IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-954

THOMAS GUDINAS,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary,
Florida Department of Corrections,

Respondent,

and

ROBERT BUTTERWORTH,
Attorney General,

Additional Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Tommy Gudinas' first habeas corpus petition in this Court. Art. l, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Tommy Gudinas was deprived of the right to a fair, reliable, and individualized trial and sentencing proceedings and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

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.

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INTRODUCTION

Significant errors which occurred at Tommy Gudinas' capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Tommy Gudinas. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims appellate counsel omitted establish that "*confidence* in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions which were ruled on in direct appeal, but should now be revisited in light of subsequent case law in order to correct error in the

appeal process that denied fundamental constitutional rights. As this petition demonstrates, Tommy Gudinas is entitled to habeas relief.

PROCEDURAL HISTORY

On July 15, 1994, an Orange County grand jury indicted Tommy Gudinas of attempted sexual battery, attempted burglary with an assault, first degree murder, and two counts of sexual battery (V8, 441-43). Tommy Gudinas was tried by a jury on May 1-4, 1995, and the jury found him guilty on all counts (R538-542). After a penalty phase conducted on May 8-10, 1995, the jury recommended death by a vote of ten to two (R562). On June 16, 1995, the trial court sentenced Tommy Gudinas to death (RV5, 859-61).

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,502 U.S. 936 (1997).

Tommy Gudinas filed a shell post-conviction motion on June 5, 1998, before his one-year date, in order to toll Federal time periods (V8, 515-538). 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). The court held a limited evidentiary hearing on December 17, 1999 (V6 131-32, V7, 391-92).

The court denied Tommy Gudinas' Second Amended Motion To Vacate Judgments Of Conviction And Sentence on March 20, 2000 (V12, 1391-1419). Tommy Gudinas filed his notice of appeal on April 19, 2000 (V12, 1420-21). His appeal shall be filed concurrently with this petition.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). *See* Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Tommy Gudinas' death sentence.

This Court has jurisdiction, *see*, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Tommy Gudinas' direct appeal. *See* Wilson, 474 So.2d at 1163 (Fla.

1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Tommy Gudinas to raise the claims presented herein. *See*, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. *See* Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors such as those herein pled is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Tommy Gudinas' claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Tommy Gudinas asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights guaranteed

by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

THE PROSECUTOR'S IMPROPER PENALTY PHASE CLOSING ARGUMENT RENDERED TOMMY GUDINAS' DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO EFFECTIVELY RAISE THIS CLAIM ON DIRECT APPEAL.

Appellate counsel performed deficiently by failing to raise the majority of the prosecutor's improper penalty phase closing argument on direct appeal. Though appellate counsel raised two instances of unobjected-to misconduct as fundamental error, counsel failed to raise the additional fundamentally prejudicial improper argument from which this Court could determine, the misconduct "reach[es] down into the validity of the trial itself to the extent that a verdict could not have been obtained without the assistance of the alleged error" and remand the case for a new penalty phase. Cochran v. State, 711 So.2d 1159, 1162 (Fla. 1998) *quoting* Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996).

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 Tommy Gudinas' 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:

> **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)(emphasis added). The prosecutor essentially asked the jury to put themselves in the victim's place by probing the last minutes of her life, 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, appellate counsel deficiently failed to raise this improper argument on direct appeal. 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**.

(ST304-5)(emphasis added). The same prosecutor replicated this argument in Hitchcock v. State, and this Court held it was error because it 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 raise this fundamentally improper argument on direct appeal.

Again, the prosecutor intentionally mislead 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. And it's testimony from his own witness. . . There was nothing about Mr. Gudinas at the time that he committed this crime that was any different on any other day of his life.
>
> I suggest to you , ladies and gentlemen, that that is not a mental or emotional disturbance. He was not psychotic. He was not under the influence of some schizophrenic disease. He was simply being Thomas Gudinas. And Thomas Gudinas is a monster.

(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). 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).

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.

Appellate counsel raised this improper argument as fundamental error on direct appeal, but, because counsel deficiently raised only two instances as fundamental error, this Court held the two instances of misconduct did not rise to the level of fundamental error and did not consider the substance of the misconduct. 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).

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

(ST306-7).

