

IN THE SUPREME COURT OF FLORIDA

THOMAS LEE GUDINAS,

Petitioner,

v.

CASE NO. SC00-2495

MICHAEL W. MOORE,

Respondent.

\_\_\_\_\_ /

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Come now the Respondents, and respond as follows to Gudinas' petition for habeas corpus relief. In compliance with *Florida Rule of Criminal Procedure* 3.851(b)(2), the petition was filed contemporaneously with Gudinas' *Initial Brief* on appeal from the denial of his Rule 3.850 motion.

RESPONSE TO INTRODUCTION

On pages 1-2 of the petition, Gudinas has set out an "introduction" to the petition. To the extent that this part of the petition includes averments of error, those claims are denied.

RESPONSE TO PROCEDURAL HISTORY

On pages 2-3 of the petition, Gudinas has set out what appears to be a substantially accurate history of the prior proceedings in this case. To the extent that any legal or factual averments may be contained within the "procedural history", such averments are denied.

RESPONSE TO JURISDICTIONAL STATEMENT

On pages 3-4 of the petition, Gudinas asserts that this Court has jurisdiction over this petition, and that relief should be granted thereon. Respondents do not dispute the general proposition that this Court has jurisdiction to consider a habeas petition such as this one. However, for reasons set out herein,

certain claims are inappropriate for habeas review. By agreeing that jurisdiction is generally proper, Respondents waive no available defenses. To the extent that the jurisdictional component of the petition includes an averment that relief should be granted, that averment has nothing to do with this Court's jurisdiction, and is specifically denied.

#### STATEMENT OF THE FACTS

In its direct appeal decision affirming Gudinas' convictions and sentences, this Court described the facts in the following way:

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon appellant Thomas Lee Gudinas. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm Gudinas' convictions for first-degree murder, two counts of sexual battery, attempted sexual battery, and attempted burglary with an assault. We also affirm his sentence of death.

#### FACTS

Gudinas and three of his roommates arrived at an Orlando bar, Barbarella's, between approximately 8:30 and 9 p.m. on May 23, 1994. Prior to arriving at the bar, the group drank beer and smoked marijuana at their apartment and in the car on the way to the bar. While drinking throughout the night, Gudinas and his roommates periodically returned to their car to smoke marijuana. However, when the bar closed at 3 a.m, Gudinas could not be located. One of Gudinas' roommates, Todd Gates, testified that he last saw Gudinas in the bar at approximately 1 a.m.

Rachelle Smith and her fiancé arrived at the same bar between 11 and 11:30 p.m. They stayed until about 2 a.m. Rachelle left the bar at that time, while her fiancé remained inside saying goodbye to friends. She

initially went to the wrong parking lot where she saw a man watching her while crouched behind another car. Realizing she was in the wrong parking lot, Rachelle walked to the lot where her car was parked. Because she felt she was being followed, she immediately got into her car and locked the door. Looking into her mirror, she saw the same man she had just seen crouched behind a car in the other parking lot. After trying to open Rachelle's passenger side door, the man crouched down, came around to the driver's side and tried to open the door. While screaming at Rachelle, "I want to f\_\_\_ you," the man covered his hand with his shirt and began smashing the driver's side window. Rachelle blew the horn and the man left. Upon hearing of the murder that occurred nearby that same night, Rachelle contacted police, gave a description of the man, and identified Gudinas from a photographic lineup as the man who tried to attack her. (FN1) She also identified Gudinas at trial.

The victim, Michelle McGrath, was last seen at Barbarella's at approximately 2:45 a.m. She apparently had left her car in the same parking lot where Rachelle Smith first saw Gudinas crouching behind a car. Between 4 and 5 a.m., Culbert Pressley found Michelle's keys and a bundle of clothes next to her car in the parking lot. (FN2) Her body was discovered at about 7:30 a.m. in an alley next to Pace School. (FN3) Michelle was naked, except for a bra which was pushed up above her breasts.

