IN THE SUPREME COURT OF FLORIDA

JESSE GUARDADO, Appellant, v. STATE OF FLORIDA, Appellee. _____/	CASE NO. SC05-2035

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JESSE GUARDADO, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is the direct appeal of a capital case. Guardado was indicted for the September 13, 2004 murder of Jackie Malone. (T. Vol. I 5-6). Count I charged premeditated murder or felony murder with armed robbery being the underlying felony. The indictment charged that he stabbed the victim with a knife. Count II charged armed robbery with a knife with jewelry, a brief case, a cell phone, currency and a check book being the property taken. The grand jury returned a true bill on first degree premeditated murder or felony murder with a weapon and robbery with a weapon on October 14, 2004. (T. Vol. I 6).

On October 19, 2004, Guardado entered a guilty plea, with the Honorable Kelvin Wells presiding, to both counts of the indictment and the additional counts of dealing in stolen property and possession of a firearm by a convicted felon. (Vol. 1 8; Vol. III 3-4,6). The trial court explained to the defendant his constitutional right to an attorney. (Vol. III 5). Guardado stated that he wanted to waive counsel. (Vol. III 6). The trial court explained that an attorney could help him bargain with the State.
(Vol. III 6). Guardado stated that he understood that. (Vol. III 6). After the trial court read the charged to him, Guardado stated that he understood the charges and their serious nature.

(Vol. III 7). Guardado stated that he understood the maximum penalty for first degree premeditated murder was death by lethal injection. (Vol. III 7). The prosecutor explained that he had not yet held the committee meeting required to seek the death sentence, but that it was likely that the State would seek the death penalty in this case. (Vol. III 7). The prosecutor explained that death was the maximum sentence and life without parole was the minimum sentence for first degree murder. (Vol. III 8). Guardado said he had no questions regarding the consequences of his plea. (Vol. III 8). The trial court asked a series of question to determine whether the waiver of counsel was knowing and intelligent. (Vol. III 9). The trial court asked Guardado his age and Guardado responded 42 years old. (Vol. III 9). The trial court ask Guardado if he could read and write and Guardado responded: “yes, sir.” (Vol. III 9). The trial court asked Guardado how many years if school had he completed and Guardado responded that he had completed ten years and had a GED. (Vol. III 9). The trial court asked Guardado if he had ever been diagnosed and treated for any mental illness and Guardado responded: “No, sir.” (Vol. III 9). The trial court asked Guardado if he understood that a lawyer would represent him for free and Guardado responded: “Yes, sir.” (Vol. III 10). The trial court asked Guardado if he understood that

the trial court could appoint stand-by counsel for the plea and Guardado responded: “Yes, sir” but he did not want stand-by counsel. (Vol. III 10). The trial court explained that counsel would be knowledgeable about court procedures, the rules of evidence, and the law. (Vol. III 10). The trial court stated that did not think he should represent himself; that even lawyers have lawyers represent them and told Guardado the saying about any person who represents himself has a fool for a client. (Vol. III 11). The trial court explained that he could not take over chores for a *pro se* defendant. (Vol. III 12). The trial court inquired whether the defendant understood all this but still desired to proceed without a lawyer and Guardado responded: “Yes, sir.” (Vol. III 12).

The prosecutor also asked several questions. (Vol. III 13). Guardado had been employed and was a certified water treatment operator. (Vol. III 13). Guardado had represented himself previously at a prior trial. (Vol. III 13). The prosecutor explained that this was an adversarial system and that he was “a well-trained, experienced legal professional with 23 years of experience and over 15 years of experience in death penalty cases” and he would have “decided advantages” in this case because of that experience. (Vol. III 16-17). The prosecutor explained that if the defendant pled not guilty, he would have

the right to a trial. (Vol. III 18). The prosecutor noted that Guardado had the right to testify in his own behalf at trial and the right to cross-examine the witnesses against him. (Vol. III 18-19). The prosecutor also explained that by entering a guilty plea, Guardado was waiving the right to appeal his guilt or innocence. (Vol. III 19).

Guardado expressed his desire to have the charges finalized expediently as possible so that some form of healing can begin for both his family and the victim's family. (Vol. III 21-22). The trial court explained that attorneys that are appointed in death penalty cases have special training and qualifications in addition to those of normal criminal defense lawyers. (Vol. III 23). Guardado then accepted an attorney for penalty phase. (Vol. III 23-24). The prosecutor then explained that dealing in stolen property was a second degree felony with a maximum sentence of 15 years and a $10,000.00 fine. (Vol. III 24). The maximum sentence for first degree murder was death or life without parole. (Vol. III 24). Robbery with a weapon is a first degree felony punishable by life. (Vol. III 24). The maximum sentence for possession of a firearm by a convicted felon is fifteen years in prison with a three year minimum mandatory. (Vol. III 25).

The trial court asked Mr. Guardado if anything was promised to him and he responded: “No, sir.” (Vol. III 25-26). Guardado stated that he was entering the plea freely and voluntarily; was not under the influence of any drugs, alcohol or medications; was not suffering from any mental illness; understood that he was giving up his right to a jury trial; his right to make the State prove the charges beyond a reasonable doubt; the right to confront the State’s witnesses and to present his own witnesses. (Vol. III 26-27).

The defendant waived the factual basis for the charges but the prosecutor preferred to state the factual basis. (Vol. III 28-29). The prosecutor then stated the factual basis of the charges in the indictment as: on September 13, 2004, the defendant entered the residence of Jackie Malone at 436 Thornton Road, DeFuniak Springs, Florida armed with a knife and steel bar. (Vol. III 32). While inside, he bludgeoned Ms. Malone with the steel bar and stabbed her several times with the knife causing her death and obtained her purse with $80.00 U.S. Currency as well as her checkbook, cell phone and jewelry. (Vol. III 32). The prosecutor noted that, on September 21, after

being advised of his *Miranda* rights[1] and after having public defender Mr. Platteborze appointed to advise him, Guardado confessed to the murder and robbery of Ms. Malone. (Vol. III 32-33). The trial court found a sufficient factual basis. (Vol. III 33).

The trial court found that the plea was freely and voluntarily entered and accepted the plea. (Vol. III 33). The trial court also found that Guardado's waiver of his right to counsel was knowing and informed. (Vol. III 33). The trial court explained to the defendant that, if at any time he wanted to change his decision and have counsel appointed for the penalty phase, the court would appoint an attorney at no cost to him. (Vol. III 34).

After the Public Defender withdrew due to a conflict, John Gontarek was appointed to represent Guardado. (Vol. 1 17). Jason Cobb was appointed as co-counsel. (Vol. 1 183). Mr. Gontarek filed a motion to have Dr. James Larson appointed as a confidential mental health expert. (Vol. 1 21). The trial court granted the motion. (Vol. 1 29-30). Mr. Gontarek filed a motion to have Annie Dullum appointed as a private investigator. (Vol. 1 32). The trial court granted that motion as well. (Vol. 1

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[1] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16

33). Defense counsel filed a notice of expert testimony of mental mitigation that stated that Mr. Guardado's IQ was in the normal range. (Vol. 1 185-186).

Guardado filed numerous pre-trial motions, including a "motion to declare Florida's death penalty unconstitutional under *Ring v. Arizona*." (Vol. 1 37-170; Vol. I 46-78). On September 6, 2005, the trial court held a motion hearing on the twenty-one (21) pre-trial motions filed by defense counsel. (T. Vol. III). Defense counsel argued that victim impact evidence was non-statutory aggravation that should not be presented to the jury, only the judge. (T. Vol. III 4,2). The trial court denied the motion. (T. Vol. III 5). The second motion was a motion based on *Ring*. (T. Vol. III 5). Defense counsel argued motions two, five, six, seven, nine, ten, eleven, twelve, thirteen and twenty-one together. (T. Vol. III 5-6). Defense counsel argued that the statute should be declared unconstitutional because the aggravators were not in the indictment and were not found by the jury. (T. Vol. III 8). The prosecutor noted that the Florida Supreme Court had upheld the constitutionality of Florida's death penalty statute and asked the trial court to deny the motions based on this precedent. (T.

L.Ed.2d 694 (1966).

Vol. III 9). The trial court denied the *Ring* motions. (T. Vol. III 9).

Defense counsel asked for notice of the aggravating circumstances. (T. Vol. III 9-10,14,16). The prosecutor objected, noting that the caselaw does not require prior notice of aggravating circumstances.

(T. Vol. III 10,15). The trial court partially granted the motion requiring the State to provide the aggravating circumstances sought at the charge conference at the penalty phase. (T. Vol. III 11,16). Defense counsel argued motion four which was a motion to preclude the State from striking jurors based on their opposition to the death penalty. (T. Vol. III 11). The trial court explained that he was going to do voir dire in chambers, two or three jurors at the time. (T. Vol. III 12). Defense counsel thought that "may cure it." (T. Vol. III 12). Defense counsel explained that he was really seeking a chance to rehabilitate such jurors. (T. Vol. III 13). The trial court denied the motion but with the proviso that rehabilitation would be allowed. (T. Vol. III 14). Defense counsel argued that the State has an obligation to disclose mitigating evidence. (T. Vol. III 14). The prosecutor argued that it was not for the State to determine what matter were mitigating but acknowledged that if the State had in its sole possession "some remarkable

matter of mitigation," the State had a duty to disclose it. (T. Vol. III 18). The prosecutor then represented to the Court that he had no such mitigating evidence. (T. Vol. III 18). Defense counsel withdrew the motion for a special guilt phase verdict as moot due to the guilty plea. (T. Vol. III 19). The trial court granted the motion to compel a penalty phase witness list. (T. Vol. III 21). The trial court granted the motion to preclude argument designed to create sympathy for the victim with the exception of admissible victim impact evidence and argument. (T. Vol. III 21-23). Defense counsel withdrew his motion for a special verdict regarding aggravating and mitigating circumstances. (T. Vol. III 23-24).

On September 12-15, 2005, a penalty phase was conducted. The Honorable Kelvin Wells presided at the penalty phase as well. On September 12 and 13, the jury was selected. (Vol. IV 4-173, Vol. V 174-358). The jurors were William Foster, William Cornelius, Anne Stuart, Adam Prince, David Sherry, Sharon Steelman, Rebecca Bruce, Lee Jordan, Pamela Pennington, Donna Johns, Earl Hall and Angela Metts. (Vol II 227; Vol. V 356,357). The alternate jurors were Edwin Cuchens and Dottie Kitch. (Vol. V 356; Vol II 227).

In opening statement of the penalty phase, the prosecutor explained the State's theory of the case. (Vol. VI 8-14). The

prosecutor noted that the murder victim was Jackie Malone who was 76 years old and a resident of DeFuniak Springs. (Vol. VI 8). The victim, Ms. Malone, owned a realty company, and had rented property to the defendant, Jesse Guardado. (Vol. VI 8-9). She had loaned him money and helped him in various ways to adjust to life outside prison. (Vol. VI 9). The prosecutor explained that, "in a crack cocaine addiction binge," Guardado armed himself with a breaker bar, which is a heavy metal wrench, and a kitchen knife, and he went to the victim's house with the weapons concealed behind his back. (Vol. VI 9). Guardado went to her home, in the middle of the night, and knocked on the door. (Vol. VI 9). The victim answered the door in her nightgown. (Vol. VI 10). Guardado asked to use the phone and she let him in. (Vol. VI 10). Guardado took out the heavy metal breaker bar and began "savagely and viciously beating her about the head." (Vol. VI 10). The prosecutor explained that Guardado hit her eleven times causing with "blood going everywhere". (Vol. VI 10). The victim put her hands over her head to protect herself. (Vol. VI 10). When the victim did not die, Guardado took out the knife and stab the victim in the chest five times. (Vol. VI 10). The victim attempted to grab the knife and got cuts on her hands from doing so. (Vol. VI 10). Guardado then slashed the victim's throat. (Vol. VI 10). The victim then

died. (Vol. VI 10). Guardado took the victim's purse, briefcase, and a jewelry box. (Vol. VI 11). Inside the purse was money, a checkbook and a cell phone. (Vol. VI 11). The defendant then left the victim's home. (Vol. VI 10). Guardado cashed four of Ms. Malone's checks the next day at the Tom Thumb in Niceville. (Vol. VI 11). Guardado was captured on their surveillance video cashing the checks. (Vol. VI 11). Guardado confessed to the murder in a taped recorded and videotaped interview. (Vol. VI 11). The prosecutor noted that Guardado was truthful and cooperated with law enforcement and corrected errors in his confession. (Vol. VI 12). While Guardado initially claimed to have disposed of the murder weapons, he later admitted to law enforcement where the weapons could be located and identified the knife and breaker bar. (Vol. VI 12). In the taped confession, Investigator Roy, now Rivers, asked Guardado if he went there to kill Jackie Malone and he answered yes and to get the money. (Vol. VI 13). The prosecutor told the jury that they would see certified copies of Guardado's four prior convictions and hear testimony that Guardado, the same night of the murder, attempted to rob James Brown at the Winn-Dixie with a knife. (Vol. VI 13). The prosecutor referred to the CCP aggravator; the prior violent felony aggravator; the HAC aggravator; the particular vulnerable due to age aggravator and

the under sentence of imprisonment aggravator because Guardado was on controlled release. (Vol. VI 13-14).

Defense counsel, in his opening statement, pleaded for mercy. (Vol. VI 14-20). Defense counsel explained to the jury that they were here to decide if Guardado falls into the category of case where there is no mitigation and "no hope for". (Vol. VI 15-16). Defense counsel explained that the defendant had a problem - "an addiction to crack cocaine" (Vol. VI 16). Guardado did not blame the crime on anyone else. (Vol. VI 16). Defense counsel expected the evidence to show that Guardado ended "it as fast as he could so that there would be little or no suffering." (Vol. VI 16). Guardado ignored the advice of public defender not to talk with the investigator because he wanted to cooperate. (Vol. VI 17). During the interview, Guardado was remorseful; he was "choked up and tearful." (Vol. VI 17). Guardado accepted responsibility. (Vol. VI 17). Guardado did not attempt to cut a deal with the prosecutor; rather, he waived his right to a trial and his right to a lawyer and entered a guilty plea. (Vol. VI 17). Guardado asked one of the investigators if he pretended like he was going to escape, if she would shot him to put everyone out of their pain. (Vol. VI 18). Defense counsel noted that Dr. Larson, a forensic psychologist, was going to testify that Guardado was not a

psychopath, who was totally cold toward other people, and that Guardado could “make a contribution to the prison population.” (Vol. VI 18). Defense counsel explained that if Guardado was sentenced to life, he would work, doing plumbing in prison. (Vol. VI 19). Defense counsel urged to jury to recommend life. (Vol. VI 19-20).

Prior to the first witness being called, the prosecutor noted that he had redacted portions of the defendant’s taped and videotaped confession that referred to the possession of a firearm by a convicted felon, a DUI, and a prior incident of trespassing on the victim’s property. (Vol. VI 21).