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. *See* Gore v. State, 719 So.2d 1197, 1201 (Fla.1998). 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 the 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. Appellate counsel deficiently failed to raise this issue on direct appeal. Appellate counsel did raise the prosecutor's monster remark, with the prosecutor's erroneous argument on the extreme mental or emotional disturbance mitigator, alone as fundamental error.

Again, because counsel failed to raise other instances of prosecutorial misconduct, this Court held it was not fundamental error and did not consider it. Gudinas, 695 So.2d 958.

The prosecutor impermissibly injected argument calculated to arouse bias and fear and which was not supported by the evidence. Although no expert or lay witness so testified, the prosecutor twice told the jury that Tommy Gudinas specifically hated women. The prosecutor stated 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 (RV1, 194). The prosecutor injected unfounded elements of fear, emotion, and bias into Tommy Gudinas' penalty phase. 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, appellate counsel deficiently failed to raise his improper argument on direct appeal.

The prosecutor improperly argued to the jury they consider actions taken after the victim died 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)(emphasis added).

This argument is similar to the argument this Court held improperly misled the jury in Rhodes v. State, 547 So.2d 1201, 1205 (Fla. 1989). In Rhodes, 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). Appellate counsel deficiently failed to raise this improper argument on direct appeal.

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 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 evidence and inflammatory argument. § 921.141 Fla. Stat.. Garron, 528 So.2d 353, 359 (Fla. 1988). 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, appellate counsel deficiently failed to raise this improper argument on direct appeal.

Cumulatively, the prosecutor's closing argument utterly destroyed Tommy Gudinas' most important right under our legal system, the right to the "essential fairness of his criminal trial." Cochran v. State, 711 So.2d 1159, 1163 (Fla. 1998) *quoting* Knight v. State, 672 So.2d 590, 591 (Fla. 4th DCA 1996). Because trial counsel failed to contemporaneously object to preserve this misconduct for appeal, appellate counsel had to raise the misconduct as fundamental error in order for this Court to consider the substantive impact of the

misconduct. However, appellate counsel raised only two instances, the illegal argument on extreme mental and emotional disturbance and the monster argument, combined, as fundamental error. Gudinas, 695 So.2d 958. Gutierrez v. State, 731 So.2d 94 (4th DCA 1999). Raising only two instances of misconduct was deficient performance. When this Court considers whether prosecutorial misconduct was prejudicial, this court considers whether the cumulative impact of the misconduct deprives a person of a fair trial. Garron v. State, 528 So.2d 353, 359 (Fla. 1988). Thus, when raising the prosecutor's misconduct as fundamental error, appellate counsel performed deficiently by not raising all of the prejudicial misconduct, Golden Rule violations, illegal limiting statements, misleading statements regarding statutory mitigators, improper name calling, argument calculated to arouse bias and fear, and erroneous legal standards, for this Court's consideration. As a result, this Court did not consider the cumulative prejudice caused by the prolific prosecutorial misconduct. Had counsel raised the totality of the prosecutorial misconduct on appeal, this Court probably would have remanded the case for a new constitutional penalty phase.

The prosecutor's misconduct occurred during the penalty

phase. The prosecutor had his convictions and was urging the jury to recommend that the state kill Tommy Gudinas rather than incarcerate him for life. The prosecutor had to have known his outrageous and vile argument violated Tommy Gudinas' constitutional right to a fair trial. However, the prosecutor repeatedly and opprobriously violated these rights at this most final decision–whether the state executes a twenty year old young man. Both trial and appellate counsel deficiently failed to preserve, litigate, and correct the prosecutor's misconduct. Both were ineffective, and Tommy Gudinas will suffer the ultimate prejudice caused by an unconstitutional penalty phase. Had counsel raised all of the prosecutor's abhorrent misconduct on appeal, there is a reasonable probability that this Court would have remanded the case for a new penalty phase. Brooks v. State, 25 Fla. L. Weekly S417 (Fla. 2000). Counsel was deficient, and the prejudice is Tommy Gudinas' death sentence.

CLAIM II

APPELLATE COUNSEL PERFORMED DEFICIENTLY BY FAILING TO RAISE THE TRIAL COURT'S ERRORS IN REJECTING THE STATUTORY MITIGATOR THAT TOMMY GUDINAS' ABILITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED. TOMMY GUDINAS' RESULTING DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS AND FLORIDA LAW.