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

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

Dr. Hegert, the medical examiner, testified that the cause of death was a brain hemorrhage resulting from blunt force injuries to the head, probably inflicted by a stomping-type blow from a boot. He found severe cerebral edema and determined that Michelle died thirty to sixty minutes after the fatal injury, the forceful blow to the head. Dr. Hegert also found defensive wounds on one of Michelle's hands and two broken sections of a stick, one inserted two inches into her vagina and the other inserted three inches into the area near her rectum. In addition, Dr. Hegert also determined that Michelle had been vaginally and anally penetrated by something other than the sticks, as indicated by trauma to her cervix. He also found that Michelle had a blood alcohol content of .17% at the time of her death. While Michelle might have lived longer without that amount of alcohol in her system, Dr. Hegert testified that the head injury would have been fatal anyway. He estimated the time of death to be between 3 and 5 a.m.

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

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

During the penalty phase, the State introduced certified copies of Gudinas' Massachusetts felony convictions. These included convictions for burglary of an automobile; assault; theft; assault with intent to rape; indecent assault and battery; and assault and battery. These offenses all occurred in the early 1990's.

Karen Ann Goldthwaite, Gudinas' mother, testified that she had a difficult pregnancy and delivery with Gudinas and that he had some health problems during the first six months of life. She also testified that he had extreme temper tantrums as a small boy, although he was never violent toward others. His teacher reported that he was hyperactive at school, sometimes throwing chairs and acting up. Mrs. Goldthwaite had Gudinas evaluated at Boston University when he was six. Thereafter, she sought help from the Massachusetts Division of Youth Services. Over the next several years, Gudinas had 105 different placements through that agency. Mrs. Goldthwaite was advised that Gudinas should be placed in a long-term residential program, but she was never able to accomplish this. (FN6) Because of his treatment in numerous facilities, Gudinas only completed his formal education through the fourth grade, although he eventually attained his GED. He also was diagnosed as having a low IQ. Finally, Gudinas' mother testified that he began drinking alcohol while a juvenile, smoked marijuana, and had used cocaine and LSD.

Michelle Gudinas, Gudinas' younger sister, testified that their father put Gudinas' hand over an open flame as punishment for playing with matches. She also testified that on another occasion, as punishment for wetting his bed, their father made Gudinas stand in front of their house in his underwear wearing a sign that said "I will not wet the bed." Ms. Gudinas noted that Gudinas had a good relationship with his stepfather. She denied ever having any sexual contact with her brother or telling anyone she had. However, in rebuttal, Emmitt Browning, an Orlando Police Department investigator, testified that Ms. Gudinas told him she

was at a party and went into a bedroom with her brother. She allegedly said her brother lay on top of her and began tearing her swim suit off before some of their cousins entered the room and pulled Gudinas off her.

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

Dr. James O'Brian, a physician and pharmacologist, was recognized by the trial court as an expert witness in the area of toxicology. He testified that Gudinas is unable to control his impulses in an unstructured environment and opined that Michelle's murder was impulsive. Gudinas told Dr. O'Brian that on the day before the murder, he ate marijuana "joints" at breakfast, at 1:30 p.m., five between 3 and 8 p.m., and another at 1 a.m. the following morning. Gudinas also reported that he drank alcohol between 1:30 and 3 p.m. and 9:30 p.m. and 2 a.m. the following morning. Dr. O'Brian testified that marijuana and alcohol remove inhibitions, thus allowing the underlying personality to show through. He stated that as the dosage increased, someone like Gudinas would not be able to control his "strong impulses." Based on his alcohol consumption and evaluation of Gudinas' underlying psychological makeup, Dr. O'Brian concluded that Gudinas' ability to conform his behavior to the requirements of the law was substantially impaired on

the night of the murder.

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

(FN1.) Two other witnesses, Culbert Pressley and Mary Rutherford, also positively identified Gudinas from the same photo lineup. They had each seen Gudinas near the scene of the murder later that morning.

(FN2.) Several hours later, shortly after 7 a.m., a man whom Pressley subsequently identified as Gudinas came walking down the sidewalk. When the man saw Pressley holding the car keys, he said, "Those look like my keys. I've been looking for them all morning." Pressley gave him the keys in exchange for a promised \$50 reward. The man then walked away.