The prosecutor then called Investigator James Lorenz, an investigator with the Walton County Sheriff’s Office, to testify. (Vol. VI 23-24). On September 15, 2004, he responded to the residence of Jackie Malone at 436 Thornton Road in DeFuniak Springs. (Vol. VI 24-25). The victim’s brother had discovered her body. (Vol. VI 25). When he entered the house, the screen door was open and there was a key in the french doors. (Vol. VI 25). The victim was lying on the floor behind the couch. Her right hand and elbow was across her forehead in the “defensive posture.” (Vol. VI 26). There were several wounds to her head; bleeding around the nose and mouth; and blood on her nightgown in the chest area. (Vol. VI 26). He took

photographs of the victim that were introduced as State's exhibits #1 and #2. (Vol. VI 26-27). Investigator Rome Garrett was the co-investigator in the case. (Vol. VI 28). They were both assigned to the case. (Vol. VI 28). They conducted a search of the home and saw an outline on the dresser that looked like a jewelry box. (Vol. VI 28). Other items taken in the robbery were the victim's briefcase; her purse; her wallet; her cell phone and her checkbook. (Vol. VI 29).

They developed Jesse Guardado as a suspect. (Vol. VI 29). Detective Forgione with the Niceville Police Department contacted him and said that Guardado wanted to speak with him. (Vol. VI 29-30). On September 21, 2004, they met Jesse Guardado in the Wal-Mart parking lot because Guardado's truck had broken down in that parking lot. (Vol. VI 30). The investigator searched the truck. (Vol. VI 30). On the way to the Sheriff's Office, Guardado made the spontaneous statement: "that lady didn't deserve what I did to her." (Vol. VI 30). Guardado was tearful. (Vol. VI 31). He did not question Guardado at that time because Public Defender Platteborze wanted to speak with Guardado and he told Guardado that he would have to talk with the Public Defender first, but if, after he talked with the public defender, Guardado still wanted to talk with him, he would be "more than happy" to talk with him. (Vol. VI 31).

After speaking with Public Defender Platteborze, Platteborze informed him that Guardado still wanted to talk to the investigator against his advice. (Vol. VI 31). They spoke with Guardado at the administrative office of the Walton County Sheriff's Office. (Vol. VI 32). The interview was at approximately 4:00 on September 21. (Vol. VI 32). Investigator Lorenz, Investigator Garrett and Sergeant Roy were present for the interview. (Vol. VI 32). Sergeant Roy advised Guardado of his *Miranda* rights. (Vol. VI 32). Guardado signed a waiver of *Miranda* rights form. (Vol. VI 32). The interview was recorded on cassette tape and on videotape. (Vol. VI 33). The beginning of the interview was recorded on cassette tape only, but during a break, Captain Sunday wanted the interview videotaped as well. (Vol. VI 33). They started from the beginning again. (Vol. VI 33). The audio cassette recording of the interview was introduced as State's exhibit #8. (Vol. VI 33). The videotape of the interview was introduced as State's exhibit #9. (Vol. VI 33). The audiotaping began at 4:25 and the videotaping began at 5:39. (Vol. VI 33). The exhibits were received without objection. (Vol. VI 34). Guardado confessed to the murder of Jackie Malone during the interviews. (Vol. VI 34). Guardado admitted that he went to the victim's home intending to kill her during the first interview. (Vol. VI 34). Guardado said that he

went to the victim's home with the intention "to do whatever it took to get the money" during the second interview. (Vol. VI 35).

The audio tape was played for the jury. (Vol. VI 35-69). Ms. Roy stated that she had already advised Guardado of his rights (Vol. VI 35). She asked if he needed her to go over them with him again and Guardado responded: "No." (Vol. VI 35). She referred to the waiver and stated that it basically said that she had not promised him anything or treated him badly and she asked if Guardado agreed with that and he responded: "Yes". (Vol. VI 36). She stated that Guardado had just talked with the Public Defender Platteborze, who had advised him of his rights and cautioned him against speaking with the investigators. (Vol. VI 36). She then had Guardado sign the waiver form. (Vol. VI 36). She asked Guardado to tell them what happened. (Vol. VI 37). On Monday, September 13, the day before Hurrican Ivan, Guardado went to work at 12:17. (Vol. VI 37). Guardado drove to the victim's home. (Vol. VI 38). He drove in Lois' car because his truck was broken down. (Vol. VI 39). The victim was asleep. (Vol. VI 39). Guardado knocked on the door repeatedly until she got up out of bed. (Vol. VI 39,40). The victim was in her nightclothes. (Vol. VI 39). She opened the door and let Guardado in. (Vol. VI 39). Guardado told the victim that he

needed to use the phone. (Vol. VI 40). Guardado explained that he went to the victim's home because he needed money to fix his truck. (Vol. VI 39). He knew that sometimes Jackie carried money in her wallet. (Vol. VI 39-40). Guardado did not ask the victim to loan him some money because he already owed her money. (Vol. VI 40). Guardado hit her in the head with the breaker bar. (Vol. VI). Ms. Roy asked where the breaker bar was and Guardado said that it was gone. (Vol. VI 40). Guardado thought that that would kill her but it did not. (Vol. VI 41). He "hit her repeatedly with it." (Vol. VI 41). She fell but it "just didn't seem like she was going to die." (Vol. VI 41). Guardado tried to stab her in the heart "so that would end for her" but he had never killed anybody before and just thought it would be done and over with." (Vol. VI 41). Guardado stabbed her with a old kitchen knife. (Vol. VI 41). Guardado tried to stab her once in the heart. (Vol. VI 41). In his earlier days of incarceration, he had worked at the slaughter house at the Marianna Boys School, slaughtering beef. (Vol. VI 42). He thought that by cutting her jugular he could "speed things along." (Vol. VI 42). So, he slashed her throat. (Vol. VI 42). "She may have been dead by then because it didn't seem to bleed much." (Vol. VI 42). Guardado did not remember her saying anything to him during the murder. (Vol. VI 42). She "kept

moving”; “it wouldn’t stop moving”; “twitching in her fingers.” (Vol. VI 42). One of the investigator asked how her fingers got broken and Guardado explained that after the first blow, “she put her hands up.” (Vol. VI 43). Guardado stabbed the victim while she was laying on the floor. (Vol. VI 43). Guardado then thought he could speed the process up by cutting her jugular. (Vol. VI 43). He thought he only cut her once in the neck. (Vol. VI 43). He then got her purse from the bedroom. (Vol. VI 43-44). He also took a briefcase. (Vol. VI 44). After prompting, he stated he also took a jewelry box. (Vol. VI 44). The cell phone was inside her purse. (Vol. VI 44). He then got in the car and left. (Vol. VI 44). He burned his clothes with lighter fluid in the woods. (Vol. VI 45,46). One of the investigators asked Guardado if he would take them to the location where he burned his clothes but he could not remember how to get there. (Vol. VI 45-46). Burning his clothes was why he was late for work. (Vol. VI 46). Guardado stayed at work most of the night but left early about 5:00 or 5:30. (Vol. VI 46). He left during work to go to the store and cashed a check of the victim’s. (Vol. VI 46-47). Guardado had obtained the victim’s checks from her purse. (Vol. VI 47). Guardado bought crack cocaine. (Vol. VI 48). Guardado smoked the crack. (Vol. VI 49). Guardado could not remember his whereabouts. (Vol. VI

49). Guardado used the victim's cell phone to make phone calls. (Vol. VI 50). Guardado could not recall what he did with the cell phone but he got nervous about it. (Vol. VI 50). Guardado burned the knife along with his clothes. (Vol. VI 51). He tossed the breaker bar away in a watery place because it was metal and would not burn. (Vol. VI 51). The breaker bar was his. (Vol. VI). Guardado claimed he took it to work with him because the car's front wheel was wobbling. (Vol. VI 51). He did not ask the victim for a loan because he had previously ask and she would not loan him money. (Vol. VI 52). When he went to the house, he knew that Jackie would not loan him money. (Vol. VI 52). Guardado admitted that he knew what was going to happen when he went to the house. (Vol. VI 52). The investigator asked if he went there to kill the victim and he responded: "Yeah". (Vol. VI 52). He went there to kill her. (Vol. VI 52). The victim had $80.00 dollars. (Vol. VI 53). Guardado bought drugs with the eighty dollars. (Vol. VI 53). Guardado did not see anything in the jewerly box that was worth anything. (Vol. VI 53). It was all just costume jewelry, so he tossed the jewelry box. (Vol. VI 53,67). The briefcase was next to her purse which is why he grabbed it. (Vol. VI 54). Guardado did not use the victim's phone, needing to use the phone was just "an excuse to get her to open the door." (Vol. VI 54-55).

Guardado knew the victim because he had rented a trailer from her. (Vol. VI 55). When he got out of prison in 2003, his parents tried to find a place for him to live and introduced him to Jackie. (Vol. VI 55). Jackie let him out of the contract for the rent of the trailer without any problems or hassles. (Vol. VI 56). He started taking crack and had "no idea" that it was "so powerful." (Vol. VI 57). Once when he had problems with another rental, he went to see Jackie in the middle of the night and she let him stay with her in her house for a few days. (Vol. VI 59). Jackie rented him another property. He would pay the rent and then go get $100.00 back from her to buy dope with. (Vol. VI 60). He would pay her in cash and she would give him back the money in cash. (Vol. VI 60). Guardado was evicted. (Vol. VI 60). Guardado knew where the key to the victim's house was, but the night of the murder, the house key was not in its spot. (Vol. VI 61). The house key was normally on a block of wood by the door of the screened porch. (Vol. VI 61). The victim never gave him a blank check. (Vol. VI 62). No one was with him at the victim's house the night of the murder. (Vol. VI 63). The investigators wanted to tow his truck and search it. Guardado agreed and wanted Lois, his girlfriend, to have his truck. (Vol. VI 64). Guardado stated that he burned everything including his shoes. (Vol. VI 66). The victim's dog was at the

house but went outside when the victim opened the door. (Vol. VI 68). The victim did not say anything to him, she just turned around to let him in, when he said he needed to use the phone. (Vol. VI 69).

At this point, the subsequent interview was videotaped. (Vol. VI 69). The prosecutor played the videotape for the jury. (Vol. VI 71-109). The videotape interview was conducted at 5:39 on September 21, 2004. (Vol. VI 71). Jesse Guardado was born on June 5, 1962. (Vol. VI 72). He was 42 years old. (Vol. VI 72). Ms. Roy offered to read Guardado his *Miranda* rights again but Guardado stated that he understood them. (Vol. VI 72). She also noted that Guardado had counsel who had advised him of his rights. (Vol. VI 73). On September 13th, Guardado left his house at around 10:00 and went over to Jackie Malone's house. (Vol. VI 74). Guardado stated: "I left and went over to Jackie Malone's. Pulled up to the house; found out she was in bed; knocked on the door repeatedly. She answered the door. I told her I need to use the phone. She opened the door. Turned to walk away, and I hit her with the breaker bar. She stumbled. I hit her again. She fell by the couch. And I hit her several hits. She didn't act like she was going to die, so I tried to stab her in the heart and I slashed her across the throat." (Vol. VI 74). The victim had told him that she could not loan him anymore money.

(Vol. VI 75). He went over to the victim's house "to get money in whatever way possible." (Vol. VI 75). He was going to kill Ms. Malone "if that's what it was going to take." (Vol. VI 75). He went into her bedroom and got her purse and the briefcase next to it and grabbed her jewelry box. (Vol. VI 75). He was driving a 1988 Honda Accord that belonged to Lois Grigsby. (Vol. VI 75). He left and got the money out of her purse and stopped somewhere to buy drugs. (Vol. VI 75). He then went to work at the Niceville water plant. (Vol. VI 77). He left work before getting off, at about midnight or 1:00, in the company truck, to go to the Tom Thumb where he wrote some checks. (Vol. VI 78, 79). He wrote three or four checks. (Vol. VI 78). They were the victim's checks. (Vol. VI 79). He then went to buy drugs. (Vol. VI 79). Guardado then went back to work. (Vol. VI 79). Guardado used the victim's cell phone a couple of times and then just tossed it. (Vol. VI 80). The knife was a little kitchen knife. (Vol. VI 81). The blade was over six inches. (Vol. VI 82). He had gotten the knife in a trailer that he cleaned about a month ago. (Vol. VI 82). He bought the breaker bar at a flea market over a year ago. (Vol. VI 82). The knife was on the car seat beside him on the drive over to the victim's house. (Vol. VI 83). Guardado had the breaker bar and the knife behind his back when he knocked on the victim's door. (Vol. VI 84).

Guardado knew that she usually had cash on her from the previous times he had borrowed money from her. (Vol. VI 85). He usually borrowed $50.00 to $100.00 dollars from her which she had in cash. (Vol. VI 85). The victim had rented him the property back behind her house. (Vol. VI 86). He was "paying less and less on the rent" so she finally told him to move out by the 31st of August. (Vol. VI 86). Guardado would let himself into the victim's house with the key when she was not there. (Vol. VI 87). On the night of the murder, Guardado looked for the key but it was not there. (Vol. VI 88). Guardado said he needed a break, so they took a break. (Vol. VI 89). The briefcase contained papers. (Vol. VI 93). He burned the purse and briefcase. (Vol. VI 94).

One of the employees at Winn-Dixie was robbed at knife point earlier the same day of the murder. (Vol. VI 97). The employee grabbed the knife and nothing was taken. (Vol. VI 98). Guardado admitted that he was the robber. (Vol. VI 98). Guardado attempted to rob the stocker to get money to buy drugs but the employee started hollering, so he left. (Vol. VI 98). Guardado used a pocket knife that he took from a man in Crestview in the Winn-Dixie robbery, not the murder weapon. (Vol. VI 98).

Investigator Lorenz testified that he already knew that Guardado had written four checks on the victim's account from his investigation. (Vol. VI 103). Mrs. Malone's son, Patrick Malone, had told them that the victim's purse, briefcase, checkbook and cell phone were missing and that some checks had been written on her account. (Vol. VI 103). He contacted the Tom Thumb near the Niceville waste water plant. (Vol. VI 103). They obtained video surveillance from the store. (Vol. VI 103). Guardado was on the videotape writing checks. (Vol. VI 104). They recovered the checks written on the victim's account. (Vol. VI 104). State's exhibit #5 was four checks - number 429, 430, 791 and 792. (Vol. VI 104). The investigator had obtained the victim's cell phone records. (Vol. VI 106). One of the calls was to the Niceville waste water plant where Guardado worked and another call was to a nursing home in Crestview where his girlfriend worked. (Vol. VI 106). They searched Guardado girlfriend's house with her consent and found a black tee shirt that had what appeared to be blood spots on it. (Vol. VI 107). The black tee shirt was sent to FDLE for DNA testing which established that the victim's DNA was on the shirt. (Vol. VI 107). The investigators had a Okaloosa dive team search for the murder weapons near a bridge on 85 where Guardado said he threw them. (Vol. VI 108). Guardado took the investigators to the

place where he burned the items. (Vol. VI 108). The son of the one of the residents had found a knife around the barrel where Guardado burned the items. (Vol. VI 109). They located a burnt kitchen knife with a six inch blade. (Vol. VI 109). Guardado identified the knife as possibly one of the two murder weapons. (Vol. VI 110). State's exhibit #4 was the burnt knife. (Vol. VI 110).