A. Counsel was ineffective for failing to appeal the trial court's use of an erroneous standard in rejecting this mitigator.

Appellate counsel failed to effectively raise the trial court's errors in rejecting the statutory mitigator that Tommy Gudinas' ability to appreciate the criminality of his conduct or to conform his conduct to the standards of the laws was substantially impaired. Fla. Stat. 921.141(6)(f).

At trial, Dr. O'Brien testified that Tommy's impaired capacity to conform his conduct to the requirements of the law was caused by a combination of the alcohol and marijuana Tommy ingested and his psychological trauma (ST 118-19, 144-45). The state presented no evidence to refute Dr. O'Brein's opinion. However, the trial court refused to find this mitigator established (V8, 453-54).

The trial court used an erroneous standard to hold that the mitigator was not established. The court proclaimed, "[n]o witnesses that saw the defendant that night indicated that he [sic] substantially impaired to the extent that he did not know what he was doing." The court's requirement that Tommy Gudinas prove he was "substantially impaired to the extent that he did not know what he was doing" is tantamount to Florida's legal test of insanity, that he was unable to understand the nature and quality of his act.

> Under the M'Naughten Rule an accused is not criminally responsible if, at the time of the alleged crime, the defendant was by reason of mental infirmity, disease, or defect **unable to understand the nature and quality of his act or its consequences** or was incapable of distinguishing right from wrong. *(Citations omitted)*.

Hall v. State, 568 So.2d 882 (Fla. 1990)(emphasis added). The court's refusal to find the statutory mitigator based on an erroneous standard is similar to the sentencing order this Court reversed in Mines v. State, 390 So.2d 332 (Fla. 1980). In Mines, this Court remanded Mr. Mines' case for a resentencing, holding:

> From the record it is clear that the trial court properly concluded that the appellant was sane, and the defense of not guilty by reason of insanity was inappropriate. The finding of sanity, however does not eliminate consideration of the statutory mitigating factors concerning mental condition.

Mines v. State, 390 So.2d at 337. Similarly, in Ferguson v. State, the court refused to find the statutory mental mitigators because, "[t]his defendant's conduct from the crime through the trial is indicative of an individual who has an absolute understanding of the events and the consequences thereof." Ferguson v. State, 417 So.2d 631, 637 (1982). This Court vacated Mr. Ferguson's death sentence, noting:

> Apparently, the judge applied the wrong standard in determining the presence or absence of the two mitigating circumstances

> related to emotional disturbance, so we have no alternative but to return this case to the trial judge for resentencing.

Ferguson, 417 So.2d at 638. In Campbell v. State, this Court vacated Mr. Campbell's death sentence.

> [T]he trial judge concluded that Campbell did not suffer from impaired capacity under section 921.141(6)(f), Florida Statutes (1985), because no evidence indicated that he was "insane" at the time of the killing. "The finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition." Mines v. State, 390 So.2d 332, 337 (Fla. 1980).

Campbell v. State, 571 So.2d 415, 428 (Fla. 1990).

Had counsel raised the trial court's error on appeal, this Court probably would have vacated Tommy Gudinas' death sentence and remanded the case for a new penalty phase. Thus, counsel's failure to raise this issue was deficient performance which prejudiced Tommy Gudinas.

B. Counsel ineffectively appealed the trial court's misstatements and slight of critical evidence.

Not only did the trial court use the wrong standard to evaluate this mitigating circumstance, the trial court misstated and overlooked facts that established the mitigating circumstance, and appellate counsel ineffectively raised this issue on appeal.

The court justified his refusal to find this mitigator,

stating:

> Todd Gates and Frederick Harris were also with the defendant the night in question and no testimony came from them to establish whether the defendant was intoxicated.

(V8, 453). The court erred. In fact, both Todd Gates and Fred Harris testified that Tommy used alcohol that night. Todd Gates testified that he observed Tommy Gudinas drinking at the club and going up to the bar (RV4, 609). In addition to the beer Tommy consumed at the club, Tommy drank beer with the other boys at Fred Harris' apartment before going to the club (RV4, 620). Fred Harris testified that Tommy Gudinas used Fred's identification to obtain a wristband which would allow him to drink an unlimited amount of beer (RV4, 637). Before leaving for the club, Fred and Tommy smoked marijuana at Fred's apartment, and Fred testified he knew Tommy smoked marijuana that night(RV4, 659, 663). At the club, Fred saw Tommy drinking (RV4, 661). Appellate counsel failed to cite this evidence of drug and alcohol abuse, making only one ambiguous statement that "[a]ll the boys drank some beers at the apartment before they even left for the downtown bar" (Appellant's Initial Brief, 79).

