

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2495

THOMAS GUDINAS,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary,

Florida Department of Corrections,

Respondent,

and

ROBERT BUTTERWORTH,

Attorney General,

Additional Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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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.

Respondent initially claims that this issue is not properly plead in a petition for writ of habeas corpus (Response, 13). However, despite Respondent's assertion, this Court has repeatedly held that ineffective assistance of appellate counsel claims are appropriately raised in a petition for writ of habeas corpus. Freeman v. State, 761 So.2d 1055, 1069 (Fla.2000). Appellate counsel performed deficiently in Tommy Gudinas' case by not raising all of the prosecutor's penalty phase misconduct, from which this Court could determine the misconduct "reach[ed] 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).

Respondent further asserts that the prosecutor's Golden Rule violations were merely "valid and appropriate argument" (Response 14). However, this Court has repeatedly held that

penalty phase arguments are improper when they "invite[d] the jury to imagine the pain and suffering of the victim". Muhammad v. State, SC90030, 26 (January 18 2000). Telling the jury that they must probe the last moments of the victim's life, the prosecutor stated:

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.

(ST 281, 292)(emphasis added). This was not valid and appropriate argument, it was an improper and prejudicial Golden Rule violation. See Muhammad v. State, SC90030, 26 (January 18 2000); 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).

Respondent ridiculously asserts that the record supports the prosecutor's following argument(Response 15):

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).

"[A]nd that the last human being she would ever see was **that.**"

(ST292)(emphasis added).

"[t]his is an **evil human being**, committing an evil and atrocious act."

(ST296)(emphasis added).

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).

"has a pathological hatred for women"

(ST 295).

"she had time to think what this maniac was going to

do to her in this dark and secluded alleyway.”
(ST292). However, *absolutely nothing in the record supports those preposterous arguments.* Moreover, even if the record could support arguments that Tommy Gudinas is a monster, the prosecutor’s use of such argument was clearly improper and prejudicial. Garron, 528 So.2d at 359. Brooks v. State, 25 Fla.Law Weekly S417 (Fla.2000); Muhammad, at 27 (Fla.2001).

Respondent also claims that the error resulting from the prosecutor’s misconduct in limiting the jury’s consideration of nonstatutory mitigation is harmless because the court instructed the jury on aggravators and mitigators (Response, 14). However, in response to a juror’s questions regarding Tommy Gudinas’ mental problems, the court instructed the jury:

The only thing I can say is that you need to listen closely to the arguments of counsel, remember that evidence that was presented here during the guilt phase and the penalty phase.

(ST 270-73). After closing arguments, the court instructed the jury:

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.

(ST 330). During the penalty phase, the court did not instruct the jury that closing arguments are not evidence or correct

statements of the law. The court also told the jury, "the final word on [sic.] as to the law, what the law is, will come from the Court" (ST 313). However, this admonition came in response to the state's objection to defense counsel's misstatement of the law. The jury never heard a similar admonition in connection to the prosecutor's repeated misstatements of law, to which the court ordered the jury to "listen closely" (ST 270-73). As well, the errors in Tommy Gudinas' case were not rendered harmless, unlike those in Hitchcock, because Tommy's jury was never told that mitigation is anything that "makes the defendant less morally culpable for the crime in some way". Hitchcock, 755 So.2d 638, 643 (Fla.2000).

Respondent asserts that appellate counsel's slight of this issue was strategy (Response, 15 n.3). However, appellate counsel's brief clearly demonstrates it was ignorance of the law, not strategy. The discussion of the one portion of the misconduct raised as fundamental error is less than three pages long and contains absolutely no law (Direct Appeal Initial Brief, 65-68). While Appellate Counsel has no duty to raise meritless claims, Appellate counsel does have a duty to raise claims properly. Suarez v. Dugger, 527, So.2d 190, 193 (Fla.1998). Appellate counsel failed to properly raise this meritorious claim in Tommy Gudinas' case.

Generally, a contemporaneous objection is required to preserve an improper comment for appellate review. Urbín v. State, 714 So. 2d 411, 418 n. 8 (Fla. 1998). However:

The exception to the general rule is where the allegedly improper comments constitute fundamental error. We have defined fundamental error as being error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error."