State's exhibit #10 was another interview with Guardado conducted on September 27, 2004 at 12:17 pm. (Vol. VI 112). The investigator read Guardado his *Miranda* rights. (Vol. VI 112-114). Guardado said that he threw the breaker bar into the river. (Vol. VI 114). Guardado acknowledged that the knife the investigator located was consistent with the knife used in the murder. (Vol. VI 115,118). The tape concluded.

Investigator Lorenz testified the Guardado contacted them and wanted to show them where the briefcase and the breaker bar were actually located. (Vol. VI 119). Guardado took them to Michael Ball's house where he had dropped off the victim's briefcase containing the metal breaker bar. (Vol. VI 119). Guardado was concerned that Mr. Ball not get into any trouble. (Vol. VI 119). Guardado had told Mr. Ball to burn or bury the briefcase. (Vol. VI 119). They interviewed Mr. Ball and he told them that he had not burn or buried the briefcase because he

thought it was suspicious. (Vol. VI 119-120). Mr. Ball hid the briefcase in the woods across the street. (Vol. VI 120). Inside the briefcase, was a plastic bag with the breaker bar, which had blood on it. (Vol. VI 120). There was also a set of car keys which were to the victim's GMC pickup truck. (Vol. VI 120). State's exhibit #3 was the breaker bar. (Vol. VI 120-121).

On cross, Investigator Lorenz explained that Guardado had contacted law enforcement. (Vol. VI 122). Guardado had told them he had done something wrong and wanted to talk to them about it. (Vol. VI 122). Guardado was cooperative and not evasive. (Vol. VI 122-123). Guardado had requested that Sergeant Roy open the door to let him escape and she could shoot him. (Vol. VI 124). At one point in the interview, Guardado was crying. (Vol. VI 126). Investigator Lorenz thought Guardado was remorseful. (Vol. VI 126,129). Guardado said the Ms. Malone was a good lady who treated him well. (Vol. VI 127). Guardado did not ask for a plea bargain. (Vol. VI 127). Guardado told showed them the place where he purchased the crack and they passed that information on to the narcotics unit. (Vol. VI 129). On redirect, the prosecutor established that Guardado was already a suspect in the murder before he contacted law enforcement. (Vol. VI 131).

There was a short preliminary jury instruction conference after the jury was excused for the day. (Vol. VI 133-136). The prosecutor was concerned about the conviction for the Winn-Dixie robbery because he was going to have to white out a great deal of information and proposed calling the deputy clerk to testify instead. (Vol. VI 136-137). Defense counsel stipulated to that conviction. (Vol. VI 137). The trial court agreed to announce to the jury that Guardado had entered a guilty plea to that robbery. (Vol. VI 137). There was a discussion about jurors taking notes. (Vol. VII 139-141).

Derek Evan Walters, who was a Defuniak Spring Police Office and who was the responding officer in the Winn-Dixie attempted robbery, testified. (Vol. VII 142). He was on duty on September 13, 2004 and responded to a call that an individual had been assaulted inside the Winn-Dixie. (Vol. VII 142-143). He arrived at the Winn-Dixie at 7:38 p.m. (Vol. VII 143). He took a statement from the victim, James Brown, who was an employee at the Winn-Dixie. (Vol. VII 143). Mr. Brown reported that he had been kneeling down in one of the aisles stocking the shelves when a individual came up behind him with a knife and demanded his wallet. (Vol. VII 144). Mr. Brown reached up and grabbed the knife and yelled for help. (Vol. VII 144). The robber then pulled the knife away slicing two of the victim’s fingers rather

deeply, and ran from the store. (Vol. VII 144). The officer had no clues or suspects at that time. (Vol. VII 145, 146). On cross, defense established that the robber did not get the wallet. (Vol. VII 145). James Brown, the victim of the Winn-Dixie robbery, testified. (Vol. VII 146). On September 13, 2004, he was working as a stocker for Winn-Dixie. (Vol. VII 147). He was kneeling down to get to the bottom shelf and somebody came up behind me and stuck a knife in his throat and told him to give him his wallet. (Vol. VII 147). He put his hands up to push the knife away and hollered for another employee. (Vol. VII 148). The robber ran. (Vol. VII 148). He cut two of his fingers when he pushed the knife away. (Vol. VII 148). The robber did not get his wallet. (Vol. VII 148). He not get a look at the robber and could not identify Guardado as the robber. (Vol. VII 148-149). The prosecutor announced that the defendant had entered a stipulation that he had entered a guilty plea on February 17, 2005 to attempted robbery with a deadly weapon for the Winn-Dixie attempted robbery. (Vol. VII 150).

Defense counsel objected to the prosecutor projecting autopsy photographs right in front of Guardado. (Vol. VII 152). The trial court agreed to move the defendant and inform the jury that he was moved so as not to interfere with the projection.

(Vol. VII 153). Dr. Andrea Minyard, the chief medical examiner, testified regarding the autopsy. (Vol. VII 154). She was a forensic pathologist. (Vol. VII 155). She is board certified in pathology. (Vol. VII 156). She did not perform the autopsy on the victim. (Vol. VII 156). The associate medical examiner, Dr. Karen Kelly, who was no longer with the office, performed the autopsy. (Vol. VII 156). But Dr. Minyard was able to review the autopsy files and reports because Dr. Kelly took "very good notes" and wrote a "very complete autopsy protocol." (Vol. VII 157). There was no question in Dr. Minyard's mind that her opinion would be accurate and would be the same as Dr. Kelly's. (Vol. VII 157). The autopsy of the victim was performed on September 18, 2004 at 11:30 am. (Vol. VII 157). The autopsy notes reflected that the victim had several traumatic head injuries, wounds in the neck, wounds of the chest, wounds of the hands, arms, buttocks, fingers. (Vol. VII 158). The victim was wearing a white nightgown with blue flowers. (Vol. VII 158). The victim was an elderly white female who in physical appearance was near the reported age of seventy-five. (Vol. VII 158). The victim's date of birth was July 4th 1928. (Vol. VII 158). The victim had twelve abrasions, contusion and/or lacerations to her head. (Vol. VII 160,161). There was a little bit of bleeding on the brain called a

subarachniod hemorrhage. (Vol. VII 160). She had at least two incise wounds of the neck which are made with a sharp weapon. (Vol. VII 160). The victim had five stab wounds to the chest. (Vol. VII 160). The victim had abrasions, contusion and/or lacerations to both hands. (Vol. VII 160). The victim had fractures of the fingers of both hands. (Vol. VII 160). She also had incise wounds to her right hand. (Vol. VII 160). An incise wound is made with a sharp weapon like a knife. (Vol. VII 161). The prosecutor showed the medical examiner the breaker bar, which was exhibit #3, and the medical examiner testified that the blunt trauma to the victim's head was consistent with such a weapon. (Vol. VII 161). The prosecutor showed the medical examiner the knife and the medical examiner testified that the incise wounds to the victim's neck and hands was consistent with such a weapon. (Vol. VII 162). The prosecutor showed the medical examiner the autopsy photographs, which was exhibit #11A-L, which would be helpful to explain her testimony. (Vol. VII 162-164). The medical examiner described each photograph. (Vol. VII 164-170). The medical examiner testified that, in her opinion, the cause of the damage to the victim's hands was that these were defensive wounds. (Vol. VII 168). The victim's fingernail was traumatically ripped off her finger. (Vol. VII 169). The victim had an incise wound between the first and

second finger of her right hand which are commonly seen in stabbings when the victim tries to grab the knife and is cut with the sharp blade while doing so. (Vol. VII 169). The cause of death was stab wounds of the chest and blunt head trauma. (Vol. VII 171). The medical examiner testified that the victim was conscious when she was being beaten with the breaker bar and the basis of her opinion was the victim's defensive wounds. (Vol. VII 171-172). The medical examiner also testified that the victim was conscious when she was being stabbed because the victim grabbed the knife. (Vol. VII 172). On cross, the medical examiner testified that any one of the head wounds was severe enough for the victim to be "dazed." (Vol. VII 173). While the victim could have been unconscious while being stabbed, the problem with that version was the incise wounds on the victim's hands and the "more likely scenario" was the wounds were from the victim grabbing the knife. (Vol. VII 174). There was a "small possibility" that the victim's hands may have been lying on her chest and gotten nicked on the way in. (Vol. VII 174). The fatal wound was the stab wound to the heart. (Vol. VII 174). There was no way to determine the time frame but she thought that twelve blows to the head would have been delivered "very quickly" and the five stab wound also would have been delivered

“very quickly”. (Vol. VII 175). She agreed that there was a “very quick time frame.” (Vol. VII 176).

On redirect, the medical examiner, testified that the incise wounds to the neck were pre-mortem. (Vol. VII 176-177). The victim was still alive when her neck was slashed. (Vol. VII 177). The medical examiner testified that the victim was alive through the beating until the stab wound of her heart pierced the heart causing the pericardial sac to fill with blood and stop beating. (Vol. VII 177,174). The incise wound to the victim’s right hand was a “textbook” example of the type of wound a person gets when the person grabs a knife and it gets pulled out of his or her hands. (Vol. VII 177-178).

Mark Hugh Malone, who was the victim’s son, testified. (Vol. VII 178). He was a choir director in Hattiesburg, Mississippi. (Vol. VII 179). Mr. Malone was a victim impact witness. (Vol. VII 185). His mother was a guardian ad litem. (Vol. VII 180). She was a very loving mother. (Vol. VII 181). He showed a few photographs of his mother to the jury. (Vol. VII 182-183). His mother had a “tremendous work ethic.” (Vol. VII 185).

Patrick Richard Malone, who was also the victim’s son, testified. (Vol. VII 188). Mr. Malone was also a victim impact witness. (Vol. VII 189). He was a professor of music at Baptist

College of Florida. (Vol. VII 187). His mother was active in the music of the church and encouraged her children to sing in the choir and play instruments. (Vol. VII 188). He was concerned for his daughters losing their grandmother and a role model. (Vol. VII 189-190). His mother was very frugal. (Vol. VII 191). His mother was on the Hospital Board. (Vol. VII 191). His mother inspired him to be a Guardian ad litem by her example. (Vol. VII 191-192).

Betsy Lindsey Malone, who was the victim's chosen daughter, testified. (Vol. VII 192). She was also a victim impact witness. (Vol. VII 196). She had changed her last name to the victim's name. (Vol. VII 194-195). The victim had provide her with financial assistance to buy a home. (Vol. VII 196).

Ray Padgett, who was employed in Ms. Malone real estate company for a year or so, testified. (Vol. VII 197). He was also a victim impact witness. (Vol. VII 198,200-201). He testified that they were both involved in the local Democratic party. (Vol. VII 197-198). The victim had been the Chair and Vice-chair for the Democratic Party in Walton County. (Vol. VII 198). She was active in Common Cause and S.H.I.P.P. which was an organization for housing for low income people. (Vol. VII 199).

The prosecutor explained to the trial court that the defendant had provided information concerning drug dealers in the area. (Vol. VII 202). The prosecutor also noted that the form establishing Guardado's conditional release included information that he had attended various programs which could be mitigating. (Vol. VII 202-203). The prosecutor then offered into evidence State's exhibits #12, #13, #14 and #15 which were four certified copies of Guardado's prior convictions. (Vol. VII 204). State's exhibit #12 was a certified copy of a conviction in which Guardado had been convicted of armed robbery on April 9, 1984 in case #83-1608 in Orange County. (T. Vol. VII 204; R. Vol. II 259-260). State's exhibit #13 was a certified copy of a conviction in which Guardado had been convicted of robbery on January 23, 1991 in case #89-2454 in Seminole County. (T. Vol. VII 205; R. Vol. II 259-266). State's exhibit #14 was a certified copy of a conviction in which Guardado had been convicted of robbery with a weapon on January 23, 1991 in case #89-2496 in Seminole County. (T. Vol. VII 205; R. Vol. II 259-266). State's exhibit #15 was a certified copy of a conviction in which Guardado had been convicted of robbery with a deadly weapon on July 6, 1990 in case # 89-5977 in Orange County. (T. Vol. VII 206; R. Vol. II 266).

Gilbert Fortner, who was Guardado's probation officer testified, establishing that Guardado was on conditional release on the day of the murder. (Vol. VII 206-209). The probation officer had the Conditional Release Agreement that is issued by the Parole Commission showing that Jesse Guardado was under supervision until February 6, 2014, which was State's exhibit #16. (Vol. VII 208).

On cross, defense counsel established that Guardado participated in several mental health programs, such as stress management, as part of his conditional release. (Vol. VII 209-210).

The State rested. (Vol. VII 211). Defense counsel moved for a judgement of acquittal arguing against the HAC aggravating circumstance. (Vol. VII 212). Defense counsel argued that the testimony of the medical examiner, Dr. Minyard, was that she could not establish the time frame it took to inflict these injuries on the victim. (Vol. VII 213). The medical examiner testified that the victim could have been dazed from the first blow and the fatal wound could have been inflicted when the victim was unconscious. (Vol. VII 213). Defense counsel also moved for judgment of acquittal on the CCP aggravator arguing that Guardado was on a cocaine binge and therefore, there was not the heightened premeditation required for CCP. (Vol. VII 213-214). Defense counsel noted that this was a robbery to get

money for some dope. (Vol. VII 214). The prosecutor responded that the Florida Supreme Court has affirmed the HAC aggravator in beating and stabbing murders. (Vol. VII 214). The prosecutor noted that, in fact, the medical examiner testified that the victim was conscious at the time she was being beaten by the breaker bar. The medical examiner based this on the victim's defensive wounds. (Vol. VII 215). Both of the victim's hands were crushed and dislocated. (Vol. VII 215). While the victim may have been dazed, she was conscious. (Vol. VII 215). Moreover, the medical examiner testified that the victim's attempted to grasp the knife causing incise wounds to her fingers. (Vol. VII 215). The prosecutor noted that CCP was established by Guardado's confession, in which he admitted going to the victim's with the intent to kill her. (Vol. VII 216). Guardado went to the victim's door with both murder weapons. (Vol. VII 216). Guardado was not in a frenzy or angry. (Vol. VII 216). The trial court denied both motions. (Vol. VII 219).

Defense exhibit #1D was a letter. (Vol. VII 220; Vol. II 279). The letter was from Sharon Ramos, the records clerk at the sheriff's Office, who stated in the letter that Guardado had no discipline reports or incident reports. (Vol. VII 221).

Defense exhibit #2 was also a letter. (Vol. VII 221). The letter was from Guardado's mother, Patsy Umloft. (Vol. VII 221).

The letter was a plea for mercy stating that the crime would never have happened without drug involvement. (Vol. II 280-281).