(FN3.) Pace School employee Jane Brand discovered the victim in the alley. In the preceding half hour before seeing Michelle's body, Ms. Brand had arrived at school and encountered a young man inside the gated area on the steps leading to the school's front door. The man, whose back was to Ms. Brand, remained seated and did not look at her. She described him as about eighteen years old with short brown hair and wearing dark, loose-fitting shorts and a loose shirt. After being told to leave the school grounds, the man jumped the fence and ended up in the alley. About ten minutes later, Ms. Brand heard a loud crash in the alley. She looked outside and saw Michelle's body. She later identified Gudinas as the same man she saw in

the courtyard that morning after seeing him in a television report.

(FN4.) Gudinas' apartment was less than a half mile from where Michelle's car was found.

(FN5.) These were Frank Wrigley, Todd Gates, and brothers Fred and Dwayne Harris. The Harris brothers are Gudinas' first cousins.

(FN6.) His lengthiest treatment was a five-month program. He also spent nine days in a psychiatric ward during this time.

(FN7.) The trial court found the following statutory aggravators: (1) the defendant had been convicted of a prior violent felony, section 921.141(5)(b), Fla.Stat. (1995); (2) the murder was committed during the commission of a sexual battery, section 921.141(5)(d); and (3) the murder was especially heinous, atrocious, or cruel, section 921.141(5)(h). The court found one statutory mitigator: the defendant committed the murder while under the influence of an extreme mental or emotional disturbance, section 921.141(6)(b). The court found the following nonstatutory mitigating factors and accorded them very little weight: (1) defendant had consumed cannabis and alcohol the evening of the homicide; (2) defendant had the capacity to be rehabilitated; (3) defendant's behavior at trial was acceptable; (4) defendant had an IQ of 85; (5) defendant was religious and believed in God; (6) defendant's father dressed as a transvestite; (7) defendant suffered from personality disorders; (8) defendant was developmentally impaired as a child; (9) defendant was a caring son to his mother; (10) defendant was an abused child; (11) defendant suffered from attention deficit disorder as a child; and (12) defendant was diagnosed as sexually disturbed as a child.

*Gudinas v. State*, 693 So.2d 953, 956-59 (Fla. 1997).

#### THE DIRECT APPEAL ISSUES

On appeal to this Court, Gudinas raised the following claims, as framed by the Court:

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

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

#### THE LEGAL STANDARD

With the exception of one claim, which is not ripe for review, Gudinas' petition is based upon his various specifications of ineffective assistance of appellate counsel. In order to prevail on these claims, Gudinas must demonstrate that

the performance of his appellate counsel was deficient, **and** that he was prejudiced as a result of such deficient performance. See, *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Dugger*, 523 So.2d 161 (Fla. 1988). The "deficiency" must be of such a magnitude that, but for that deficiency, the result of the proceeding would have been different. *Id.* In reviewing a claim of ineffective assistance of counsel, this Court must determine:

whether the alleged omissions are of such magnitude as to constitute a serious or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

*Freeman v. State*, 25 Fla. L. Weekly S451 (June 8, 2000).

The law has long been settled that appellate counsel is not required to raise every colorable claim in order to provide "effective" assistance on appeal. Instead, as the United States Supreme Court has emphasized:

Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:

"One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the

suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one.... [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Jackson, *Advocacy Before the Supreme Court*, 25 Temple L.Q. 115, 119 (1951).

Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:

"Most cases present only one, two, or three significant questions.... Usually, ... if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones." R. Stern, *Appellate Practice in the United States* 266 (1981).

There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts -- often to as little as 15 minutes -- and when page limits on briefs are widely imposed. See, e.g., *Fed. Rules App. Proc.* 28(g); McKinney's 1982 *New York Rules of Court* §§ 670.17(g)(2), 670.22. Even in a court that imposes no time or page limits, however, the new per se rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments -- those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 897 (1940) -- in a verbal mound made up of strong and weak contentions. See generally, e.g., Godbold, *Twenty Pages*

*and Twenty Minutes -- Effective Advocacy on Appeal*, 30 SW.L.J. 801 (1976).