State v. Delva, 575 So.2d 643, 644-45 (Fla.1991) (quoting Brown v. State, 124 So.2d 481, 484 (Fla.1960). When considering whether prosecutorial misconduct was prejudicial under the fundamental error standard, 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 on nonstatutory mitigators, misleading statements regarding statutory mitigators, improper name calling, improper argument of the heinous, atrocious, and cruel aggravator, argument calculated to arouse bias and fear, and erroneous legal standards, for this Court's consideration. See Brooks v. State, 25 Fla.Weekly S417 (Fla.2000). Appellate

counsel also performed deficiently because he did not present any law to explain why the one portion of misconduct he raised was fundamental error.

Moreover, appellate counsel utterly failed to address the circuit court's errors in allowing this misconduct. "[T]he trial court has a crucial role in ensuring that lawyers do not exceed the bounds of proper advocacy." Gore v. State, 719 So.2d 1197, 1202 (Fla.1998). After the prosecutor's tirade of a closing argument, the circuit court denied defense counsel's request for a mistrial and stated: "I remind Mr. Ashton of the cases that the Supreme Court has drafted with the characterization of defendants by other names other than their names." (ST 310). Thus, the trial court clearly recognized that the prosecutor exceeded the bounds of proper argument, but failed to stop the prosecutor or give the jury curative instructions to thwart the effects of his improper and prejudicial argument. The court clearly disregarded this Court's commend "to trial judges the vigilant exercise of their responsibility to insure a fair trial". Berlotti v. State, 476 So.2d 130, 134 (Fla.1985). Appellate counsel failed to address the trial court's errors in its three page, void of law, discussion of the fundamental error caused by the prosecutor's misconduct.

The cumulative impact of the prosecutor's penalty phase closing argument denied Tommy Gudinas his rights to a fair sentencing phase (Response 15). The prosecutor represented the State of Florida, holding a semijudicial position. Washington v. State, 98 So.2d 605, 609 (Fla.1923). In the absence of any contemporaneous instructions otherwise, the jurors likely believed the prosecutor instructed them properly when he told them that the child abuse Tommy suffered wasn't mitigating, the extreme mental or emotional disturbance mitigator did not apply because Tommy is always extremely emotionally disturbed, they should consider actions taken after the victim died in deciding whether the crime was heinous, atrocious, and cruel, and that their recommendation is "not about legal principle" (ST 203-5, 304, 308). As a result, the jury likely did not weigh those mitigators. This, combined with the prejudicial arguments which induced bias, prejudice and fear during which the prosecutor displayed slides of the victim's body, probably resulted in at least four juror's death recommendations. "In order to constitute fundamental error, improper comments made in the closing arguments of a penalty phase must be so prejudicial as to taint the jury's recommended sentence." Thomas v. State, 748 So.2d 970 at 985 (Fla. 1999). A new trial should be granted when it is "reasonably evident that the remarks might have

influenced the jury to reach a *more severe* verdict of guilt than it otherwise would have done." Darden v. State, 329 So.2d 287, 289 (Fla. 1976)(emphasis added). This occurred in Tommy Gudinas' case, and, had counsel raised these fundamental errors on appeal, this Court probably would have granted Tommy Gudinas a new penalty phase. Appellate counsel was ineffective.

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.**

Respondent argues this subclaim is procedurally barred because it was raised and addressed on direct appeal (Response 15-17)(Direct Appeal Initial Brief, 77-80). In fact, because this issue was not raised nor addressed on direct appeal, it is properly raised as ineffective assistance of appellate counsel in this petition.

Appellate counsel performed deficiently by failing to raise the issue that the trial court used an erroneous standard to hold that the mitigator, Tommy Gudinas' ability to conform his

conduct to the standards of the laws was substantially impaired, was not established. Fla. Stat. 921.141(6)(f). Though Tommy presented un rebutted evidence that his 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, the court refused to find this mitigator: "No witnesses that saw the defendant that night indicated that he [sic] substantially impaired to the extent that he did not know what he was doing." (ST 118-19, 144-45). 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, and the court erred in holding Tommy Gudinas to this standard. Mines v. State, 390 So.2d 332 (Fla. 1980); Ferguson v. State, 417 So.2d 631, 637 (1982); 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 resentencing or a new penalty phase. See Mines v. State, 390 So.2d 332 (Fla. 1980); Ferguson v. State, 417 So.2d 631, 637 (1982); Campbell v. State, 571 So.2d 415, 428 (Fla. 1990). Thus, counsel's failure to raise this

issue was deficient performance which prejudiced Tommy Gudinas.