The defense presented two witnesses, Dr. James Larson and the defendant. (Vol. VII 222-253, 278-308). Dr. Larson, who is a clinical psychologist, testified as to the defendant's mental health. (T Vol. VII 223-253). He reviewed the arrest report and the depositions. (T Vol. VII 229). Dr. Larson gave Guardado a battery of tests both including an I.Q. test, an academic achievement tests, and personality tests. (T Vol. VII 230). He administered the WAIS I.Q. test to Guardado, which "he scored in the upper part of the normal range." (T Vol. VII 231-232). Guardado's full scale IQ was 105. (T Vol. VII 234). Dr. Larson testified that Guardado was not mentally ill or psychotic; he found no indications of delusions and no bipolar disorder. (T Vol. VII 233). Guardado scored in the average range on the academic achievement tests. (T Vol. VII 234). Guardado's MMPI showed no indications of mental illness. (T Vol. VII 236). The MMPI score was valid. (T Vol. VII 236). There was a slight elevation in depression which was normal when facing life in prison. (T Vol. VII 236-237). The paranoia scale was also up a little bit which was normal for an incarcerated person. (T Vol. VII 237). The Kent Scales deal with substance abuse. (T Vol. VII 237). It showed Guardado's scores were elevated. (T Vol.

VII 237). The Hare Psychopathy Checklist showed that Guardado was not a psychopath. (T Vol. VII 238-240). Guardado was in the normal range. (T Vol. VII 240). Guardado was not a psychopath in Dr. Larson's opinion. (T Vol. VII 240-241, 242). Guardado did not have a bipolar disorder, nor schizophrenia, nor a major depression, nor major brain damage. (T Vol. VII 241). Guardado would make a good adjustment to prison and not be a danger to others. (T Vol. VII 241-242). Guardado was under emotional duress at the time of the murder due to his problems adjusting to life outside prison. (T Vol. VII 242). Guardado had been incarcerated most of his adult life. (T Vol. VII 242). He returned to his old habits of using cocaine. (T Vol. VII 242). Dr. Larson did not consider Guardado to be a drug addict. (T Vol. VII 242). Rather, this was a relapse. (T Vol. VII 242). Several of the tests Dr. Larson performed showed that Guardado was remorseful. (T Vol. VII 243). Dr. Larson thought that Guardado's remorse was genuine. (T Vol. VII 243). Dr. Larson thought Guardado could make a contribution to the prison population. (T Vol. VII 244). He would not be a danger to other inmates or officers. (T Vol. VII 244).

On cross, Dr. Larson admitted that Guardado was not under extreme mental or emotional disturbance. (T Vol. VII 246). Dr. Larson admitted that Guardado was not under extreme duress. (T

Vol. VII 246). Dr. Larson also admitted that Guardado's capacity to appreciate the criminality of his conduct was not substantially impaired. (T Vol. VII 246). Dr. Larson did not refer Guardado to a neurologist because he found no indication of brain damage. (T Vol. VII 247). Guardado suffered from culture shock after being released from prison into the computer age. (T Vol. VII 249). Guardado had been out of prison for 2 ½ years at the time of the murder and had had that time to adjust. (T Vol. VII 249). The main duress at the time of the murder was his addiction to cocaine which is self-imposed. (T Vol. VII 250). Guardado had been on a crack cocaine binge for two weeks prior to the murder. (T Vol. VII 250). Dr. Larson had not reviewed the arrest report of the prior convictions and had not discussed them with Guardado, so he did not have an opinion on whether Guardado's four prior conviction were also related to substance abuse. (T Vol. VII 251). It was a good summary that Guardado was not insane, suffered from no mental illness, no psychosis and committed the murder to obtain more crack. (T Vol. VII 252).

On redirect, Dr. Larson, could spot faking mental illness. (T Vol. VII 252-253). Guardado was very candid with Dr. Larson. (T Vol. VII 253). Guardado taking responsibility for the murder

was consistent with him not being a psychopath. (T Vol. VII 253).

The trial court conducted a jury charge conference. (T Vol. VII 255-278). The trial court removed the pecuniary gain aggravating circumstance due to an improper doubling concern which the State agreed to. (T Vol. VII 258). The prosecutor voluntarily removed the particular vulnerable due to advanced age aggravating circumstance. (T Vol. VII 260). Defense counsel requested a special instruction that the jury was never required to recommend a sentence of death which the trial court agreed to give. (T Vol. VII 262-263). Defense counsel asked for an unanimous recommendation. (T Vol. VII 273). Defense counsel renewed his objection to instructing the jury on the HAC and the CCP aggravator. (T Vol. VII 274). The trial court ruled that his prior rulings would remain consistent. (T Vol. VII 274).

Jesse Guardado testified at the penalty phase. (Vol. VII 278). Guardado testified that while he was previously incarcerated he became certified in waste water. (Vol. VII 280). Guardado was the lead operator for DeFuniak Springs until he lost his job for a DUI. (Vol. VII 282). Guardado also testified that he had eighteen years of plumbing experience within the prison. (Vol. VII 283). Guardado testified that he could save the prison money because he could do plumbing after hours for

the prison instead of calling a outside plumber. (Vol. VII 284). Guardado acknowledged he was on conditional release. (Vol. VII 284). Guardado testified that he had spent close to 21 years incarcerated. (Vol. VII 286). Guardado was on call 24 hours a day, seven days a week, as a water treatment operator. (Vol. VII 289). One Friday night he was drinking beer and got called out to work on a well. (Vol. VII 289). A deputy stopped him and he was arrested for DUI and fired. (Vol. VII 290). There was a hearing on whether to revoke his conditional release. (Vol. VII). He was reinstated. (Vol. VII 290). One of the people who wrote a letter for him was the victim, Jackie Malone. (Vol. VII 290). Anytime he needed help he could go to the victim. (Vol. VII 290). Guardado testified that the victim was the best person he ever met in his life beside his mother. (Vol. VII 290). Guardado testified that he had used cocaine when he was younger but not crack cocaine until recently. (Vol. VII 291). The victim let him and Lois stay in her house when there was a problem with a prior roommate. (Vol. VII 291). Guardado lost another job due to a fight with a man. (Vol. VII 292). He was using drugs heavily and was living off his girlfriend. (Vol. VII 292). The victim got him a job in the Niceville waste water treatment plant. (Vol. VII 292). His crack use became worse. (Vol. VII 293). Guardado testified that the victim did not

deserve to die. (Vol. VII 293). He entered a guilty plea without an attorney to atone for the murder. (Vol. VII 295). Guardado admitted his guilt on the stand. (Vol. VII 295). Guardado deeply regretted the murder. (Vol. VII 296-297).

The prosecutor prompted the trial court to inquire whether the defendant voluntarily testified and whether there was additional mitigation not presented. (Vol. VII 310). The trial court asked Guardado if he had any additional evidence that he wanted to present and explained that Guardado could reopen the defense case to present any additional mitigation witnesses. (Vol. VII 310). Guardado responded: "Not to my knowledge, no." (Vol. VII 311).

The trial court conducted a jury instruction conference. (Vol. VIII 313). The prosecutor objected to several statements in the mother's letter which were redacted. (Vol. VIII 314-317). Guardado, under oath, testified that he had no additional mitigating evidence. (Vol. VIII 318). The Defense rested. (Vol. VIII 320).

The prosecutor gave his closing argument in the penalty phase arguing the five aggravating circumstances. (Vol. VIII 320-332). The prosecutor replayed part of the defendant's confession. (Vol. VIII 330). The prosecutor argued against the mitigation pointing out that the defense expert had testified

that Guardado was not mentally ill. (Vol. VIII 332-335). The prosecutor pointed that Guardado will not be fully responsible for this murder until he receives the death penalty. (Vol. VIII 341).

Defense counsel gave his closing argument, arguing against HAC and CCP. (Vol. VIII 341-344). Defense counsel discussed the mitigating evidence and urged the jury to vote for life. (Vol. VIII 344-349).

The trial court instructed the jury. (Vol. VIII 349-362; Vol. II 284-297). The alternate jurors were excused. (Vol. VIII 362; R. Vol II 225). The jury began deliberations at 10:41 a.m. and reached a verdict at 2:05 p.m. (T. Vol. VIII 363-364; R Vol II 225,226). The jury recommended a death sentence unanimously (12-0). (Vol. VIII 364; R. Vol II 298). The jury was polled. (Vol. VIII 365-368). The defendant wished to waive the *Spencer* hearing.[2] (Vol. VIII 370-371). The trial court found the defendant's waiver to be knowing, intelligent and voluntary. (Vol. VIII 371). Defense counsel admitted that he had nothing further to offer at a *Spencer* hearing. (Vol. VIII 372).

The trial court asked both parties to prepare written sentencing memorandums. (Vol. VIII 372). Both the State and

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[2] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

defense counsel submitted written sentencing memorandums. In the defense sentencing memo, counsel argued against the HAC aggravator. (T. Vol. II 326). He asserted that because the medical examiner testified that all of the injuries could have been inflicted within a few seconds and the victim could have been dazed from the first blow to her head, the murder was not unnecessarily torturous. (T. Vol. II 326). The defense memo argued for ten non-statutory mitigating circumstances and asserted that they should be given great weight by the trial court, resulting in a life sentence. (T. Vol. II 326-327). In the State's sentencing memo, the prosecutor argued for five aggravating circumstances: (1) the crime was committed by a person under a sentence of imprisonment or on conditional release; (2) the defendant was previous convicted of another felony involving the use or threat of violence; (3) the capital felony was committed while the defendant was engaged in the commission of a robbery with a weapon; (4) the capital murder was especially heinous, atrocious and cruel and (5) The crime was committed in a cold, calculated and premeditated manner. (T. Vol. II 331-337). The state noted that there were no statutory mitigating circumstances. (T. Vol. II 337). The State discussed several non-statutory mitigators, including that the defendant confessed, which it stated should be given substantial weight.

(T. Vol. II 337). The prosecutor discussed several other non-statutory mitigators but argued that they should be accorded only some or little weight. (T. Vol. II 337-338). The State argued that the aggravating circumstance outweighed the non-statutory mitigating circumstances and that the trial court should follow the jury's recommendation of death and impose a death sentence. (T. Vol. II 338-339). The State also argued that the defendant should be sentence to 30 years on the armed robbery. (Count II) (T. Vol. II 339). The prosecutor also asserted that the trial court should hold a *Spencer* hearing despite Guardado's waiver of the right to a *Spencer* hearing citing *Phillips v. State*, 705 So.2d 1320, 1323 (Fla. 1997)(Anstead, J., concurring)(noting that the *Spencer* rule is a *mandatory* one which *must* be followed in a death penalty sentencing.)(emphasis in original). (T. Vol. II 339).

On September 30th, 2005, the trial court conducted a *Spencer* hearing. (Vol. VIII 2-12). Defense counsel informed the trial court that his client did not want a *Spencer* hearing. (Vol. VIII 2). Guardado personally also informed the trial court that he did not want a *Spencer* hearing, that "he wanted to put it to an end." (Vol. VIII 3-4). He informed the judge that he had "no knowledge of any further mitigation" that he could present. (Vol. VIII 3). He wanted to speak to the judge without the

attorneys present. (Vol. VIII 3). The trial court explained to the defendant that he was not allowed to speak with him alone. (Vol. VIII 3). The prosecutor explained that if the defendant did not want to present any additional mitigating evidence, the proper procedure was to have defense counsel explain on the record what additional mitigating evidence there was and for the trial court to then consider that additional mitigating evidence in its sentencing order. (Vol. VIII 4). The prosecutor then explained that he had no additional aggravating evidence but he did have additional victim impact evidence in the form of a letter from the victim's sister, Elizabeth T. Black. (Vol. VIII 4). The prosecutor informed the judge that, while the judge cannot truly consider victim impact evidence, only the jury may, the sister had a constitutional right to present it to the court. (Vol. VIII 4-5). The trial court then inquired of Guardado whether he was in fact instructing his attorneys not to present any further mitigation. (Vol. VIII 5). Guardado said he thought what he was trying to do was to inform the trial court that "I no longer have representation." (Vol. VIII 5). Guardado stated that he was "no longer comfortable with the representation" that he had received. (Vol. VIII 5). Guardado stated: "I think it has been inadequate and ineffective" (Vol. VIII 5). He was "shown great indifference." (Vol. VIII 5). He

could not let these people speak for him anymore. (Vol. VIII 5). The trial court asked what evidence did counsel not present that Guardado wished that they would present. (Vol. VIII 5). Guardado said: “these are things that I can’t discuss in a public environment.” (Vol. VIII 6). Guardado explained that it was nine almost ten months ago that Mr. Gontarek was appointed to represent him, and in that time, he had “spent less than an hour in actual conference with me.” (Vol. VIII 6). Guardado had constantly asked counsel for information about his case but did not receive anything. (Vol. VIII 6). The trial court pointed out that Guardado had not raised this issue at the penalty phase. (Vol. VIII 6). Guardado asserted that he told his lawyer that he needed to speak with him and counsel said they would speak on Monday but Monday was a trial day, Guardado did not get to see his lawyer and that was the end of it. (Vol. VIII 7). While he no longer wanted Mr. Gontarek to represent him, his mother was “so distraught” at him not having counsel, that against his better judgement, he allowed Mr. Gontarek to continue to represent him. (Vol. VIII 7). Guardado pointed out the lack of evidence that counsel put on in the penalty phase and that the psychologist was the only witness he put on. (Vol. VIII 7). The trial court again asked what evidence did Guardado want counsel to present that counsel did not present (Vol. VIII

7). Guardado responded: “I cannot bring these things to light in a public situation.” (Vol. VIII 7). Guardado stated that he could not bring these things to light until sentence was imposed. (Vol. VIII 7). This was why he wanted sentencing to be done as expediently as possible. (Vol. VIII 8). The trial court explained that this was Guardado chance to tell him. (Vol. VIII 8). The trial court then asked “one more time”, what evidence did Mr. Gontarek or Mr. Cobb not present that he wanted them to present. (Vol. VIII 8). Guardado then complained that it was his understanding that “for evidence to be testified to, that it should have been presented in court, made evident in the court” but “during the penalty phase hearing, evidence was testified to that was not presented in the court.” (Vol. VIII 8). His attorneys did not object. (Vol. VIII 8-9). Guardado noted that the medical examiner who testified did not perform the autopsy. (Vol. VIII 9). Guardado also complained that the autopsy photographs were placed six inches from his head. (Vol. VIII 9). Guardado again stated that his attorneys had shown great indifference to him. (Vol. VIII 9). Guardado again asked for the sentence to be imposed today. (Vol. VIII 10). The trial court then asked counsel, Mr. Gontarek, what mitigating evidence he would have presented at the *Spencer* hearing if Guardado wanted him to. (Vol. VIII 10). Defense counsel presented the

written report of Dr. Larson to supplement his penalty phase testimony. (Vol. VIII 10). Guardado again expressed his wish to be sentenced on that day. (Vol. VIII 10). The trial court agreed to expedite sentencing. (Vol. VIII 11). The trial court requested that the attorneys amend their sentencing memorandums to reflect any changes in light of the *Spencer* hearing. (Vol. VIII 11). The prosecutor stated that he would not be filing an amendment because Dr. Larson's report did not affect the State's argument regarding aggravation and he had no objection to the trial court considering the defendant's history contained in the report as mitigation and giving it whatever weight the trial court deemed appropriate. (Vol. VIII 11). The trial court set sentencing for October 13th (Vol. VIII 11). Guardado then asked whether the trial court was "refusing to accept the fact that I no longer wish to have Mr. Gontarek and Mr. Cobb to represent me" (Vol. VIII 12). The trial court responded that that was right and he was "not going to relieve them at this time." (Vol. VIII 12).