*Jones v. Barnes*, 463 U.S. 745, 751-53 (1983). [footnotes omitted]; *Smith v. Murray*, 477 U.S. 527, 536 (1986) ("This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy."); *Provenzano v. Dugger*, 561 So.2d 541, 549 (Fla. 1990) (" . . . counsel need not raise every nonfrivolous issue revealed by the record."); *Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of **every conceivable argument often has the effect of diluting the impact of the stronger points.**") [emphasis added].

In the context of a claim of ineffective assistance of appellate counsel, Eleventh Circuit Court of Appeals Judge Edmonson concurred in the denial of relief, stating:

. . . I cannot agree that the quality of counsel's performance can be judged much by the length of briefs or the number of issues raised. Especially in the death penalty context, too many briefs are too long; and too many lawyers raise too many issues. **Effective lawyering involves the ability to discern strong arguments from weak ones and the courage to eliminate the unnecessary so that the necessary may be seen most clearly.** The Supreme Court -- as today's court recognizes -- has never required counsel to raise every nonfrivolous

argument to be effective. See *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). That the custom in death penalty cases is for lawyers to file long briefs with lots of issues means little to me. This kind of "custom" does not define the standard of objective reasonableness. See *Gleason v. Title Guar. Co.*, 300 F.2d 813 (5th Cir. 1962). While compliance with custom may generally shield a lawyer from a valid claim of ineffectiveness, noncompliance should not necessarily mean he is ineffective. Not all customs are good ones, and customs can obstruct the creation of better practices.

*Heath v. Jones*, 941 F.2d 1126, 1141 (11th Cir. 1991) [emphasis added].

Appellate counsel is not "ineffective" for "failing" to raise issues which are not properly preserved for review. See, *Freeman, supra*; *Suarez v. Dugger*, 527 So.2d 190, 193 (Fla. 1988). Likewise, "failure" to brief a meritless issue, or one having little merit, is not deficient performance. *Id.* Further, the "failure" to raise weak issues, or the "failure" to raise an issue that, at most, is harmless error, does not establish a basis for relief on ineffective assistance of counsel grounds. *Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989); *Duest v. Dugger*, 555 So.2d 849 (Fla. 1990). Of course, counsel is not "ineffective" when he "chose not to argue the issue as a matter of strategy." *Freeman, supra*.

Appellate counsel is not ineffective for failing to convince this Court of the merit of the claims raised on appeal. *Freeman*,

*supra*; *Alford v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir.), *modified*, 731 F.2d 1486, *cert. denied*, 469 U.S. 956 (1984) (“[trial counsel] cannot be faulted simply because he did not succeed.”). How present counsel would have argued the issues had he been appellate counsel is not the standard -- petitioner must allege “a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based.” *Card v. Dugger*, 911 F.2d 1496, 1507 (11th Cir. 1990); *Freeman, supra*.

### THE INDIVIDUAL CLAIMS

#### I. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

On pages 5-17 of the petition, Gudinas alleges that appellate counsel was ineffective for “failing” to raise various **additional** allegations of prosecutorial misconduct based upon the State’s closing argument. Gudinas admits that appellate counsel raised “two instances of unobjected-to misconduct” on direct appeal. This Court found those claims procedurally barred because there had been no contemporaneous objection at trial. *Gudinas v. State*, 693 So.2d at 959 and n. 8. No objection to the alleged instances of prosecutorial misconduct contained in the petition was made at the time of trial, and, under settled Florida law, appellate counsel is not ineffective for not raising an unpreserved issue. See pages 9-12, above. Moreover, while cast in the form of an ineffective assistance of appellate counsel claim,

the prosecutorial argument claim is, in fact, the sort of claim that is properly raised in a *Florida Rule of Criminal Procedure* 3.850 proceeding, as Gudinas has done. This claim is not properly the subject of a petition for habeas corpus. See, e.g., *Parker v. Dugger*, 550 So.2d 459 (Fla. 1989).<sup>1</sup>

