in a situation where he was forced to sleep with his father while his father wore women's stockings, and slept with her husband in the living room, where Tommy easily observed them (V6, 156, 158, 165, 168).

Tommy's mother's verbal abuse, however, was probably the most devastating (V6, 154). After years of physical, sexual, and emotional torture, Tommy was placed in the Massachusetts Department of Youth Services. Whenever Tommy returned from DYS, his mother and his step-father verbally and physically abused him until he acted out to escape their abuse and return to DYS custody (V6, 170-71).

The jury heard none of this mitigating evidence which tragically explained why Tommy Gudinas was in and out of the Massachusetts Department of Youth Services and, seemingly, could not be cured. Had counsel presented the mitigation provided by Ellen Evan's testimony, the mitigation counsel did present would have carried 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. If, from a total lack of evidence, a strategic decision not to present this mitigation is assumed, it was not reasonable. Strickland, 466 U.S. at 688. The trial court erred in denying this claim.

2. Counsel's failure to hire a licensed social worker was ineffective assistance of counsel.

Appellee supports the court's erroneous conclusion that counsel's failure to investigate and present evidence of Tommy's institutional background was a strategic decision and not deficient performance (V12, 1407) (AB 37-38). However, counsel's failure to hire an expert such as a licensed social worker to investigate and explain to the jury the nature of the approximately 15 institutions where Tommy Gudinas spent one third of his life was not a strategic decision because it was made without investigation. Strickland, 466 U.S. at 691; Williams, 529 U.S. at 399.

Irwin, who was the experienced attorney with one prior penalty phase and who made the decisions, 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, 208, 261, 284, 288-9; V7, 344-45). Because he believed the institutions had treated Tommy Gudinas, but he could not be treated, Irwin considered Tommy's institutional past a "double edged sword" (V6, 262). Irwin testified that he believed that Tommy Gudinas "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." (V6, 288-89, *see also* 262).

However, had Irwin hired a social worker to investigate the

nature of these institutions and whether the institutions even treated Tommy Gudinas, he would have found that no institution treated Tommy Gudinas (V7, 424). The institutions were merely detention programs which subjected him to more sexual abuse (V6, 173-74). 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.

Appellee asserts that counsel's failure to hire a social worker to investigate and present Tommy Gudinas' social history was not ineffective assistance of counsel because the trial court held that the evidence Ms. Vogelsang established was cumulative (AB 36-39). Appellee forgot to note, however, that the trial court's order denying 3.850 relief distorts the mitigation it found when sentencing Tommy Gudinas to death. In its sentencing order, the court found the following nonstatutory mitigation:

1. The defendant had consumed cannabis and alcohol the evening of the homicide.
2. The defendant has [sic.] capacity to be rehabilitated.
3. The defendant [sic.] behavior at trial was acceptable.
4. The defendant has an IQ of 85.
5. The defendant is religious and believes in God.

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

7. The defendant suffers from personality disorders.

8. The defendant was developmentally impaired as a child.

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

10. The defendant **was an abused child**.

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

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

(V8, 454) (emphasis added). Combining all 12 nonstatutory mitigators as one, the trial court gave it "very little weight" (V8, 454). In finding the statutory mitigating factor that Tommy Gudinas was extremely mentally or emotionally disturbed at the time of the crime, the court relied on Dr. Upson's testimony:

Dr. Upson goes on to say that the defendant [sic.] beginning at the first grade was showing behavioral problems in school. The defendant was showing signs of aggression, sexual problems, poor peer relationships, and difficulties in adjusting to adults.

The testing on the defendant by Dr. Upson revealed no evidence of neuropsychological impairment and both sides of the defendant's brain, as well as the frontal portion, appeared to be functioning within normal limits. The defendant tested rather elevated on the MMPI scale. The defendant fell in the A-2 code type on the MMPI. Dr. Upson said the following concerning the A-2 code type:

"There are 10 scales that we use.

And we code type them as the two highest in the profile. And this profile is one that reflects individuals having a higher degree of impulsivity, sexual confusion, manipulation skills in terms of tending to manipulate others, sexual conflict, at times bizarre ideations."

"There are individuals that will tend to be physically abusive. They have the capacity and ability to be violent. They use a higher degree of rationalization, projection. At times they will show regressive tendencies. And in many cases, the situation is such as looking and dealing with a person, the person looks to be very well in control, but these behaviors will escalate and come out under conditions where the person is either threatened, or in a situation whether for some reason might be losing control."