The court justified his failure to find this mitigator:

> Mr. Dwayne Harris testified that the defendant appeared pretty drunk. He also

> testified that he observed the defendant dancing and just having a good time.

(V8, 453). The court disregarded Dwayne Harris' testimony that he observed Tommy wandering and drinking, and that Tommy was "really drunk" and could have been stoned (RV4, 673, 699). Appellate counsel failed to raise this oversight as well.

The court also noted as justification for refusing to find this mitigator established:

> the defendant stealthily approached Ms. Smith's car and attempted to gain entry to her vehicle. The defendant in attempting to gain entry to Ms. Smith's car tried to break the window. Once, [sic] he heard Ms. Smith sounding the horn, he fled.

(V8, 453). Appellate counsel failed to accentuate testimony which proves Tommy Gudinas was not stealthy. Smith admitted that when she first saw Tommy Gudinas hiding, she laughed to herself because he was so obvious (RV2, 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 (RV2, 257-58). Hiding in a manner so obvious that someone laughs and following someone to attack them while a car full of people watch are not stealthy moves. In fact, such flagrant moves indicate a sufficiently impaired capacity to conform conduct to the requirements of the law.

Appellate counsel raised the trial court's erroneous

rejection of this mitigator on appeal, but failed to point out that the trial judge ignored critical evidence that Tommy Gudinas was intoxicated and that Tommy Gudinas' capacity to conform his conduct to the requirements of the law was substantially impaired. As a result, this Court upheld the trial court's erroneous oversights and misstatements of fact. Had counsel elucidated these critical facts in Tommy Gudinas' direct appeal, this Court probably would have held the trial court erred in refusing to find this mitigating circumstance and remanded the case for a resentencing. Appellate counsel was ineffective.

CLAIM III

THE TRIAL COURT'S REFUSAL TO SEVER COUNTS I AND II FROM THE REMAINING CHARGES VIOLATED THOMAS GUDINAS' DUE PROCESS RIGHTS TO A FAIR TRIAL UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES' CONSTITUTION AND THE CORRESPONDING PORTIONS OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL'S FAILURE TO RAISE THIS ISSUE WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

Tommy Gudinas was indicted of attempted sexual battery, attempted burglary with an assault, two counts of sexual battery, and first degree murder(V8, 441-43). The first two counts, attempted sexual battery and attempted burglary with an assault, involved Rachelle Smith. Tommy Gudinas followed her to her car, attempted to open her car by lifting both door

handles, hit her car window with his fist, and yelled, "I want to fuck you." (RV2, 251-63). The last three counts involved the brutal murder and sexual battery of Michelle McGrath. Trial counsel filed a motion to sever the charges involving Smith, but, after a hearing on December 8, 1994, the court denied the motion (RV1,73-83, V4, 404). Appellate counsel appealed the court's denial of the motion to sever as a violation of the Florida Rules of Procedure, but deficiently failed to appeal the denial of the motion to sever as a violation of Thomas Gudinas' fundamental due process right to a fair trial.

Federal courts recognize that prejudice caused by properly joined offenses may deny a person a constitutional trial. United States v. Lewis, 787 F.2d 1318 (9th Cir. App. 1986); Bean v. Calderon, 163 F.3d 1073 (9th Cir. App. 1998). If such prejudicial offenses are joined and the trial court denies a motion to sever, reversible error occurs. United States v. Lewis, 787 F.2d 1318 (9th Cir. App. 1986).

Tommy Gudinas was prejudiced by joinder in this case. "Studies have shown that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case." Lewis, 787 F.2d at 1322 (*citations omitted)*. Prejudice can result from joinder.

> The defendant may be prejudiced for one or more of the following reasons: (1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; (3)the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.

Drew v. United States, 331 F.2d 85, 88 (U.S. App. D.C. 1964). Tommy Gudinas suffered each kind of prejudice.