CLAIM III

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

1. The new law announced in Apprendi v. New Jersey renders the Florida death penalty sentencing scheme unconstitutional as applied in Mr. Gudinas' case.

In Mills v. Moore, this Court held that because Apprendi did not overrule Walton v. Arizona, the Florida death penalty scheme was not overruled. Mills v. Moore, 2001 WL 360893 *3-4 (Fla.2001). To support this opinion, this Court relied on the language in Apprendi which states:

Finally, this Court has considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.

Id. When read in conjunction with the following citation from Walton v. Arizona ("Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which

makes a crime a capital offense.”), it is clear that the Apprendi Court intended to limit this statement to only those capital sentencing schemes in which, using the test outlined by the Apprendi Court, aggravating factors are sentencing factors and not elements of a crime for which death is the maximum statutory penalty. Apprendi v. New Jersey, 120 S.Ct. 2348, 2366 *citing* Walton v. Arizona, 497 U.S. 639, 647-49 (1990).

The Florida Legislature’s plain language in Florida Statute 775.082, at the time of the crime, clearly makes aggravating circumstances elements of death penalty eligible first degree murder rather than sentencing considerations (RB 19-21). Because, under Florida law, the effect of finding an aggravator exposes the defendant to a greater punishment than that authorized by the jury’s guilty verdict alone, the aggravator is an element of the death penalty eligible offense which requires notice, submission to a jury, and proof beyond a reasonable doubt. Apprendi, at 2365.

Though the Apprendi majority specifically upheld the Arizona death penalty sentencing scheme addressed in Walton v. Arizona, the Court did not address the Florida death penalty scheme which is significantly different. Apprendi, 120 S.Ct. at 2366 *citing* Walton v. Arizona, 497 U.S. 639, 647-49 (1990). The Arizona statute upheld in Apprendi provides:

A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life as determined in accordance with the procedures provided in subsections B through G of this section.

§ 13-703 Arizona Statutes (1985)(emphasis added). Death is clearly within the maximum penalty for first degree murder in Arizona.

Contrarily, in Florida, death is not within the maximum penalty for a mere conviction of first degree murder. Tommy Gudinas was sentenced under Florida statute 775.082, which provided:

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. (1993)(emphasis added). If the court sentenced Tommy Gudinas immediately after conviction, the court could only impose a life sentence. § 775.082 Fla. Stat. (1993).

Therefore, in Florida, unlike Arizona, 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.

The fact that both Florida statutes 921.141 and 775.082 use the term "capital" felony does not make death the maximum possible penalty for a capital felony. A capital felony under Florida law is not defined in effect as a felony for which death is a possible sentence. Both capital sexual battery and first degree murder for which there are no aggravating circumstances are capital felonies even though death is never a possible punishment. Fla. Stat. 794.011(2)(a); 782.04(1)(a); Batie v. State, 534 So.2d 694, 695 (Fla.1988); Perez v. State, 545 So.2d 1357, 1358 (Fla. 1989); Rusaw v. State, 451 So.2d 469, 470 (Fla.1984). The legislature designates these crimes as capital to give them the increased stigma and burdens attached to the statutory maximum life sentence. See Batie v. State, 534 So.2d 694, 695 (Fla.1988); Perez v. State, 545 So.2d 1357, 1358 (Fla. 1989); Rusaw v. State, 451 So.2d 469, 470 (Fla.1984). Clearly, under Florida law, death is not the maximum possible penalty for a capital felony.

The statutes underlying the post-Apprendi death penalty cases this Court cited in Mills are distinguishable from the Florida death penalty statutes. Each of the other statutes make aggravating circumstances sentencing factors rather than

elements of the offense because each statute states that punishment shall be death. See 11 Delaware Code § 636 (2000); 11 Delaware Code § 4209(a),(b), (c) (1975); North Carolina General Statutes § 14-17 (1994); North Carolina General Statutes § 15A-2000(a)(b)(c) (1995). Moreover, each case cited is also distinguishable. In State v. Hoskins, 14 P.3d 997, 1016 (Ariz.2000), the Apprendi issue was not briefed or argued, so the Arizona Supreme Court specifically did not address Apprendi's application, noting that Walton was precedent until the court had a chance to evaluate the Arizona death penalty scheme in light of Apprendi. In Weeks v.State, 761 A.2d 804, 806 (Del.2000), Weeks plead guilty to felony murder, establishing two aggravating circumstances. The Weeks court held that, by pleading guilty, Weeks waived his right to any jury determination of those aggravators. In North Carolina v. Golphin, 533 S.E.2d 168, 193-94 (N.C.2000), the court relied on the fact that the United States Supreme Court upheld Walton v. Arizona to hold that the trial court did not err in denying motion for notice of aggravating circumstances. However, not only does the North Carolina statute provide that death is maximum punishment for a capital felony, it provides more Sixth and Fourteenth Amendment protections than the Florida death sentencing scheme. The statutes require a unanimous death