Alternatively and secondarily, without waiving the procedural bar defenses set out herein, the "prosecutorial argument" claim set out in the petition is without merit. The "Golden Rule" portion of Gudinas' argument has no legal basis -- what he attempts to cast as an improper argument is nothing more than a valid argument based upon the undisputed evidence and the reasonable inferences drawn from it. Gudinas' attempt to transform a valid and appropriate argument into "error" is disingenuous. Likewise, what Gudinas claims is an improper "limitation" on the jury's consideration of mitigation is, in fact, legitimate argument based upon the evidence. In any event, the jury was properly instructed about how it should weigh the aggravators and mitigators, and, of course, juries are presumed to follow their instructions. *Yates v. Evatt*, 500 U.S. 391, 403 (1991); *Valle v. State*, 474 So.2d 796, 805 (Fla. 1985).

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<sup>1</sup>This claim is essentially a verbatim reproduction of the closing argument claim contained in his appeal from the denial of his Rule 3.850 motion.

Moreover, the prosecutor's argument concerning the applicability of the "extreme mental or emotional disturbance" mitigator was not improper, and, in any event, this Court found a "fundamental error" claim based partly upon this argument to be procedurally barred on direct appeal. *Gudinas, supra*. Likewise, this Court rejected, on direct appeal, a "fundamental error" claim based on the "prosecutor's monster remark". That determination should not be disturbed. To the extent that Gudinas claims that appellate counsel was ineffective for not raising other "instances" of "misconduct", the complained-of comments, while perhaps somewhat strong, do have record support.<sup>2</sup>

To the extent that Gudinas complains about other alleged instances of "misconduct" that were not raised on direct appeal, he has not shown that **any** allegation, separately or cumulatively, rises to the level of fundamental error. Even if appellate counsel had raised all of the unobjected-to comments on direct appeal, it still would not have established a basis for relief.<sup>3</sup>

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<sup>2</sup>Gudinas complains because the prosecutor referred to him as a "maniac" and as "evil". In light of the uncontroverted evidence demonstrating what Gudinas did to his victim, those descriptive terms are among the ones that come to mind in attempting to describe this crime. Even if appellate counsel had raised this claim, it would not be a basis for relief because any error was harmless. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986),

<sup>3</sup>Given that appellate counsel raised certain claims of prosecutorial misconduct, it is obvious that counsel was aware

## II. THE "APPRECIATE AND CONFORM" MITIGATOR

On pages 17-22 of the petition, Gudinas argues that "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 law was substantially impaired." This claim is procedurally barred in this proceeding because the rejection of this mitigator was raised and addressed on direct appeal. That is a procedural bar to relitigation of this claim. *Blanco v. Wainwright*, 507 So.2d 1377, 1384 (Fla. 1987). Gudinas is precluded from using a habeas corpus petition to relitigate this claim under a new theory.

To the extent that further discussion of this claim is necessary, on direct appeal this Court held:

Furthermore, we agree with the State that the trial court did not abuse its discretion in rejecting as a statutory mitigator Gudinas' claim that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement was substantially impaired. In its sentencing order, the court acknowledged Dr. O'Brian's opinion that Gudinas' "ability to conform his behavior was impaired substantially on the basis of alcohol and his underlying psychological makeup." The court then rejected Dr. O'Brian's opinion as "too heavily based

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of such a claim. It was reasonable for counsel to focus on the stronger claims, and the fact that present counsel obviously would have briefed the case differently proves nothing beyond the truism that hindsight is 20/20. It does not establish the deficient performance and prejudice prongs of *Strickland*.

upon unsupported facts from what he was told other witnesses were going to testify about concerning the issue of intoxication." The court then noted that no witnesses testified that Gudinas was "substantially impaired to the extent that he did not know what he was doing." Indeed, the court then cited "credible evidence" that Gudinas "stealthily approached" Rachelle Smith's car at approximately 2 a.m. and attempted to gain entry. Therefore, we agree with the State that the court did not abuse its discretion in rejecting this mitigator, especially considering the evidence cited in its sentencing order and adduced at trial. See *Walls v. State*, 641 So.2d 381, 390-91 (Fla. 1994) (stating that opinion testimony "gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking"), *cert. denied*, 513 U.S. 1130, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995).