The testing of the defendant also revealed that he had an IQ of 85.

The Court finds that this mitigating factor is present, based on the unrebutted testimony of Dr. Upson.

(V8, 451-52). In the sentencing order, the court dismissed all the information presented through Dr. Upson's review of Tommy Gudinas' school, mental health, and placement histories in two sentences (V8, 451-52). Based mostly upon the MMPI results, the court found Tommy Gudinas was extremely mentally or emotionally disturbed at the time of the crime (V8, 451-52). The court then added that mitigation to the childhood abuse counsel presented and 11 other nonstatutory mitigators and gave them, cumulatively, "very little

weight" (V8, 454).

However, in finding Ms. Vogelsang's testimony cumulative, the court mischaracterized the mitigating factors announced in his sentencing order:

Based on the evidence at the penalty phase, the Court found that the Defendant . . . was **severely abused** as a child. . . and that **based upon his school, mental health, and placement histories, he was a very seriously disturbed young man.**

(V12, 1407) (emphasis added). Clearly the court did not find, based upon the evidence that trial counsel presented, that Tommy Gudinas was **severely** abused as a child, because counsel presented only three or four instances of abuse, which the court combined with 11 other nonstatutory mitigators and dismissed as having "very little weight" (V8, 454). Ms. Vogelsang's testimony established the **severe** abuse. Moreover, the sentencing order clearly shows that the court really considered the MMPI when finding Tommy Gudinas was extremely emotionally or mentally disturbed at the time of the crime. The court did not mention Tommy Gudinas' school, mental health, and placement histories in its sentencing order. Again, this testimony was established by Ms. Vogelsang, the licensed social worker.

This mitigation would not have been cumulative, as the court erroneously held, because it would have established that Tommy's mother and father fought violently, abused drugs, Tommy's mother

physically and emotionally 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 after his mother's abuse repeatedly drove him to act out. Trial counsel presented none of that mitigation. Ms. Vogelsang's testimony also conclusively established that DYS never gave Tommy the treatment recommended by their doctors, DYS merely punished him (V7, 424). Counsel also failed to present that evidence.

Any part of Ms. Vogelsang's testimony that would be cumulative as to the mere fact that it was presented, would not be cumulative to the *weight* of the mitigation. Both the court and the jury weigh mitigation against aggravation. It is a qualitative analysis, not a quantitative analysis. Any overlapping evidence is made much more weighty by the details in Ms. Vogelsang's testimony. Counsel's failure to present this mitigation was not a reasonable decision and it prejudiced Tommy Gudinas. Had the jury heard this mitigation, there is a reasonable probability that at least four more jurors would have recommended a life sentence.

3. Counsel's failure to hire a neuropharmacologist was ineffective assistance of counsel.

Appellee claims that this issue is procedurally barred because it was not specifically plead in Tommy Gudinas' 3.850 motion (AB 39). However, the 3.850 motion plead that counsel performed ineffectively by failing to investigate and present mitigating

evidence (V10 1020-33). Dr. Lipman presented mitigating evidence that counsel failed to investigate and the court addressed Dr. Lipman's testimony as mitigating evidence which could have been presented during the penalty phase (V14, 1399-1401). This claim is not procedurally barred.

4. Counsel's failure to present Tommy Gudinas' ten year history of drug and alcohol abuse was ineffective assistance of counsel.

Appellee again claims that this issue is procedurally barred because it was not specifically plead in Tommy Gudinas' 3.850 motion (AB 39). Appellee is wrong; this issue was specifically plead (V10, 1028).

Evidence regarding Thomas Gudinas' character and background, his early life marked by abandonment, . . . and his serious problem with drug and alcohol addiction all were not fully developed.

(V10, 1028).

Appellee also asserts that Dr. Lipman's testimony regarding Tommy's ten year history of drug and alcohol abuse was improper because Dr. Lipman "exceeded the bounds of his expertise, and reached into the area of psychiatry" (AB44-45). Appellee points to no specific testimony that exceeded Dr. Lipman's expertise as a neuropharmacologist. The state did not object to his qualifications as an expert in the field of neuropharmacology. (V7,299-302, 307, 310). Dr. Lipman spoke with Dr. Upson and based his opinions on Dr. Upson's psychological evaluation and

psychological evaluations in Tommy's records (V7, 302). Dr. Lipman did not testify as a psychiatrist.