recommendation from the jury with specific findings as to the aggravators found. North Carolina General Statutes § 14-17 (1994); North Carolina General Statutes § 15A-2000(a)(b)(c) (1995). Given the fundamental distinctions between the death penalty sentencing schemes in these states and that in Florida, these cases are not applicable as authority to Florida law. *But see, Mills v. Moore*, 2001 WL LW437022 (2001).

2. This claim is not procedurally barred.

Respondent asserts that a jumble of procedural bars prevent this claim: it should have been raised on direct appeal, it should have been raised in Tommy Gudinas' 3.850 motion, and there was no objection at trial (Response, 21-22).

Respondent's first asserted procedural bar is a correct statement but an incorrect application of the procedural bar. This is a direct appeal issue which appellate counsel should have raised on direct appeal. However, because this Court has repeatedly held that ineffective assistance of appellate counsel claims are appropriately raised in a petition for writ of habeas corpus, this issue is not procedurally barred in this petition. Freeman v. State, 761 So.2d 1055, 1069 (Fla..2000).

Appellate counsel was ineffective for not raising on direct appeal that 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). The result in Apprendi was clearly dictated by precedent existing at the time Tommy Gudinas' sentence became final, and appellate counsel failed to raise this fundamental error on appeal.

In Winship, the United States Supreme Court held, "the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In the Matter of Samuel Winship, 397 U.S. 358, 364 (1970). In Mullaney v. Wilbur, the Supreme Court extended Winship's protections to determinations of length of sentence as well as determinations of guilt and innocence. Mullaney v. Wilbur, 421 U.S. 684, 699 (1975). This was consistent with the common law notion that:

Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. [2 M. Hale, Pleas of the Crown *170].

Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000) quoting Archbold, Pleading and Evidence in Criminal Cases, at 51.

In McMillan v. Pennsylvania, the Supreme Court held that a

Pennsylvania statute did not violate the Winship and Mullaney boundaries because it limited the sentencing judge's discretion within the available range of penalties:

Section 9712 **neither alters the maximum penalty for the crime committed** nor creates a separate offense calling for a separate penalty within the range already available to it without the special finding of visible possession of a firearm.

McMillan v. Pennsylvania, 477 U.S. 79, 87-88 (1986)(emphasis added).

The precedent existing at the time of Tommy Gudinas' second penalty phase dictated that provisions which increase a maximum penalty for a crime committed are elements of the crime which must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. The aggravating factors in Tommy Gudinas' case did not comply with these standards dictated by the Sixth and Fourteenth Amendments, and the court refused to correct these errors by 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 performed deficiently by failing to raise these errors on appeal. Had appellate counsel raised these errors on appeal, this Court probably would have vacated Tommy Gudinas' death

sentence and remanded his case for a new penalty phase.

Alternatively, this claim is properly plead in a petition for writ of habeas corpus because Apprendi is new law for which Witt v. State permits retroactive application (RB 16-17). Witt v. State, 387 So.2d 922 (Fla.1980). In Witt, this Court held that a new law will be retroactive in post conviction appeals if it meets the following standards: the new law emanates from the Unites States Supreme Court or the Florida Supreme Court, the change is constitutional in nature, and it has fundamental significance. Id. at 928-30. Apprendi meets all three standards: it emanates from the United States Supreme Court, is constitutional, and it is fundamental-mandating Sixth and Fourteenth Amendment protections to statutes which previously denied them.

3. Application of Apprendi under Florida law

The critical difference between the Florida and Arizona sentencing schemes proves that the dicta in Apprendi upholding the Arizona scheme does not apply to Florida. Florida statute 775.082 clearly puts death outside the statutory maximum penalty for Apprendi analysis, and is therefore, unconstitutional as it was applied to Tommy Gudinas.

ARGUMENT AS TO REMAINING CLAIMS

Tommy Gudinas relies on argument presented in his initial

Petition for Writ of Habeas Corpus regarding these issues.

CONCLUSION AND RELIEF SOUGHT

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

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
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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.

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