*Gudinas v. State*, 693 So.2d at 966-67. Appellate counsel litigated the issue Gudinas claims he should have pursued, and the fact that he was unable to convince this Court to rule in Gudinas' favor does not establish ineffective assistance of counsel. *Herring v. Dugger*, 528 So.2d 1176, 1177 (Fla. 1988); see also, *Scott v. Dugger*, 604 So.2d 465, 469-70 (Fla. 1992) ("Counsel's performance cannot be deemed deficient for failing to raise every conceivable aspect of a claim."). This claim is not a basis for relief.

### III. THE JOINDER CLAIM

On pages 22-27 of the petition, Gudinas alleges that appellate counsel was ineffective for failing to raise the denial of a motion to sever Counts I and II (the Rachelle Smith cases)

from the murder and sexual battery cases in which Michelle McGrath was the victim.<sup>4</sup> This claim was litigated on direct appeal and decided adversely to Gudinas. This Court held:

Gudinas first contends that the trial court improperly allowed the joinder of his alleged offenses against Rachelle Smith with those against Michelle McGrath in one trial. The State responds that the offenses were properly joined as being part of a spree of crimes committed by Gudinas. The State also contends that the crimes against Rachelle Smith constitute admissible similar fact evidence in Gudinas' murder prosecution.

In *Ellis v. State*, 622 So.2d 991 (Fla. 1993), we surveyed our cases interpreting joinder based on "two or more connected acts or transactions" within the meaning of rule 3.150(a), *Florida Rules of Criminal Procedure*. We first reviewed *Wright v. State*, 586 So.2d 1024 (Fla. 1991), where we stated:

"[T]he rules do not warrant joinder or consolidation of criminal charges based on similar but separate episodes, separated in time, which are 'connected' only by similar circumstances and the accused's alleged guilt in both or all instances." Courts may consider "the temporal and geographical association, the nature of the crimes, and the manner in which they were committed." However, interests in practicality, efficiency, expense, convenience, and judicial economy, do not outweigh the defendant's right to a fair determination of guilt or innocence.

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<sup>4</sup>On page 22 of the petition, Gudinas states that appellate counsel did not raise the severance issue. On page 23, he "refines" that claim to be that while counsel raised the issue as a violation of the Rules of Criminal Procedure, it was ineffective assistance of counsel not to raise the claim as a due process claim, instead. Of course, it is not deficient performance not to raise every possible variation of a particular claim. *Scott, supra*.

*Id.* at 1029-30 (citations omitted) (quoting *Garcia v. State*, 568 So.2d 896, 899 (Fla. 1990)). We further addressed the rules of permissible joinder in *Crossley v. State*, 596 So.2d 447, 450 (Fla. 1992), wherein we explained that "[t]he danger in improper consolidation lies in the fact that evidence relating to each of the crimes may have the effect of bolstering the proof of the other." To forestall that possibility, we required trial courts to find "a meaningful relationship between the charges of two separate crimes before permitting them to be tried together." *Id.* (emphasis added).

We next analyzed our decision in *Bundy v. State*, 455 So.2d 330 (Fla. 1984), *cert. denied*, 476 U.S. 1109, 106 S.Ct. 1958, 90 L.Ed.2d 366 (1986), where the defendant first attacked four women, killing two, in a Florida State University sorority house. Roughly an hour later, Bundy attacked a fifth woman in an apartment house several blocks away. *Id.* at 334-35. In *Bundy*, we found that "the criminal acts [were] connected by the close proximity in time and location, by their nature, and by the manner in which they were perpetrated." *Id.* at 345. We later characterized the Bundy crimes as "a classic example of an uninterrupted crime spree in which no significant period of respite separated the multiple crimes." *Ellis*, 622 So.2d at 999.