Appellee did not address the circuit court's error in holding that:

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

(V12, 1400). At trial, Dr. Upson testified that his tests found no indication of brain damage, which he interpreted as organic brain damage (ST, 54). Dr. Upson did testify however, that his tests revealed that Tommy has attention deficit problems and that his finding is consistent with Tommy's records (ST, 61-63). Dr. Lipman based his conclusions regarding the relationships between drug and alcohol use in a person with an attention deficit disorder on Dr. Upson's testing and Tommy's records (V7, 306). Thus, Dr. Lipman's testimony is consistent with Dr. Upson's testing and testimony, and the trial court erred in dismissing Dr. Lipman's testimony.

Appellee also failed to address the circuit court's error in holding that "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", even though an extensive history of drug and alcohol abuse is clearly mitigating evidence (V12, 1409). See 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). See also, People v. Wright, 488 N.E.2d 973 (Ill. 1986).

Counsel's failure to investigate and present Tommy's extensive history of drug abuse was not strategy, it was ignorance of the law. With investigation, counsel could have presented evidence that the drug abuse is especially mitigating because it was not entirely volitional. 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). Dr. Upson testified that Tommy's illegal activity during his childhood probably resulted from his attention deficit problems (ST, 88). Tommy's history of drug and alcohol abuse, which started when he was only ten years old, also establishes mitigation of parental abuse and neglect. With investigation, this mitigation could not have hurt Tommy Gudinas, and it probably would have induced at least four more jurors to recommend life. The trial court erred in holding counsel's failure to investigate and present this evidence was not ineffective assistance of counsel.

5. Counsel's failure to investigate Tommy Gudinas' institutional background was ineffective assistance of

counsel.

Appellee wrongly asserts that the circuit court's order regarding this issue is not clearly erroneous (AB 47). The court held:

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.

(V12, 1403). In fact, Ms. Vogelsang testified that she spoke to Tommy's Massachusetts caseworker and learned that:

[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). Had the court granted a continuance, Tommy's case worker would have been able to fly to Florida and testify about the lack of treatment in further detail.

Appellee asserts that because Dr. Upson did not change his testimony based on this new information, there is no prejudice (AB 47). However, Dr. Upson testified that this new information, with all the new information provided before the evidentiary hearing, would have "given my testimony more **weight**" (V1, 185) (*emphasis added*). The jury would have considered the **weight** of Dr. Upson's testimony differently, and at least four more jurors probably would have recommended life.

Appellee also failed to address the prejudice caused by this failure to investigate on Dr. Upson's cross examination and closing argument. The prosecutor destroyed the mitigation Dr. Upson offered regarding Tommy's institutional background 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). 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 (ST 301-2, 306-7). As a result, the jurors clearly did not know that Tommy Gudinas never received the recommended long term treatment. The jury submitted questions to the court asking whether Tommy in fact received treatment, and the court refused to answer the questions (ST 269-73). The court instead instructed the jury to rely on the evidence presented and closing arguments (ST 272-73). Had counsel investigated, procured records from the institutions, and contacted Tommy's case worker, counsel and Dr. Upson could have precluded this prejudice by presenting the readily available evidence that the State of Massachusetts did not give Tommy Gudinas the treatment that psychologists continually recommended. Had counsel investigated and presented this evidence, at least four more jurors probably would have recommended life. The court erred in denying this claim.

6. Conclusion

The above arguments clearly show that counsel violated their "obligation to conduct a *thorough* investigation of the defendant's background". Williams, 529 U.S. at 1514. During closing argument, defense counsel asked the jury to recommend a life sentence:

Where does a 10 year old learn to become hostile, aggressive and difficult with everyone?

(ST, 318).

How can a 12 year old be depressed, withdrawn, impulsive, and aggressive without learning it from somewhere else?

(ST, 318).

What was going on? What factors contributed to him behaving that way at age seven?

(ST, 326). However, counsel presented no evidence to answer those questions, blaming it on the evidence they presented that Tommy's father abused him four times and dressed in women's clothes, Tommy looked young for his age, and the suggestion that Tommy never received the treatment he needed (ST, 311-29).