Dr. Larson's written mental health report is in the record. (T. Vol. II 303-309). The written report noted the sexual abuse by a neighbor. (Vol. II 304). The report documented Guardado's full scale I.Q. on the WAIS-III as 105. (Vol. II 305). The report repeatedly documented Guardado had no "mental illness or

psychosis" according to the MMPI-2. (Vol. II 306, 308, 309). The report noted that there was a "significant elevation on a paranoid scale" but the elevations could "be explained on the basis of his current legal situation." (Vol. II 306). The report contained a section on the Hare Psychopathy Checklist which is "particularly helpful in predicting" recidivism and future dangerousness. (Vol. II 307). Guardado's score was 15 whereas most psychopaths score above 30. (Vol. II 307). Dr. Larson concluded that "this man can make an adequate adjustment and even a contribution to a prison population." (Vol. II 307, 308). Dr. Larson noted that Guardado expressed "deep remorse for his actions" and that the victim "did not deserve it". (Vol. II 308,309). While the defendant did not want to discuss the details of the murder with Dr. Larson, Guardado explained that Guardado was on a two week cocaine binge and "was desperate for more drug money." (Vol. II 308). Dr. Larson's summary was that Guardado was not at high risk for violence or subsequent murders and the murder was "situational, driven by chemical addition." (Vol. II 308). Dr. Larson's summary was that Guardado did not suffer from any major mental illness and was not a psychopath. (Vol. II 308). Dr. Larson noted the Guardado was under emotional duress because of his difficulty adjusting to life outside prison. Guardado had lost jobs and became increasing

dependent on crack cocaine. (Vol. II 309). Dr. Larson noted that Guardado was under the influence at the time of the murder and had been on a two week crack cocaine binge. (Vol. II 309). He quoted Guardado as saying "it wouldn't have happened if I had not been on drugs" but noted that Guardado did not blame anyone else and took full responsibility for his conduct. (Vol. II 309).

On October 13, 2005, the trial court held a sentencing hearing. (Vol. VIII 2-35). The trial court noted that although the defendant waived any *Spencer* hearing, the State in its sentencing memorandum, requested a *Spencer* hearing despite the waiver. (Vol. VIII 3). The trial court noted that neither the State nor the defense amended their respective sentencing memos in light of the *Spencer* hearing. (Vol. VIII 4). The trial court found five aggravating circumstances: (1) the crime was committed by a person under a sentence of imprisonment or on conditional release supervision, explaining that Guardado was placed on conditional release supervision on January 1, 2003, which did not expire until February 6, 2014, as a result of a robbery with a deadly weapon conviction in Orange County and a robbery/robbery with a weapon conviction in Seminole County; (2) the defendant was previous convicted of another felony involving the use or threat of violence, explaining that Guardado had been

convicted of armed robbery on April 9, 1984, in case #83-1608, in Orange County; convicted of robbery with a deadly weapon, on July 6, 1990, in case #89-5977, in Orange County; convicted of robbery on January 23, 1991, in case #89-2454, in Seminole County; convicted of robbery with a weapon, on January 23, 1991, in case #89-2496, in Seminole County, and convicted of attempted robbery with a deadly weapon, in case #04-CF-920, in Walton County, which was stipulated to during the penalty phase, which was a total of five prior robbery convictions; (3) the capital felony was committed while the defendant was engaged in the commission of a robbery with a weapon, which was supported by Guardado's guilt plea to robbery with a weapon of Jackie Malone, the murder victim and Guardado's penalty phase testimony admitting to the robbery; (4) the capital murder was especially heinous, atrocious and cruel because the defendant, armed with two weapons, a metal breaker bar and a knife, "struck Ms. Malone with repeated brutal blows about her head" and then the defendant "brutally stabbed her and slashed her throat" with the knife, which was established by Guardado's taped confession and the medical examiner's penalty phase testimony, which also established that the victim was conscious until the defendant stabbed her in her heart and that the murder was a "savage attack"; (5) the crime was committed in a cold, calculated and

premeditated manner without any pretense of moral or legal justification, which was supported by Guardado's confession, in which, he admitted he knew that he was going to kill the victim when he drove to her home to obtain money to buy drugs. (Vol. VIII 4-16). The trial court found no statutory mitigating circumstances. (Vol. VIII 16). The trial court considered nineteen non-statutory mitigators as proposed by defense counsel's sentencing memo. (Vol. VIII 16-20). The trial court found the following nineteen mitigating circumstances: (1) the defendant entered a plea without asking for a plea bargain which it gave great weight; (2) the defendant accepted full responsibility which it gave great weight; (3) the defendant, according to the mental health expert, was not a psychopath and would not be a danger to other inmates which it gave moderate weight; (4) the defendant could contribute to the prison population as a plumber which it gave little weight; (5) the defendant fully cooperated with law enforcement by confessing and by helping law enforcement recover the murder weapons which it gave great weight; (6) the defendant has a good jail record which it gave little weight; (7) the defendant was remorseful which it gave great weight; (8) the defendant has an addiction to crack cocaine, which was the basis of his criminal actions, which included drug abuse from his teenage years and abuse of

crack in the months and weeks preceding the murder, which it gave some weight; (9) the defendant has a good family support system which it gave moderate weight; (10) the defendant was willing to counsel other inmates which it gave moderate weight; (11) defendant suffered a major trauma due to the crib death of a sibling which it gave moderate weight; (12) the defendant suffered a major trauma by being sexually molested by a neighbor which it gave moderate weight[3]; (13) the defendant has a lengthy history of substance abuse beginning in his early teenage years which it gave little weight; (14) the defendant's biological father died when Guardado was very young which it gave little weight; (15) the defendant was raised by a loving mother and a supportive stepfather which it gave little weight; (16) the defendant was under emotional duress from adjusting to life outside prison and his drug problems at the time of the crime which it gave little weight; (17) the defendant does not suffer from a mental illness or major emotional disorder based on Dr. Larson written report and penalty phase testimony which it gave little weight; (18) the defendant offered his property, including his truck, to his girlfriend which it gave little

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[3] The defendant objected when the trial court first proposed that his prior sexual abuse be considered as

weight and (19) the defendant previously contributed to the prison by being a plumber which it gave little weight. (Vol. VIII 20-32). The trial court then stated that he had given great weight to the jury's recommendation of death. (Vol. VIII 32). The trial court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Guardado to death. (Vol. VIII 32). On Count II, the robbery with a weapon conviction, the trial court sentenced Guardado to 30 years incarceration. (T. Vol. VIII 33, R Vol. II 315). The trial court, in its sentencing order, found the same five aggravating circumstances; no statutory mitigating circumstances and the same nineteen non-statutory mitigating circumstances. (T. Vol. II 340-352).

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mitigating, stating he was "not going to deal with that". (T. Vol. VIII 18)

SUMMARY OF ARGUMENT

ISSUE I -

Guardado asserts the trial court violated the requirements of *Nelson/Harwick*[4] at the *Spencer* hearing when the trial court refused to conduct an inquiry into his complaints of ineffective assistance of counsel and appoint substitute counsel. Guardado asserts that his lawyer did not present certain unidentified mitigating evidence. The State respectfully disagrees. Some of Guardado's complaints were generalized complaints that did not require a *Nelson* inquiry and some of Guardado's complaints were meritless as a matter of law. Guardado's complaint regarding the omission of mitigating evidence is waived. The trial court conducted a *Nelson* inquiry into the mitigating evidence that was truncated due to the defendant's refusal to answer the trial court's questions regarding the alleged omitted mitigation evidence. The trial court properly denied the request to discharge counsel.

ISSUE II -

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[4] *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973); *Hardwick v. State*, 521 So.2d 1071 (Fla. 1988)(adopting the *Nelson* procedure for all Florida courts).

Guardado claims that the trial court erred in finding the heinous, atrocious and cruel aggravating circumstance. This Court has repeatedly affirmed a finding of HAC in both beating and stabbing deaths. Guardado's own confession, in which he admitted stabbing the victim in her neck and heart because she would not die from the multiple blows to her head from the metal bar, establishes the HAC aggravator. Guardado argues that the victim may have lost consciousness quickly after the initial blows to her head. This argument is rebutted by the victim's extensive defensive wounds to her hands. Guardado, in his confession, admitted that after the first blow, "she put her hands up." She was conscious after the first blow. As the trial court found, the medical examiner's testimony established that the victim was conscious at least through the time the defendant stabbed her in the heart. Moreover, the error, if any, is harmless. Even if the HAC aggravating circumstance is stricken, there are four remaining aggravating circumstances, including the prior violent felony aggravator, and no statutory mitigation. The trial court properly found the HAC aggravator.

ISSUE III -

Guardado contends the trial court improperly found the cold, calculated and premeditated aggravating circumstance. The

trial court properly found CCP. In his audiotaped and videotaped confession, Guardado admitted that he planned to kill the victim prior to entering her home. Guardado entered the victim's home with a metal breaker bar and knife. Guardado immediately struck the victim with the metal bar upon being admitted to the victim's home while the victim's back was turned. The defendant admitted that he stabbed the victim because she did not die from the repeated blows from the metal bar. Moreover, the error, if any, is harmless. Even if the CCP aggravating circumstance is stricken, there are four remaining aggravating circumstances, including HAC and the prior violent felony aggravator and no statutory mitigation. Thus, the trial court properly found the CCP aggravator.

ISSUE IV -

Guardado asserts that Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court has repeatedly rejected *Ring* claims. There was no violation of the Sixth Amendment right to a jury trial in this case. Guardado had a jury in his penalty phase that unanimously recommended death. As this Court has recently observed, relying on United States Supreme Court precedent, when a jury makes a sentencing recommendation of

death, the jury "necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." Moreover, as this Court has explained in numerous cases, prior violent felony aggravator takes a case outside the scope of *Ring.* One of the aggravators in this case was a prior violent felony conviction. Guardado had five prior convictions for robbery. The trial court properly denied the *Ring* challenge to Florida's death penalty statute.

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO DISCHARGE COUNSEL AT THE *SPENCER* HEARING? (Restated)

Guardado asserts the trial court violated the requirements of *Nelson/Harwick*[5] at the *Spencer* hearing when the trial court refused to conduct an inquiry into his complaints of ineffective assistance of counsel and appoint substitute counsel. Guardado asserts that his lawyer did not present certain unidentified mitigating evidence. The State respectfully disagrees. Some of Guardado's complaints were generalized complaints that did not require a *Nelson* inquiry and some of Guardado's complaints were

[5] *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973); *Hardwick v. State*, 521 So.2d 1071 (Fla. 1988)(adopting the *Nelson* procedure for all Florida courts).

meritless as a matter of law. Guardado's complaint regarding the omission of mitigating evidence is waived. The trial court conducted a *Nelson* inquiry into the mitigating evidence that was truncated due to the defendant's refusal to answer the trial court's questions regarding the alleged omitted mitigation evidence. The trial court properly denied the request to discharge counsel.

The *Spencer* hearing

On September 30th, 2005, the trial court conducted a *Spencer* hearing. (Vol. VIII 2-12). Defense counsel informed the trial court that his client did not want a *Spencer* hearing. (Vol. VIII 2). Guardado personally also informed the trial court that he did not want a *Spencer* hearing, that "he wanted to put it to an end." (Vol. VIII 3-4). He informed the judge that he had "no knowledge of any further mitigation" that he could present. (Vol. VIII 3). He wanted to speak to the judge without the attorneys present. (Vol. VIII 3). The trial court explained to the defendant that he was not allowed to speak with him alone. (Vol. VIII 3). The prosecutor explained that if the defendant did not want to present any additional mitigating evidence, the proper procedure was to have defense counsel explain on the record what additional mitigating evidence there was and for the

trial court to then consider that additional mitigating evidence in its sentencing order. (Vol. VIII 4). The trial court inquired of Guardado whether he was in fact instructing his attorneys not to present any further mitigation. (Vol. VIII 5). Guardado said he thought what he was trying to do was to inform the trial court that "I no longer have representation." (Vol. VIII 5). Guardado stated that he was "no longer comfortable with the representation" that he had received. (Vol. VIII 5). Guardado stated: "I think it has been inadequate and ineffective" (Vol. VIII 5). He was "shown great indifference." (Vol. VIII 5). He could not let these people speak for him anymore. (Vol. VIII 5). The trial court asked what evidence did counsel not present that Guardado wished that they would present. (Vol. VIII 5). Guardado said: "these are things that I can't discuss in a public environment." (Vol. VIII 6). Guardado explained that it was nine almost ten months ago that Mr. Gontarek was appointed to represent him, and in that time he had "spent less than an hour in actual conference with me." (Vol. VIII 6). Guardado had constantly asked counsel for information about his case but did not receive anything. (Vol. VIII 6). The trial court pointed out that Guardado had not raised this issue at the penalty phase. (Vol. VIII 6). Guardado asserted that he told his lawyer that he needed to speak with him and counsel

said they would speak on Monday but Monday was a trial day, Guardado did not get to see his lawyer and that was the end of it. (Vol. VIII 7). While he no longer wanted Mr. Gontarek to represent him, his mother was "so distraught" at him not having counsel, that against his better judgment, he allowed Mr. Gontarek to continue to represent him. (Vol. VIII 7). Guardado pointed out the lack of evidence that counsel put on in the penalty phase and that the psychologist was the only witness he put on. (Vol. VIII 7). The trial court again asked what evidence did Guardado want counsel to present that counsel did not present (Vol. VIII 7). Guardado responded: "I cannot bring these things to light in a public situation." (Vol. VIII 7). Guardado stated that he could not bring these things to light until sentence was imposed. (Vol. VIII 7). This was why he wanted sentencing to be done as expediently as possible. (Vol. VIII 8). The trial court explained that this was Guardado's chance to tell him. (Vol. VIII 8). The trial court then asked "one more time," what evidence did Mr. Gontarek or Mr. Cobb not present that he wanted them to present. (Vol. VIII 8). Guardado then complained that it was his understanding that "for evidence to be testified to, that it should have been presented in court, made evident in the court" but "during the penalty phase hearing, evidence was testified to that was not presented

in the court." (Vol. VIII 8). His attorneys did not object. (Vol. VIII 8-9). Guardado noted that the medical examiner who testified did not perform the autopsy. (Vol. VIII 9). Guardado also complained that the autopsy photographs were placed six inches from his head. (Vol. VIII 9). Guardado again stated that his attorneys had shown great indifference to him. (Vol. VIII 9). Guardado again asked for the sentence to be imposed today. (Vol. VIII 10). The trial court then asked counsel, Mr. Gontarek, what mitigation he would have presented at the *Spencer* hearing if Guardado wanted him to. (Vol. VIII 10). Defense counsel presented the written report of Dr. Larson to supplement his penalty phase testimony. (Vol. VIII 10). Guardado again expressed his wish to be sentenced on that day. (Vol. VIII 10). Guardado then asked whether the trial court was "refusing to accept the fact that I no longer wish to have Mr. Gontarek and Mr. Cobb to represent me" (Vol. VIII 12). The trial court responded that that was right and he was "not going to relieve them at this time." (Vol. VIII 12).