In *Fotopoulos v. State*, 608 So.2d 784 (Fla. 1992), *cert. denied*, 508 U.S. 924, 113 S.Ct. 2377, 124 L.Ed.2d 282 (1993), the defendant induced a woman to murder another man while he videotaped the shooting. He then used the video to blackmail the woman into hiring a hit man to murder his wife a month later. We found that since one crime induced the other crime, a sufficient causal link existed to permit joinder. *Id.* at 790. From our review of those cases, we concluded:

First, for joinder to be appropriate the crimes in question must be linked in some significant way. This can include the fact that they occurred during a "spree" interrupted by no significant period of respite, *Bundy*, or the fact that one crime is causally related to the other, even though there may have been a significant lapse of

time. *Fotopoulos*. But the mere fact of a general temporal and geographic proximity is not sufficient in itself to justify joinder except to the extent that it helps prove a proper and significant link between the crimes. *Crossley*.

*Ellis*, 622 So.2d at 1000. With those rules in mind, "we must consider where on the spectrum [this case] falls." *Id.*

Gudinas made three separate, unsuccessful attempts to break into Rachelle Smith's car after following her from the other parking lot. His intention to sexually assault her was made clear by the vulgar language he shouted at her as he attempted to smash his way through the driver's side window. His actions indicate he was willing to forcibly enter Rachelle Smith's car. He did not have to yell, "I want to rape you," in order for his criminal intentions to be apparent.

Unsuccessful in his attempt to rape Smith, the record (FN9) reflects that within no more than three hours and in the same proximate area, Gudinas brutally raped and murdered Michelle McGrath. Gudinas' failure to complete his attack against Rachelle Smith may have provided a causal link to his completed attack on Michelle McGrath, thus allowing joinder under *Fotopoulos*. Furthermore, the State makes a persuasive argument that the attacks were separated by less than one hour. Under the State's scenario or even if approximately three hours elapsed, Gudinas' offenses constitute a crime spree as contemplated in *Bundy*. The attempted rape and accompanying violence of his aborted entry into Rachelle Smith's car, and the actual rape and extreme violence of his murder of Michelle McGrath demonstrate a "meaningful relationship" between the two attacks as required by *Crossley*.

Furthermore, we agree with the State that even if the charges should have been severed, any error would be harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986). Rachelle Smith's testimony still would have been admissible in a severed trial for the McGrath attack as similar fact evidence in

establishing Gudinas' motive for raping and murdering Michelle McGrath. Charles W. Ehrhardt, *Florida Evidence* § 404.14 (1995 ed.). Evidence of Gudinas' unsuccessful attack against Rachelle Smith was relevant to show his motive for another attack later that morning. Thus, even if the charges were severed, Rachelle Smith's testimony regarding her encounter would have been admissible as similar fact evidence in Gudinas' murder trial. For the same reasons, we do not find that inclusion of the Rachelle Smith charges with the charges relating to Michelle McGrath's murder deprived Gudinas of a fair trial. (FN10)

Therefore, considering the facts of this case and our prior case law, we find that the trial court did not abuse its discretion in consolidating all five counts in the information into one trial.

(FN9.) Gudinas is correct that the State's case is based on circumstantial evidence. However, even he admits that all the evidence points to him as the killer.

(FN10.) Gudinas contends that Rachelle Smith's identification of him as her attacker was unduly prejudicial because she did not identify him as the man who attacked Michelle McGrath. However, as the State points out, Rachelle never claimed to identify Michelle's attacker, only her own. While Gudinas is certainly correct that Smith's testimony was prejudicial, all adverse testimony by its nature is prejudicial or it would not be offered. Smith's testimony was prejudicial to Gudinas' theory of the case because it provided similar fact evidence and placed Gudinas near the scene of the crime just prior to its commission.

*Gudinas v. State*, 693 So.2d at 959-61.