The court's refusal to sever counts I and II confounded Tommy Gudinas' defense. United States v. Daniels, 770 F.2d 1111, 1117 (D.C. App. 1985). Because the offenses against both victims were joined, Tommy Gudinas could not present his defense and testify that, in the Rachelle Smith incident, he was merely asking her on a date in a drunken and uncouth manner. Because the counts against both victims were joined, Tommy Gudinas could not testify in his own behalf on the Rachelle Smith counts without fear of negative inferences and dishonorable prosecutorial conduct relating to the McGrath crimes. *See* United States v. Bronco, 597 F.2d 1300 (9th Cir. App. 1979).

Had the court severed the counts and held a separate trial for the Rachelle Smith incident, Thomas Gudinas certainly would not have been convicted of attempted sexual battery and attempted burglary with an assault. There was no evidence that Tommy intended to rape Smith; he did not touch or threaten her. Besides Tommy's gauche solicitation for a date, no evidence suggested Tommy attempted a sexual battery. The horror of the McGrath sexual batteries permeated all aspects of this trial, including the groundless and meager inference of an attempted sexual battery against Smith. The evidence of the McGrath sexual batteries, for which no witness could identify Tommy Gudinas as the batterer, caused the jury to infer that Tommy Gudinas was criminally disposed to brutally sexually batter Rachelle Smith and attempted to burgle her car to do so. Rachelle Smith's identification of Tommy as her would-be sexual batterer caused the jury to infer that Tommy committed the brutal sexual batteries of Michelle McGrath. As a result, the jury wrongly convicted Tommy Gudinas of attempted sexual battery and burglary of Smith which he did not commit. *See* Drew v. United States, 331 F.2d 85, 88 (U.S. App. D.C. 1964); United States v. Lewis, 787 F.2d 1318 (9th Cir. App. 1986); United States v. Ragghianti, 527 F.2d 586 (9th Cir. App. 1976); Bean v. Calderon, 163 F.3d 1073

(9th Cir. App. 1998).

The cumulative evidence of the various charged sexual batteries and attempted sexual battery caused the jury to find Tommy guilty of all counts. Had the jury considered the charges involving the different victims separately, it would not have returned the same guilty verdicts on the Rachelle Smith counts. Because Tommy expressed absolutely no intent to rape Smith, the most serious charge he would have been convicted of was attempted assault. Although Smith found Tommy's approach comical and did not feel threatened enough to contact the police that night, a jury could possibly infer that he frightened her (RV2, 257-70). Tommy's statement to Smith did not express intent to commit a crime in her car, and he was therefore, wrongly convicted of attempted burglary as well. "It is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joint counts." United States v. Lewis, 787 F.2d at 1322. The overwhelming and emotional evidence of the McGrath murder, when combined with Smith's identification of Tommy Gudinas caused the jury to wrongly convict Tommy of crimes for which there was insufficient independent evidence.

Joinder prejudiced Tommy Gudinas. The joinder produced a situation where Tommy was wrongly convicted of attempted

sexual battery and attempted burglary with an assault. Those convictions, in turn, aggravated Tommy's conviction for the McGrath crimes, and resulted in Tommy Gudinas' death sentence (ST331; V8, 445). The prejudicial effect of the court's refusal to sever the counts vastly outweighed any judicial efficiency and violated Tommy Gudinas' constitutional rights to a fair trial. Appellate counsel was ineffective for failing to litigate this violation of Tommy Gudinas' constitutional rights on appeal.

CLAIM IV

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In Jones v. United States, the United States Supreme Court held, "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Florida statute 775.082 provides:

> A person who has been convicted of a capital felony **shall be punished by life imprisonment** and shall be required to serve no less than 25 years before becoming eligible for parole **unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.**

§ 775.082 Fla. Stat. (1994)(emphasis added). Under this statute, the state must prove at least one aggravating factor in the separate penalty phase proceeding **before** a person

convicted of first degree murder is eligible for the death penalty. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082 (1994); § 921.141(2)(a), (3)(a) Fla. Stat. (1994). Thus, Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If a court sentenced a defendant immediately after conviction, the court could only impose a life sentence. § 775.082 Fla. Stat. (1994). Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi, because it increases the penalty for first degree murder beyond the life sentence a defendant is eligible for based solely upon the jury's guilty verdict.