The trial court's ruling

After repeated inquiries at the *Spencer* hearing as to what mitigating evidence was not being presented that Guardado wished to present, in response to the defendant's question "is the Court refusing to accept the fact that I no longer wish to have

Mr. Gontarek and Mr. Cobb to represent me", the trial court ruled that he was "not going to relieve them at this time" (T. Vol. VIII 12).

Preservation/Waiver

This issue is preserved. The defendant stated that he no longer wished to have either of his two lawyers represent him. While he did not specifically ask for substitute counsel, he did express the desire to discharge his current lawyers. However, the issue was also waived. At the end of the penalty phase, the defendant wished to waive the *Spencer* hearing. (Vol. VIII 370). The trial court found the defendant's waiver to be knowing, intelligent and voluntary. (Vol. VIII 371). The sole reason that the trial court held a *Spencer* hearing was that the prosecutor, in his sentencing memo, asserted that the trial court should hold a *Spencer* hearing, despite Guardado's waiver citing *Phillips v. State*, 705 So.2d 1320, 1323 (Fla. 1997)(Anstead, J., concurring)(noting that the *Spencer* rule is a *mandatory* one which *must* be followed in a death penalty sentencing.)(emphasis in original). (T. Vol. II 339).[6] Defense counsel informed the

[6] The State does not agree that *Spencer* hearings are mandatory. The case cited by the prosecutor was a concurring opinion. *Phillips*, 705 So.2d at 1323 (Fla. 1997)(Anstead, J., concurring). The issue in *Phillips* was an improper delegation issue where the trial court relied on the State to prepare its

trial court at the beginning of the *Spencer* hearing that his client did not want a *Spencer* hearing; rather, he wanted to be sentenced at that time. (Vol. VIII 2). Guardado personally also informed the trial court that he did not want a *Spencer* hearing. (Vol. VIII 3). Guardado repeated this request throughout the *Spencer* hearing. (Vol. VIII 10). If a defendant waives an entire proceeding, he also necessarily waives the right to counsel at that proceeding. This issue was affirmatively waived by the defendant himself.

Standard of review

A trial court's decision involving withdrawal or discharge of counsel is subject to review for abuse of discretion. *Weaver v. State*, 894 So.2d 178, 187 (Fla. 2004). The trial court did not abuse its discretion by failing to inquire further when his initial inquiries were not answered.

Merits

In *Nelson v. State*, 274 So.2d 256, 258-259 (Fla. 4th DCA 1973), the Fourth District established a procedure to be

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sentencing order. There is no such issue in this case. A defendant may waive a *Spencer* hearing. *Griffin v. State*, 820 So.2d 906, 909 (Fla. 2002)(affirming where defendant waived the right to a jury during the penalty phase but noting that the defendant also waived the presentence investigation report and the *Spencer* hearing).

followed when a defendant seeks to discharge his court-appointed counsel based on ineffectiveness or incompetency:

> If incompetency of trial counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his court appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

The Florida Supreme Court adopted the *Nelson* procedure for all Florida courts. *Hardwick v. State*, 521 So.2d 1071 (Fla. 1988). In *Morrison v. State*, 818 So.2d 432 (Fla. 2002), this Court explained that, when a defendant complains that his appointed counsel is incompetent, the trial judge is required to make a sufficient inquiry of the defendant to determine whether or not appointed counsel is rendering effective assistance to the defendant. However, as a practical matter, the trial judge's inquiry can only be as specific as the defendant's complaint. This Court has consistently found a *Nelson* hearing unwarranted where a defendant presents general complaints about defense

counsel's trial strategy and no formal allegations of incompetence have been made. Similarly, a trial court does not err in failing to conduct a *Nelson* inquiry where the defendant merely expresses dissatisfaction with his attorney. *Morrison*, 818 So.2d at 440 (citations omitted); See also *Sexton v. State*, 775 So.2d 923, 930-931 (Fla. 2000)(setting out the same *Nelson* standard and finding a *Nelson* claim to be without merit where the defendant stated that he lacked "confidence" in his lawyers).

Several of Guardado's complaints were merely generalized grievances for which no *Nelson* inquiry is required. Complaints that he was "shown a great indifference" are merely generalized grievances for which no *Nelson* inquiry is required. *Gudinas v. State*, 693 So.2d 953, 962 n. 12 (Fla. 1997)(finding that a *Nelson* inquiry was not required because the defendant's claim was a general complaint about defense's trial strategy and not a formal allegation of incompetence); *Morrison v. State*, 818 So.2d 432, 441 (Fla. 2002)(rejecting a *Nelson* claim and characterizing the defendant's complaints "as general complaints about his attorney's trial preparation, witness development, and trial strategy."). "Indifference" is an even more generalized complaint than the complaints in *Gudinas* and *Morrison*, it is akin to the lack of confidence complaint rejected by this Court

in *Sexton*. Another one of Guardado's complaints was that his lawyer did not visit him in jail and the only conference they had was for less than one hour. This type of complaint does not require a *Nelson* inquiry either. As this Court has noted, a lack of communication is not a ground for an incompetency claim. *Morrison*, 818 So.2d at 440-441.

The trial court conducted a *Nelson* inquiry, allowing Guardado to state his complaints against counsel. Guardado seemed to think his counsel was ineffective for failing to object to hearsay evidence being presented in the penalty phase. Of course, hearsay is admissible in the penalty phase according to both the statutes and caselaw. § 921.141(1), Fla. Stat (2004)(providing: . . . "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements."); *Perez v. State*, 919 So.2d 347, 368 (Fla. 2005)(observing that the rules of evidence precluding the admissibility of hearsay do not apply to penalty phase proceedings citing *Mendoza v. State*, 700 So.2d 670, 675 (Fla. 1997)("We have recognized that hearsay evidence may be admissible in a penalty-phase proceeding if there is an opportunity to rebut."); *Lawrence v. State*, 691 So.2d 1068 (Fla.

1997)(same) and *Chandler v. State*, 534 So.2d 701 (Fla. 1988)(holding that admission in sentencing proceeding of hearsay testimony did not render section 921.141(1) of the Florida Statutes unconstitutional)). Guardado seemed to think his counsel was ineffective for failing to object to the medical examiner's testimony because she did not perform the actual autopsy. It is proper for a medical examiner to testify although she did not perform the autopsy. *Schoenwetter v. State*, 931 So.2d 857, 870 (Fla. 2006)(holding a medical examiner, who was a qualified expert, who had reviewed the autopsy reports, photos, and notes of the autopsy, but who did not perform the autopsy may testify regarding his opinion as to cause and manner of death); *Geralds v. State*, 674 So.2d 96, 100 (Fla. 1996)(holding trial court did not abuse it discretion in allowing pathologist who had not performed the autopsy, to testify as to the cause of death). Guardado also objected to the autopsy photographs being placed near him. Prior to the medical examiner's testimony, defense counsel objected to the prosecutor projecting autopsy photographs right in front of Guardado. (Vol. VII 152). The trial court agreed to move the defendant and inform the jury that he was moved so as not to interfere with the projection. (Vol. VII 153). The trial court did not need to inquire further of Guardado or inquire of

counsel into these particular matters because the trial court knew that these three complaints were legally baseless. There was no reasonable basis for the trial court to find incompetency of counsel in relation to these three complaints.

The trial court attempted to conduct a *Nelson* inquiry into the presentation of mitigating evidence and was thwarted by the defendant himself. The trial court inquired as to what counsel was omitting from the presentation of mitigating evidence that Guardado wanted to present. Guardado would not explain "in a public environment". The trial court attempted three times to inquire as to evidence that was not being presented, but Guardado repeatedly refused to answer "in a public situation."[7] For a trial court to explore whether counsel is being ineffective for not presenting certain mitigating evidence, the trial court must know what that mitigating evidence is. Guardado would not tell the judge what the mitigating evidence was. Judges cannot force defendants to answer *Nelson* inquiries

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[7] Guardado's request to speak with the judge in chambers without the attorneys present was not proper. The prosecutor is entitled to hear the mitigating evidence, so the prosecutor can rebut it. All evidence, mitigating and otherwise, must be presented in open court and on the record. Moreover, his claim of omission of mitigating evidence, was contradicted by his own earlier statement. At the start of the *Spencer* hearing, Guardado informed the trial court that he had "no knowledge of any further mitigation" that he could present. (Vol. VIII 3).

- all they can do is ask. A defendant may not assert his counsel is being ineffective in the trial court, then refuse to tell the trial court the substance of his ineffectiveness claim, and then assert a violation of *Nelson* on appeal. Guardado waived any possible violation of *Nelson* regarding the omission of mitigating evidence by his refusal to answer the judge's questions.

This Court should recede from *Nelson/Hardwick.* Under this Court's current precedent, defendants receive the remedy for ineffective assistance of counsel without showing any ineffectiveness. Defendants are not currently required to meet the test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) to obtain relief. Indeed, defendants do not even have to meet the *Cronic* standard[8] because they do not even have to establish deficient performance, much less prejudice, they just have to establish that the trial court failed to conduct a *Nelson* inquiry. Defendants should have to meet the *Strickland* standard for ineffectiveness to obtain relief. Defendants should not receive the windfall of a new trial if their lawyer was not ineffective. While it is

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[8] *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Hardwick v. State*, 521 So.2d 1071 (Fla. 1988) (adopting the *Nelson* procedure for all Florida courts).

perfectly understandable that this Court wishes to encourage judges to solve claims of ineffectiveness pre-trial by appointing effective counsel in the place of ineffective counsel in an effort to avoid the waste and expense of a first trial with ineffective counsel, if the judge does not solve the problem pre-trial, the waste of the first trial has already occurred, and there is no reason to grant a new trial based on the mere failure to inquire. A defendant should not receive a new trial unless a defendant actually had ineffective counsel at his first trial. The problem with the *Nelson/Hardwick* procedure is that it focuses on the wrong actor. While the purpose of the rule is to enforce the Sixth Amendment right to effective assistance of counsel, instead of focusing on counsel's conduct, it focuses on the judge's conduct. It asks whether the judge conducted a proper inquiry rather than asking if defense counsel conducted a proper defense. Florida seems to be the only jurisdiction with a *Nelson/Hardwick* type of procedure. While other jurisdictions encourage pre-trial inquiries into the competency of counsel, they do not have *per se* reversal rules for the failure to inquire.

Harmless error

If there is a *Nelson* violation, the remedy is an automatic new proceeding. Normally, Florida courts do not conduct a

harmless error analysis. *Jackson v. State*, 914 So.2d 30, 32 (Fla. 2d DCA 2005)(holding a trial court's failure to conduct a *Nelson* hearing in the face of a clear request to discharge counsel for ineffectiveness or incompetency constituted reversible error without addressing harmlessness); *but see Marti v. State*, 756 So.2d 224, 230 (Fla. 3d DCA 2000)(holding failure to conduct *Nelson* inquiry was error but harmless because "the evidence establishing defendant's guilt was overwhelming, and the record is devoid of any evidence of incompetence by counsel during the trial"); *Stephens v. State*, 787 So. 2d 747, 758 (Fla. 2001)(holding any error in the *Nelson* inquiry was harmless because the defendant later demonstrated satisfaction with his counsel). Assuming the failure to conduct a *Nelson* inquiry is subject to harmless error, the error was harmless. As in *Marti*, the evidence establishing the aggravators was overwhelming and the record is devoid of any evidence of incompetence by counsel during the penalty phase. Moreover, the State did not present any additional aggravation at the *Spencer* hearing. The only additional material presented by the prosecution was a victim impact letter from the victim's sister and the prosecutor specifically told the trial court that he could not consider the

letter in sentencing. (Vol. VIII 4-5).[9] Furthermore, Guardado twice denied having any additional mitigation to present - once at the end of the penalty phase and once at the beginning of the *Spencer* hearing. At the conclusion of the penalty phase, the trial court personally asked Guardado if he wanted to present any other additional mitigation evidence that was not presented and Guardado responded: "Not to my knowledge, no." (Vol. VII 310-311). Guardado, under oath, testified that he had no additional mitigating evidence. (Vol. VIII 318). At the beginning of the *Spencer* hearing, Guardado informed the judge that he had "no knowledge of any further mitigation" that he could present. (Vol. VIII 3). Defense counsel introduced Dr. Larson's written mental health report as additional mitigation at the *Spencer* hearing. However, the prosecutor had no objection to the trial court considering the defendant's history contained in the report as mitigation and giving it whatever weight the trial court deemed appropriate. (Vol. VIII 11). Basically, the *Spencer* hearing was a wash as far as aggravation and mitigation were concerned. The error, if any, was harmless.

Remedy

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[9] The State does not agree with the prosecutor that the trial court may not consider victim impact evidence. While the

The remedy is limited to a new *Spencer* hearing. The remedy for a violation of *Nelson* at a *Spencer* hearing is a new *Spencer* hearing. Guardado certainly is not entitled to a new penalty phase.

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trial court may not use victim impact evidence as non-statutory aggravation, this limitation applies to the jury as well.

ISSUE II

WHETHER THERE IS COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE? (Restated)

Guardado claims that the trial court erred in finding the heinous, atrocious and cruel aggravating circumstance. This Court has repeatedly affirmed a finding of HAC in both beating and stabbing deaths. Guardado's own confession, in which he admitted stabbing the victim in her neck and heart because she would not die from the multiple blows to her head from the metal bar, establishes the HAC aggravator. Guardado argues that the victim may have lost consciousness quickly after the initial blows to her head. This argument is rebutted by the victim's extensive defensive wounds to her hands. Guardado, in his confession, admitted that after the first blow, "she put her hands up." She was conscious after the first blow. As the trial court found, the medical examiner's testimony established that the victim was conscious at least through the time the defendant stabbed her in the heart. Moreover, the error, if any, is harmless. Even if the HAC aggravating circumstance is stricken, there are four remaining aggravating circumstances, including the prior violent felony aggravator, and no statutory mitigation. The trial court properly found the HAC aggravator.