Had counsel conducted a reasonable investigation, they could have provided the following answers:

1. Tommy's mother brutally beat him, beginning when he was three years old (V6, 164-65).
2. Tommy's father often brutally abused Tommy when he was very young. "Yes, he got the living shit kicked out of him by his dad." (V6, 164-5).

3. Tommy's step-father and his mother's boyfriend beat Tommy, often at his mother's direction (V6, 161, 170).
4. Tommy's father abused drugs and alcohol throughout his early childhood (V6, 148).
5. Tommy's mother was drunk or high during much of the time she cared for him (V6, 148). She was a vicious and violent drunk (V7, 400).
6. Tommy's mother used drugs and alcohol while pregnant with him (V6, 147-48).
7. Tommy's mother's boyfriend and his step-father abused drugs (V6, 160, 169).
8. He grew up in poverty (V6, 175).
9. Tommy's mother verbally and emotionally abused him, referring to him as a "bastard" and telling Tommy that he ruined her family (V6, 170-1).
10. Tommy's father engaged in homosexual activity while caring for Tommy (V6, 155-57).
11. Tommy's father forced Tommy to sleep with him while his father wore women's undergarments (V6, 168).
12. Tommy was raped while in DYS custody (V6, 173-74).
13. Tommy's parents neglected him for days at a time (V7, 404).
14. Tommy's mother worked in a massage parlor where employees performed oral sex for tips (V6, 155-56).
15. Tommy's parents were raised in violent and sexually abusive families (V7, 400-3, 427-28).
16. Tommy's parents fought violently in his presence (V7, 402-6).
17. Tommy was placed in special education classes (V7, 409).
18. His school attendance was inconsistent (V7, 409).
19. Tommy was ridiculed because of his small stature and foot illnesses (V6, 175).
20. At 19, Tommy's reading and math skills were at fifth and sixth grade levels (V7, 413).
21. Tommy was never given medication for his attention deficit problems (V7, 305).
22. As a child, Tommy had auditory processing problems (V7, 412).
23. Tommy started abusing drugs and alcohol when he was ten years old (V7, 316). As a teenager, Tommy abused alcohol, marijuana, mushrooms, cocaine, LSD, and heroin (V7, 316-21, 325-26).
24. Tommy's attention deficit problems drove him to use drugs and alcohol as an attempt to self medicate (V7, 315, 421).
25. Tommy used LSD the night of the crime (V7, 329-33).

26. Tommy absolutely never received the psychiatric treatment that was recommended. The DYS placements were detention programs in which he often lived at home with his violently abusive parents (V7, 424-25).
27. A detailed account of the reports which documented Tommy's severe and debilitating stress and depression, including the manner in which it escalated in relation to the trauma Tommy experienced at home (V7, 390-440).

"[T]he entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raise[ed] a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence." Had counsel presented this available, admissible, and mitigating evidence, in addition to the evidence they did present, at least four more jurors probably would have recommended a life sentence. (V8, 454). Confidence in the outcome is undermined; counsel was ineffective. Strickland, 466 U.S. at 461; Williams, 529 U.S. at 399..

ARGUMENT AS TO REMAINING CLAIMS

Tommy Gudinas relies on argument presented in his initial appeal regarding these issues.

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 SERVICE

I HEREBY CERTIFY that a true copy of the following has been
has been furnished by United States Mail, first class postage
prepaid, to all counsel of record on this _____ day of _____,
2001

PETER J. CANNON
Florida Bar No. 0109710
Assistant CCRC-Middle

Leslie Anne Scalley
Florida Bar No. 0174981
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Petition for Writ of Habeas Corpus, was generated in a Courier non-proportional, 12 point font, pursuant to Fla. R. App. P. 9.210.

Peter J. Cannon
Florida Bar No. 0109710
Assistant CCRC-Middle

Leslie Anne Scalley
Florida Bar No. 0174981
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544

Counsel for Appellant

Copies furnished to:

Honorable Belvin Perry, Jr.
Chief Circuit Court Judge
425 N. Orange County Avenue
Orlando, FL 32801

Chris A. Lerner
Assistant State Attorney
Office of the State Attorney
415 North Orange Avenue
Orlando, FL 32801

Judy Taylor Rush
Assistant State Attorney
Office of the State Attorney
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118-3951

Thomas Gudinas
DOC# 379799
Florida State Prison
Post Office Box 747
Starke, Florida 32091