Although the majority of the Court stated in dicta that Apprendi did not overrule Walton v. Arizona, 497 U.S. 639 (1990), the Apprendi Court was not addressing a death case in which constitutional protections are more rigorously applied, and Apprendi did not specifically address the Florida sentencing scheme. Apprendi 120 S.Ct. at 2366. Moreover, the majority dicta did not carry the force of an opinion of the full court. *See* Apprendi 120 S. Ct. at 2380 (Thomas, J., concurring) ("Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a

question for another day."); Apprendi, 120 S. Ct. at 2387-88 (O'Connor, J., dissenting) ("If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.") Apprendi, 120 S. Ct. 2388.

In holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt", Apprendi limited several previous decisions. Specifically, the Court limited its holding in McMillan v. Pennsylvania "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict" Apprendi, 120 S.Ct at 2361; McMillan v. Pennsylvania, 477 U.S. 79 (1986). In effect, the Court overruled its decisions in Hildwin v. Florida, 490 U.S. 638 (1989), and Spaziano v. Florida, 468 U.S. 447 (1984).

In Spaziano, the Court stated, "[t]he Sixth Amendment has never been thought to guarantee a right to jury determination of that issue" (aggravating factors). Spaziano, 468 U.S. at 459. In Apprendi, the Court held that the Fourteenth Amendment guarantees the Sixth Amendment protection that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.".

Apprendi 120 S.Ct. at 2355. Thus, Apprendi essentially overrules Spaziano; because aggravators increase the statutory maximum penalty, they are subject to Sixth Amendment protections.

Relying on McMillan and Spaziano, the Court held in Hildwin, "the existence of an aggravating factor here is not an element of the offense but instead is a "sentencing factor that comes into play only after the defendant has been found guilty". Hildwin, 490 U.S. at 640, quoting McMillan 477 U.S. at 86. In Apprendi, the hate crime sentencing enhancement came into play only after the defendant was found guilty and increased the statutory maximum penalty by up to ten years. Apprendi 120 S.Ct. At 2351. The Apprendi Court clearly dispensed with the fiction that such an enhancement was not an element which received Sixth Amendment protections. The Court wrote,"[b]ut it can hardly be said that the potential doubling of one's sentence from 10 years to 20–has no more that a nominal effect. Both in terms of absolute years behind bars, and because of the severe stigma attached, the differential here is unquestionably of constitutional significance". Apprendi 120 S.Ct. at 2365. As in Apprendi, in Tommy Gudinas' case, the sentencing factors-aggravators came into play only after he was found guilty. The aggravators increased the

statutory maximum penalty based on the guilty verdict from life imprisonment to death. Certainly, the difference between life and death has more than nominal effect and is of constitutional significance. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment that a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1975). *See* Gardner v. Florida, 430 U.S. 349, 357 (1976).

Under Apprendi's reasoning and Florida law, aggravating factors in the Florida death penalty scheme are elements of a capital crime which must be decided by a unanimous jury. Florida Rule of Criminal Procedure 3.440 requires unanimous jury verdicts on criminal charges. "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So. 2d 261 (Fla. 1956). However, in capital cases, this Court permits jury recommendations of death based upon a simple majority vote, and does not require jury unanimity as to the existence of specific aggravating factors. *See*, *e.g.*, Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). Jones v.

State, 569 So. 2d 1234, 1238 (Fla. 1990). Because Florida already considers the jury a sentencer and that aggravators are elements of a death penalty offense, the procedure followed in the sentencing phase should receive the protections guaranteed by the Fifth and Sixth Amendments and require a unanimous verdict. § 921.141(1), (2) Fla. Stat. (1999). The trial court gives great weight to the jury's recommendation, so the trial court indirectly weighs any constitutional violations caused by a simple majority verdict. Espinosa v. Florida, 505 U.S. 1079, 1082 (Fla. 1992). The unconstitutional practice is not cured.

Though Apprendi involved two separate statutes and the Florida death penalty involves only one, the issue is substance over form. Apprendi 120 S.Ct. at 2350, 2365; § 921.141 Fla. Stat. (1999). The effect of the Florida death penalty statute is similar to the effect of the federal carjacking statute the United States Supreme Court addressed in Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Three subsections of the Jones statute appeared, superficially, to be sentencing factors. However, the superficial impression lost clarity when the Court examined the effects of the sentencing factors.