The trial court's ruling

The trial court found the HAC aggravator in its sentencing order. (T. Vol. II 343-344). The trial court found:

> The evidence shows the following. The defendant JESSE GUARDADO personally knew Ms. Jackie Malone, the 75-year old victim, since on or about 2003. The defendant had been a guest in the [sic] Ms. Malone's home (including a few overnight stays when he was in between rentals), had on numerous occasions received assistance from the victim (including financial assistance and help in finding a job – including the job he held with the Niceville waste water treatment plant at the time of this crime). The defendant had rented places of residence from Ms. Malone (who was a realtor and property manager). The defendant, based on his prior relationship with Ms. Malone, knew that the victim kept some money on hand, including in her wallet. The defendant, in need of money to fix his truck and to obtain crack cocaine for his personal use and recent crack cocaine binging, decided to go to the [sic] Ms Malone's house (located in a remote or secluded area of Walton County, Florida) in the middle of the night (the night of September 13/14, 2005), armed with two weapons (a metal "breaker bar" and a kitchen knife (State's Exhibits # 3 & 4). Defendant, using his girlfriend's car, drove to the [sic] Ms. Malone's home. Ms. Malone had gone to bed for the night. When defendant arrived at Ms. Malone's home, he repeatedly knocked on the door to awaken her and then identified himself by name when she came to the door. Ms. Malone, in her night clothes, opened the front door and greeted the defendant at which time he lied to her that he needed to use her telephone. As Mr. Malone turned away from defendant to allow him to enter the house, the defendant then pulled the "breaker bar" from his pants behind his back and struck Mr. Malone with repeated brutal blows about her head. Ms. Malone raised her hands in defense of the blows. She then fell to the living room floor. Ms. Malone did not die from the repeated blows from the breaker bar, so the defendant then pulled the kitchen knife he had on his person and brutally stabbed her

and slashed her throat. The defendant, in his audio and video taped confession to law enforcement investigators (State's Exhibits # 8 & 9), respectively), stated to the effect that he hit Ms. Malone on the head with the breaker bar and thought that would have killed her, but it did not, so he hit her repeatedly. Defendant stated that Ms. Malone fell to the floor behind the couch but it just seemed that she was not going to die, so he tried to stab her with a knife, including to the heart, so it would have been over, but it just seemed not to go that way, she would not die. Defendant further stated that during his earlier days in incarceration at Marianna, he had a job cutting beef, so he knew how to slash across his throat. The defendant further stated that he had hit Ms. Malone repeatedly because she had put her hands up. After beating and stabbing Ms. Malone, the defendant then proceeded to her bedroom where he looked through her belongings for money and valuables, and took her jewelry box, briefcase, purse, and cell phone. Dr. Andrea Minyard, a forensic pathologist and the Chief Medical Examiner for the First District (covering Walton County, Florida), testified that, based upon her review of the autopsy report and the autopsy photographs of Ms. Malone, the victim had suffered injuries including (1) multiple (at least twelve) abrasions, contusions and lacerations of the skin on the head, neck and face, (2) bruising under the surface of the scalp, (2) a subarachnoid hemorrhage, (4) at least two incised wounds on the neck, (5) five stab wounds to the chest, (6) a fracture of the finger, and (7) incised wounds to the right hand. Dr. Minyard identified injuries to Ms. Malone as depicted in twelve photographs of the victim's body at the time of the autopsy (State's Exhibits # 11a-l). The evidence established beyond a reasonable doubt that Ms. Malone was conscious at least through the time that the defendant inflicted the stab wound to her heart. The medical examiner testified, that in her opinion (1) the victim's injuries were consistent with having been inflicted by an instrument such as the breaker bar (State's Exhibit 3), and the incised wounds and stab wounds by the kitchen knife (State's Exhibit 4); (2) the fracture to the victim's finger was consistent with the victim

attempting to fend off the defendant's repeated blows with the breaker bar; and (3) the incised wound to the victim's right hand in the webbing between her index and middle fingers was most consistent with the victim attempting to fend off her attacker by reaching or grabbing for the knife a the defendant repeatedly stabbed her; that it was a textbook example of a victim grabbing a knife. The medical examiner also testified that the knife wound inflicted to the victim's throat was "pre-mortem", in other words it was not fatal and the victim was still alive after the wound as evidenced by her continuing to breathe in some blood, and therefore, it was inflicted before the fatal stab wound to the heart. The medical examiner further opined that the fatal wound to the victim was the stab to her heart which resulted in filling of the pericardial sac with blood, thereby preventing the heart from beating normally, and which would have rendered the victim unconscious from a few seconds to a couple of minutes for the time to fill up the pericardial sac. The medical examiner opined that the victim experienced a painful death from the defendant's attack. In conclusion, this murder was indeed a conscienceless, pitiless crime, which was unnecessarily torturous to the victim. The evidence establishes beyond a reasonable doubt that the defendant administered a savage attack on Ms. Malone first by repeated blows about her head and limbs with a metal bar, which she tried to fend off and sustained a finger fracture; that the defendant then observed Ms. Malone still alive and lying on the floor despite that flurry of blows; that the defendant then mindful of his previous prison job slaughtering cattle, took out a kitchen knife that he brought with him and twice slashed Ms. Malone's throat and stabbed her (including the fatal stab to her heart) while she grabbed for the knife further trying to fend off or fight her attacker. The defendant admitted the facts concerning the crime. The evidence fully supports and corroborates his admissions. <u>This aggravating circumstance that the capital felony was especially heinous, atrocious, or cruel was proved beyond a reasonable doubt</u>.

(T. Vol. II 343-344)(emphasis in original).

Preservation

This issue is preserved. In the defense sentencing memo, counsel argued against the HAC aggravator. (T. Vol. II 326). He asserted that, because the medical examiner testified that all of the injuries could have been inflicted within a few seconds and the victim could have been dazed from the first blow to her head, the murder was not unnecessarily torturous. (T. Vol. II 326). During the jury instruction conference, defense counsel renewed his objection to instructing the jury on the HAC aggravator. (T Vol. VII 274). The trial court ruled that his prior rulings would remain consistent. (T Vol. VII 274).

The standard of review

The standard of review of a claim regarding the sufficiency of the evidence to support an aggravating circumstance is competent, substantial evidence. *England v. State*, - So.2d -, 2006 WL 1472909, *9 (Fla. May 25, 2006)(stating that review of a claim of the trial court's finding of an aggravator is limited to determining whether the trial judge applied the correct rule of law and, if so, whether competent, substantial evidence supports his finding citing *Hutchinson v. State*, 882 So.2d 943, 958 (Fla. 2004)). Contrary to opposing counsel's assertion that the standard of review is *de novo* (made without citation to any case), "[t]he law is well settled regarding this Court's review

of a trial court's finding of an aggravating factor." *Owen v. State*, 862 So.2d 687, 698 (Fla. 2003)(explaining the standard of review as: "[i]t is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt-that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding" quoting *Way v. State*, 760 So.2d 903, 918 (Fla.2000) and *Willacy v. State*, 696 So.2d 693, 695 (Fla.1997)). Florida's "competent, substantial evidence" standard of review is akin to the federal "clearly erroneous" standard of review. Under this standard of review, the trial court's decision cannot merely be arguably wrong; rather, the trial court decision's must be wrong "with the force of a five-week-old, unrefrigerated dead fish". *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988); *Fisher v. Roe*,263 F.3d 906,912 (9th Cir. 2001)(discussing the clearly erroneous standard of review and noting that unfortunately, many lawyers do not fully appreciate the height of the hurdle they must clear when attempting to convince us that a fact found by the trial court was clearly erroneous). Guardado does not meet this standard.

Merits

There was competent, substantial evidence that the murder was HAC. The medical examiner testified that the victim had twelve blows to her head. The medical examiner testified that the victim had five stab wounds to the chest including a fatal stab wound to the heart. The medical examiner also testified that the victim had been slashed twice in her neck. The medical examiner testimony was that the victim was conscious, although "dazed", when she was beaten with the breaker bar, based on the defensive wounds to the victim's hands. The medical examiner's testimony was that the victim was also conscious when she was stabbed, based on the incise wounds to the victim's right hand, which "most likely" resulted from the victim grabbing the knife while being stabbed. The defendant confessed she would not die from being beaten on the head with the metal breaker bar and so he had to stab her to kill her. This Court has "consistently upheld HAC in beating deaths." *England v. State*, - So.2d -, 2006 WL 1472909, *9 (Fla. May 25, 2006)(quoting *Lawrence v. State*, 698 So.2d 1219, 1222 (Fla. 1997) and citing *Dennis v. State*, 817 So.2d 741, 766 (Fla. 2002)(holding trial court's finding of HAC was supported by evidence that the victims suffered skull fractures as the result of a brutal beating and that the victims were conscious for at least part of the attack); *Bogle v. State*,

655 So.2d 1103, 1109 (Fla. 1995)(holding trial court's finding of HAC was supported by evidence that the victim was struck seven times in the head and the medical examiner testified that the victim was alive at the time most of the wounds were inflicted); *Wilson v. State*, 493 So.2d 1019, 1023 (Fla. 1986)(holding trial court's finding of HAC was supported by evidence that victim was brutally beaten while attempting to fend off blows to the head before he was fatally shot)). This Court has also "consistently upheld the HAC aggravator where the victim has been repeatedly stabbed." *Owen v. State*, 862 So.2d 687, 698 (Fla. 2003)(citing *Cox v. State*, 819 So.2d 705, 720 (Fla. 2002); *Guzman v. State*, 721 So.2d 1155, 1159 (Fla. 1998); *Williamson v. State*, 681 So.2d 688, 698 (Fla. 1996); *Barwick v. State*, 660 So.2d 685, 696 (Fla. 1995); *Finney v. State*, 660 So.2d 674, 685 (Fla. 1995) and *Pittman v. State*, 646 So.2d 167, 173 (Fla. 1994)).

Guardado argues that the victim may have lost consciousness quickly after the initial blows to her head. The victim had numerous and extensive defensive wounds. *Zakrzewski v. State*, 717 So.2d 488, 493 (Fla. 1998)(affirming a finding of HAC as to the children because the defensive wounds showed that both children were aware of their impending deaths.). Her hands were badly damaged from attempting to protect herself from the blows.

Guardado, in his confession, admitted that after the first blow, "she put her hands up." (Vol. VI 43). As the trial court found, the medical examiner's testimony established that the victim was conscious at least through the time the defendant stabbed her in the heart. (Vol. VIII sentencing at 11).

Moreover, this Court has rejected this same argument. In *Reynolds v. State*, 2006 WL 1381880, *21 (Fla. May 18, 2006), this Court rejected a similar claim regarding the finding of HAC. Reynolds was convicted of one count of second degree murder and two counts of first degree murder. He was sentenced to death for both first degree murders. Reynolds asserted that the HAC aggravator was inapplicable because there was evidence that one of the victims lost consciousness quickly and, therefore, the prolonged suffering associated with HAC was not present. The victim suffered ten stab wounds to the head and to her neck and one stab wound to the torso and had a number of defensive wounds to her arms and hands. Based on the defensive wounds, the medical examiner testified that there was a violent struggle. This Court noted that "the testimony of the medical examiner established that both of the victims exhibited defensive wounds, indicating that they were conscious during some part of the attack and attempting to ward off their attacker." *Reynolds*, 2006 WL 1381880 at *21. "This Court has

repeatedly upheld the HAC aggravating circumstance in cases where a victim was stabbed numerous times." *Reynolds*, 2006 WL 1381880 at *21 (collecting cases). This Court stated: "we have upheld the application of HAC even when the 'medical examiner determined that the victim was conscious for merely seconds.'" The Court stated that one of the victims "remained conscious for a matter of a minute or two". This Court affirmed the trial court's finding of HAC. See also *Francis v. State*, 808 So.2d 110, 135 (Fla. 2001)(noting this Court has repeatedly upheld findings of HAC where the medical examiner has determined that the victim was conscious even though only for seconds).

Here, as in *Reynolds*, the victim suffered extensive injuries. She had numerous blow to her head from the metal breaker bar and was repeatedly stabbed with a knife in her chest and neck. Here, the victim also had defensive wounds from a violent struggle. Guardado, in his confession, admitted that after the first blow, "she put her hands up." (Vol. VI 43). Unconscious victims do not raise their hands. This victim was clearly conscious after the first blow according to the defendant's own version of events. Appellate counsel's argument is directly refuted by his client's own statements. The medical examiner's opinion was that not only was the victim conscious during the beating based on the extensive damage to both her

hands but that she was also conscious during at least part of the stabbing because of the incise wound to the victim's right hand.

Guardado's reliance on *Zakrzewski v. State*, 717 So.2d 488, 493 (Fla. 1998) and *Elam v. State*, 636 So.2d 1312, 1314 (Fla. 1994), is misplaced. The *Zakrzewski* Court reversed a finding of HAC as to the one victim who had been rendered unconscious upon receiving the first blow from the crowbar because she was unaware of her impending death and awareness is a component of the HAC aggravator. However, *Zakrzewski* Court affirmed the finding of HAC as to the children because the defensive wounds showed that both children were aware of their impending deaths. *Zakrzewski*, 717 So.2d at 493. Here, the victim's defensive wounds establish that she was not rendered unconscious from the first blow. The *Elam* Court found the heinous, atrocious, or cruel aggravator inapplicable because there was no prolonged suffering or anticipation of death. The victim had defensive wounds and the medical examiner testified that the attack took place in a very short period of time ("could have been less than a minute, maybe even half a minute") rendering the victim unconscious. By contrast, here, unlike *Elam*, the medical examiner did not testify that the victim was rendered

unconscious within seconds. The trial court properly found the murder to be HAC.

Harmless Error

The error, if any, was harmless. Even if the HAC aggravating circumstance is stricken, there are four remaining aggravating circumstances and no statutory mitigating circumstances. Among the four remaining aggravating circumstances is the prior violent felony aggravating circumstance which is not being challenged on appeal. The prior violent felony aggravating circumstance was based on Guardado's five prior robbery convictions. The death sentence should be affirmed regardless of the HAC aggravating circumstance.

Remedy

Guardado asserts that the Court should "either remand for imposition of a life sentence or for resentencing before a newly empaneled jury" IB at 39. There is no support in this Court's caselaw for the proposition that a defendant is entitled to a life sentence merely because an improper aggravating circumstance was considered at the first penalty phase. If this Court finds that an aggravating circumstance was improperly considered and the error was not harmless, it remands for a new penalty phase.

ISSUE III

WHETHER THERE IS COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE? (Restated)

Guardado contends the trial court improperly found the cold, calculated and premeditated aggravating circumstance. The trial court properly found CCP. In his audiotaped and videotaped confession, Guardado admitted that he planned to kill the victim prior to entering her home. Guardado entered the victim's home with a metal breaker bar and knife. Guardado immediately struck the victim with the metal bar upon being admitted to the victim's home while the victim's back was turned. The defendant admitted that he stabbed the victim because she did not die from the repeated blows from the metal bar. Moreover, the error, if any, is harmless. Even if the CCP aggravating circumstance is stricken, there are four remaining aggravating circumstances, including HAC and the prior violent felony aggravator and no statutory mitigation. Thus, the trial court properly found the CCP aggravator.