Despite Gudinas' evident dissatisfaction with that result, this Court has already decided the joinder issue adversely to his

newest position. It is axiomatic that a petition for writ of habeas corpus does not serve as a second round of direct appeal, and it is equally well-settled that a defendant is not allowed to use different theories as a basis for collateral relief when the same issues have already been decided adversely to the defendant on direct review. With this claim, the most that Gudinas has demonstrated is that current counsel would have briefed this claim differently from the way Gudinas' experienced appellate public defender chose to prosecute the appeal. That is not the ineffective assistance of counsel standard, and there is no basis for relief.

#### IV. THE CONSTITUTIONALITY OF THE DEATH PENALTY STATUTE

On pages 27-34 of his petition, Gudinas argues that the Florida "death sentencing statute" is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. This claim is procedurally barred from review because it could have been but was not raised on direct appeal to this Court. *Blanco v. Wainwright, supra*. That procedural bar is an adequate and independent basis for denial of relief on this claim. To the extent that this claim is a stand-alone claim of constitutional error, it is also improper because it could and should have been raised in Gudinas' motion for relief under

*Florida Rule of Criminal Procedure* 3.850. See, *Parker v. Dugger*, 550 So.2d 459 (Fla. 1989).

To the extent that this claim is a claim of ineffective assistance of appellate counsel, there is no basis for relief because the underlying claim was not preserved at trial by timely objection. Appellate counsel cannot have been ineffective for not raising an unpreserved issue. See pages 9-13, above. Moreover, appellate counsel cannot have been ineffective with respect to this claim because it has no merit. The Florida death penalty statute has been repeatedly upheld, both by this court and by the United States Supreme Court. See, *Hunter v. State*, 660 So.2d 244 (Fla. 1995); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Spaziano v. Florida*, 468 U.S. 527 (1984); *Hildwin v Florida*, 490 U.S. 638 (1989); *James v. State*, 453 So.2d 786, 792 (Fla. 1984) ("Finally, the United States Supreme Court has never held that jury unanimity is a requisite of due process, [*Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)] and in *Alvord v. State*, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), this Court held that the jury in a capital case could recommend an advisory sentence by a simple majority vote."); *Larzelere v. State*, 676 So.2d 394 (Fla. 1996); *Pietri v. State*, 644 So.2d 1347, 1355 n. 16 (Fla. 1994).

The Constitution does not require a unanimous sentencing recommendation in order to impose a death sentence, and there is no basis for relief on this unpreserved and meritless claim.

#### V. THE CUMULATIVE ERROR CLAIM

On pages 34-35 of the petition, Gudinas alleges that he is entitled to relief based upon "cumulative error". The "errors" which he seeks to aggregate are not identified beyond stating that those errors are "revealed" in the habeas petition, the Rule 3.850 proceedings, and in his direct appeal. Inasmuch as the purpose of an appellate brief is to present argument supported by legal authority, the "cumulative error" claim is insufficiently pleaded and should be dismissed. *Coolen v. State*, 696 So.2d 738, 742 n.2 (Fla. 1997); *Duest v. Dugger*, 555 So.2d 849, 852 (Fla. 1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived."). Moreover, this claim is procedurally barred because the cumulative error claim, as well as the claims presumably underlying it, are procedurally barred from review by one or more procedural defaults. Finally, this claim is not a basis for relief because there is no "error" to "cumulate". Because that is true, there is no legal basis for this claim, and hence, no basis

for relief.

#### VI. THE COMPETENCY FOR EXECUTION CLAIM

On pages 35-39 of his brief, Gudinas asserts that his "Eighth Amendment right against cruel and unusual punishment **will** be violated because [he] **may** be incompetent at the time of execution." This claim is untimely, as Gudinas acknowledges, because no death warrant has been issued for the execution of his sentence. *Provenzano v. State*, 751 So.2d 37 (Fla. 1999); *Thompson v. State*, 2000 WL 373757 (Fla. 2000). This claim should be dismissed as untimely.

#### CONCLUSION

For the reasons set out above, the petition for writ of habeas corpus should be denied in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

\_\_\_\_\_  
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 Point.

\_\_\_\_\_  
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