> But the superficial impression loses clarity when one looks at the penalty

> subsections (2) and (3). These not only provide for steeply higher penalties, but they condition them on further acts (injury, death) that seem quite as important as the elements in the principle paragraph (e.g. force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range from 15 years to life, was meant to carry none of the process safeguards that elements of the offense bring with them for a defendant's benefit.

Jones, 526 U.S. at 233. Because the carjacking sentencing factors increased the maximum penalty for the crime from 15 years to 25 years or life imprisonment, the Court interpreted them as elements of the crime which receive Sixth Amendment protection. Jones, 526 U.S. at 230, 242-43.

Because the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict, the aggravator must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, at 2365. This did not occur in Tommy Gudinas' case.

By a vote of ten to two, Tommy Gudinas' jury recommended a sentence of death (R. V.3, 563). Because the verdict did not list the aggravators found, it is impossible to know whether the jurors unanimously found any one aggravator proved beyond a reasonable doubt. The two jurors who voted for life

could have found that no aggravators were established beyond a reasonable doubt so that Tommy Gudinas was not eligible for the death penalty. Moreover, the death recommendation violated Florida law because it was not unanimous. As well, the indictment violated the Sixth Amendment because it did not specify the aggravators the state would seek to prove to make Tommy Gudinas eligible for the death penalty (RV. 2, 209-10). The court erred in denying Tommy Gudinas' Motion To Dismiss Indictment Or To Declare That Death Is Not A Possible Penalty, Motion For Statement Of Aggravating Circumstances and demurrer to the indictment (RV. 2-3,291-92, 318-21, 455). Appellate counsel was ineffective for failing to raise these errors on appeal. Had counsel raised the errors, Tommy Gudinas probably would have received a new penalty phase.

CLAIM V

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED TOMMY GUDINAS OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL FAILED TO EFFECTIVELY LITIGATE THESE ERRORS ON APPEAL.

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' guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. The errors have been revealed in this petition, Tommy Gudinas' 3.850 motion, appeal from the 3.850 motion, 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' guilt and penalty phases. 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).

CLAIM VI

TOMMY GUDINAS' EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED BECAUSE TOMMY GUDINAS MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure

3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

Tommy Gudinas acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, Tommy Gudinas acknowledges that before a judicial review may be held in Florida, the prisoner must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118

S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In Re: Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, *See* United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it. [citations omitted] Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in

that provision.

Id. at pages 2-3 of opinion.

This claim is necessary at this stage because federal law requires that, in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and federal law requires all issues raised in a federal habeas petition to be exhausted in state court. Hence, Tommy Gudinas raises this claim now.

Tommy Gudinas has been incarcerated since 1994. Statistics show that incarceration over a long period of time will diminish an individual's mental capacity. Because Tommy Gudinas may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

Tommy Gudinas was first diagnosed with severe mental problems, auditory processing problems, and attention deficit disorder at the age of six (V7, 407). Throughout Tommy Gudinas' life, mental health professionals evaluated, tested, and recommended long-term residential treatment for Tommy, but the records reveal he has never received treatment (V7, 419). 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). Throughout his life, Tommy suffered physical and sexual abuse (V6, 154, 173-74) Tommy Gudinas consistently abused drugs and alcohol from the time he was 10 years old (V7, 316-21). He remains a severely disturbed man (V6, 191).

For the last five years, Tommy Gudinas has lived on Florida's death row, in solitary confinement in a very small cell. Florida State Prison is located in central Florida and is not air conditioned, even during dangerously hot weather. Tommy Gudinas is allowed yard time only twice a week and showers every other day. The majority of Tommy Gudinas' fellow death row inmates, the people with whom he can routinely talk and associate, also suffer various forms of mental illness and personality disorders. Tommy Gudinas' already fragile mental condition could only deteriorate under these circumstances. His mental condition may well decline to the point that he is incompetent to be executed.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Tommy Gudinas respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ***Petition for Writ of Habeas Corpus*** which has been typed in Font Courier New, size 12, has been furnished by U.S. Mail to all counsel of record on this ***30th day of November, 2000.***

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