The trial court's ruling

The trial court, in its sentencing order found the CCP aggravator. (Vol. II 344-345). The trial court found:

> The defendant JESSE GUARDADO, looking to get high and continue his recent crack cocaine binge and desperate

for money for drugs, first went to a local grocery store in the early evening of September 13, 2003, and committed an attempted robbery with a knife against a store employee but was left with no money because the employee-victim thwarted defendant's actions to get his wallet. Later that evening/night, the defendant calmly arranged to drive his girlfriend's vehicle to work (for night shift). The defendant knew that he maintained a change of work clothes in his girlfriend's car given the nature of his work, and in particular, for this evening/night because the landfall of a hurricane was due to arrive in the next couple of days and he had prepared changes of clothing should storm damages require him to remain at work in the days following the hurricane. (Walton County Sheriff's Investigator Lorenz testified that Hurricane Ivan made landfall or struck in the area in the late evening or morning hours of September 15/16.) The defendant drove to the parking lot at Wal-Mart in DeFuniak Springs, where he obtained (from his disabled truck parked there) the kitchen knife, to carry along with the breaker bar already in his possession and that he planned to use to kill Ms. Malone. The defendant confessed that he chose Ms. Malone to murder and rob at night because of the secluded location of her home and because she would open her home to him, even in the dark of the night, because of their prior trusting relationship. During his confession, the defendant admitted that he "knew what he was going to do," or words to that effect, when he drove to the [sic] Ms. Malone's home. Also, when asked by Walton County Sheriff's Investigator Roy if he planned to kill Mr. Malone, the defendant answered to the effect, "yes, and get the money." In his testimony during the penalty phase proceedings before the jury, the defendant made no attempt to claim that his decision to kill the victim was not the product of calm and cool reflection; he also made no claim that he was in a frenzied state of mind or rage or that his decision to kill was impromptu, spontaneous, or instantaneous at the time he began the robbery of Ms. Malone. Dr. James Larson, the defense's forensic psychologist, testified before the advisory jury that the defendant was not suffering from any extreme mental or emotional disturbance at the time of the murder and he did not

> offer any evidence to rebut that the murder was the product of calm and cool reflection. Finally, the defendant made no claim of moral or legal justification. As Investigator Lorenz testified before the advisory jury, during the course of his initial meeting with defendant and while seated in the back seat of the investigators' vehicle, the defendant made a spontaneous statement to him, to the effect that "That lady didn't deserve what I did to her." In his confession and his testimony before the advisory jury, the defendant stated the same and admitted that he had made such spontaneous statement to the law enforcement investigator. This aggravating circumstance was proved beyond a reasonable doubt.

(Vol. II 344-345)(emphasis in original).

Preservation

This issue is preserved. While defense counsel did not argue against CCP in the defense sentencing memo, defense counsel moved for judgment of acquittal on the CCP aggravator arguing that Guardado was on a cocaine binge at the close of the State's case at the penalty phase. (T. Vol. II 326; Vol. VII 213-214). The trial court denied the motion. (Vol. VII 219). During the jury instruction conference, defense counsel renewed his objection to instructing the jury on the CCP aggravator. (T Vol. VII 274). The trial court ruled that his prior rulings would remain consistent.

(T Vol. VII 274).

The standard of review

The standard of review of a claim regarding the sufficiency of the evidence to support an aggravating circumstance is

competent, substantial evidence. *England v. State*, - So.2d -, 2006 WL 1472909, *9 (Fla. May 25, 2006)(stating that review of a claim of the trial court's finding of an aggravator is limited to determining whether the trial judge applied the correct rule of law and, if so, whether competent, substantial evidence supports his finding citing *Hutchinson v. State*, 882 So.2d 943, 958 (Fla. 2004)). Contrary to opposing counsel's assertion that the standard of review is *de novo* (made without citation to any case), "[t]he law is well settled regarding this Court's review of a trial court's finding of an aggravating factor." *Owen v. State*, 862 So.2d 687, 698 (Fla. 2003)(explaining the standard of review as: "It is not this Court's function to reweigh the evidence to determine whether the State proved each aggravating circumstance beyond a reasonable doubt-that is the trial court's job. Rather, our task on appeal is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding" quoting *Way v. State*, 760 So.2d 903, 918 (Fla.2000) and *Willacy v. State*, 696 So.2d 693, 695 (Fla.1997)). Florida's "competent, substantial evidence" standard of review is akin to the federal "clearly erroneous" standard of review. Under this standard of review, the trial court's decision cannot merely be arguably wrong;

rather, the trial court decision's must be wrong "with the force of a five-week-old, unrefrigerated dead fish". *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988); *Fisher v. Roe*,263 F.3d 906,912 (9th Cir. 2001)(discussing the clearly erroneous standard of review and noting that unfortunately, many lawyers do not fully appreciate the height of the hurdle they must clear when attempting to convince us that a fact found by the trial court was clearly erroneous). Guardado does not meet this standard.

Merits

To support the CCP aggravator, a jury must find (1) that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) that the defendant exhibited heightened premeditation (premeditated); and (4) that the defendant had no pretense of moral or legal justification. *Buzia v. State*, 926 So.2d 1203, 1214 (Fla. 2006)(citing *Jackson v. State*, 648 So.2d 85, 89 (Fla. 1994)). In *Buzia*, this Court affirmed a finding of CCP based on the fact the defendant procured a weapon. *Buzia*, 926 So.2d at 1215. Buzia did not bring the murder weapon, an axe, to the victim's home; rather, he obtained the murder weapon from the

home. *Buzia*, 926 So.2d at 1216 (explaining that Buzia did not bring his own weapon to the residence, he nevertheless procured one but because he was performing various jobs for the victims at their residence, he knew exactly where to obtain the axes). The *Buzia* Court noted: "[w]e have found the CCP aggravator where the defendant procured a weapon beforehand." *Buzia*, 926 So.2d at 1215 (citing *Rodriguez*, 753 So.2d at 46 (where the defendant armed himself with a loaded handgun before proceeding to commit the crime); *Sireci v. Moore*, 825 So.2d 882, 886 (Fla. 2002)(acquisition of a tire iron); *Zakrzewski*, 717 So.2d at 492 (the defendant purchased the murder weapon the morning before the murders)).

Here, unlike *Buzia*, Guardado obtained two weapons before entering the victim's home - a metal breaker bar and a knife. He choose the victim because she lived in a remote and secluded area. He knew that the victim would open her door to him as she had done before. Guardado admitted, in his taped confession, that he planned to kill the victim to get money. He went there to kill her. (Vol. VI 52). As the trial court observed in its sentencing order, the defendant admitted that he knew what he was going to do when he drove to Ms. Malone's home. These facts establish all four elements of CCP.

Guardado basically asserts that his drug use negates CCP. This Court has rejected such a claim. In *Robinson v. State*, 761 So.2d 269 (Fla. 1999), this Court, in a very factually similar murder, where the victim was beaten and then stabbed by a chronic drug abuser, rejected a claim that the trial court erred in finding the murder to be CCP. According to Robinson's taped confession, Robinson stole the victim's property to pawn for money to purchase drugs. *Robinson*, 761 So.2d at 271. Robinson was afraid of being sent back to prison for the theft because he had been raped during a prior incarceration. *Robinson*, 761 So.2d at 272. Robinson struck the victim with a hammer in the head twice and "then stuck the claw part of the hammer into the victim's skull." *Robinson*, 761 So.2d at 271. To stop the victim' breathing and heart beat, Robinson stuck a serrated knife into the soft portion of her neck and down into her chest. *Robinson*, 761 So.2d at 271. Robinson was "a chronic drug abuser who started consuming alcohol, marijuana and LSD in his teens, and eventually moved to methamphetamine and then cocaine, which he continued to use up until the murder." *Robinson*, 761 So.2d at 271. Robinson spent four weeks binging on cocaine immediately prior to the murder. *Robinson*, 761 So.2d at 272. The defense called two doctors to testify at the penalty phase, one of whom was a neuropsychologist and the other was a neuropharmacologist.

Robinson, 761 So.2d at 271. The neuropharmacologist testified Robinson had hallucinations, "derangement of reality" and "preschizophrenic processes" due to his chronic serious drug use. Both doctors agreed that drugs controlled Robinson's life and that because of his chronic drug use, Robinson was under extreme emotional disturbance and unable to control his actions. *Robinson*, 761 So.2d at 272. Both doctors agreed that Robinson suffered from emotional duress because he believed he would be sent back to prison unless he killed the victim. *Robinson*, 761 So.2d at 272. The trial court had found one of the statutory mental mitigators based on Robinson's history of excessive drug use and gave that mitigator great weight. *Robinson*, 761 So.2d at 272. The trial court found the murder was cold, calculated and premeditated. *Robinson*, 761 So.2d at 273. This Court found no merit to Robinson's claim that the trial court erred in finding the murder to be cold, calculated and premeditated *Robinson*, 761 So.2d at 273, n.4. This Court concluded that "[a]lthough drugs admittedly consumed Robinson's life and he apparently suffered some residual effects from chronic drug abuse, the evidence indicates Robinson acted according to a deliberate plan. . ." *Robinson*, 761 So.2d at 278.

Here, like *Robinson*, the drug abuse does not negate the CCP aggravator. While the trial court in *Robinson* found that

Robinson was in a frenzy and here, the trial court found the Guardado was “desperate for money for drugs”, neither negates the cold element of CCP. (T. Vol. II 344). Opposing counsel leaves out “money” from his description of the trial court’s language regarding desperate. IB at 44. Desperate for money is not an emotional frenzy, panic, or a fit of rage. Here, unlike *Robinson*, where both doctors testified that drugs controlled Robinson's life and that because of his chronic drug use, Robinson was under extreme emotional disturbance, Dr. Larson testified that Guardado was not a drug addict. (T. Vol. VII 242). Dr. Larson also testified that, while Guardado was under “emotional duress” and “considerable stress”, he was not under “extreme duress” and neither statutory mental mitigator applied. (T. Vol. VII 242, 246). Here, unlike *Robinson*, where one of the doctors testified that Robinson had hallucinations, “derangement of reality” and “preschizophrenic processes” due to his chronic serious drug use, Dr. Larson testified that Guardado was not hallucinating, or having delusions or suffering from any psychosis. (T. Vol. VII 247-248). And here, unlike *Robinson*, the trial court did not find the drug abuse to be a basis for a statutory mitigator of great weight. Here, the trial court found drug abuse only as a non-statutory mitigator to which the trial court assigned “some weight.” (T. Vol. VIII 25; T. Vol. II

349). If CCP was not negated in *Robinson* due to chronic drug abuse, CCP is certainly not negated in this case.

Guardado's reliance on *White v. State*, 616 So.2d 21 (Fla. 1993), and *Penn v. State*, 574 So.2d 1079 (Fla. 1991), is misplaced. In *White*, a lab test of his urine, taken the day after the murder, verified that White had cocaine, valium and marijuana in his system. A forensic psychiatrist, who examined White a couple of days after the murder, testified that White displayed withdrawal symptoms. The psychiatrist concluded that both statutory mental mitigators applied. This Court found that the trial judge erred in instructing the jury on and finding that this murder was committed in a cold, calculated, and premeditated manner. This Court concluded that, while the record establishes that the killing was premeditated, the evidence of White's excessive drug use and the trial judge's express finding that White committed this offense "while he was high on cocaine", that the CCP aggravating factor was not established beyond a reasonable doubt. *White* was a domestic violence murder with a sole aggravator and both statutory mental mitigators. This is not a domestic violence murder. While the victim had been a good, generous friend to Guardado, there was not that type of emotion involved here. Here, by contrast with

White, there are five aggravators and neither statutory mental mitigator is present.

In *Penn*, this Court held that a death sentence was not proportionate where sole aggravator was HAC and mitigation included evidence of heavy drug use. Penn, who was separated from his wife, moved in with his mother, along with his young son. Penn murdered his mother with a hammer and stole her property to purchase crack. Penn's two year old son was asleep in the home. Penn's estranged wife told him that his mother stood in the way of their reconciliation. This Court struck the CCP aggravator finding there was no evidence of cold calculation prior to the murder. Here, unlike *Penn*, there was evidence of cold calculation prior to the murder. Penn had obtained the hammer from the laundry room of his mother's house. Here, by contrast, Guardado armed himself with two weapons and drove to the victim's home. The trial court properly found the CCP aggravating circumstance.

Harmless Error

The error, if any, was harmless. Even if the CCP aggravating circumstance is stricken, there are four remaining aggravating circumstances and no statutory mitigation. Among the four remaining aggravating circumstances is the prior violent felony aggravating circumstance which is not being

challenged on appeal. The prior violent felony aggravating circumstance was based on Guardado's five prior robbery convictions. Furthermore, the HAC aggravating circumstance, while being challenged on appeal, is clearly present in this case. The victim was beaten repeatedly with a metal bar and then, when she did not die, the victim was stabbed repeatedly in the neck and heart. There simply is no basis for assuming that the HAC aggravator does not apply in a case where a victim is beaten with a metal breaker bar and then stabbed repeatedly in vital areas. The death sentence should be affirmed regardless of the CCP aggravating circumstance.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY DENIED THE *RING V. ARIZONA*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) CLAIM ? (Restated)

Guardado asserts that Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court has repeatedly rejected *Ring* claims. There was no violation of the Sixth Amendment right to a jury trial in this case. Guardado had a jury in his penalty phase that unanimously recommended death. As this Court has recently observed, relying on United States Supreme Court precedent, when a jury makes a sentencing recommendation of death, the jury "necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." Moreover, as this Court has explained in numerous cases, prior violent felony aggravator takes a case outside the scope of *Ring.* One of the aggravators in this case was a prior violent felony conviction. Guardado had five prior convictions for robbery. The trial court properly denied the *Ring* challenge to Florida's death penalty statute.

The trial court's ruling

Guardado filed a "motion to declare Florida's death penalty unconstitutional under *Ring v. Arizona*." (Vol. 1 46-78). He argued, in the motion, that "although the maximum sentence authorized for some homicides is death, a defendant convicted of first-degree murder cannot be sentenced to death without additional findings of fact that must be made, by explicit requirement of Florida law, by a judge and not a jury." (T. Vol. I 48). The trial court denied the motion. (T. Vol. I 196; Vol II 209). Guardado also filed a "motion to bar imposition of death sentence on the basis that Florida's capital sentencing is unconstitutional under *Ring v. Arizona*." (Vol. I 169-170). The motion argued that the indictment did not contain the aggravating circumstances and the statute did not require that the aggravators be found by the jury. (Vol. I 169-170). At the motion hearing, defense counsel argued that the statute should be declared unconstitutional because the aggravators were not in the indictment and were not found by the jury. (T. Vol. III 8). The prosecutor noted that the Florida Supreme Court had upheld the constitutionality of Florida's death penalty statute and asked the trial court to deny the motions based on this precedent. (T. Vol. III 9). The trial court denied the *Ring* motions. (T. Vol. III 9). During the jury instruction conference, defense counsel asked for an unanimous jury

recommendation. (T Vol. VII 273). The trial court noting that at capital school they recommended against interrogatory style death recommendation special verdicts, denied to require a special verdict form or unanimity. (T Vol. VII 273).

Preservation

A Sixth Amendment right to a jury trial claim, like other constitutional claims, must be raised in the trial court to be cognizable on appeal. *McGregor v. State*, 789 So.2d 976, 977 (Fla. 2001)(holding that an *Apprendi* claim must be preserved for review and expressly rejected the assertion that such error is fundamental). Because the defendant filed a motion raising this exact issue and obtained a ruling from the trial court, this issue is preserved.

The standard of review

Whether Florida's death penalty statute violates the Sixth Amendment right to a jury trial is a pure question of law reviewed *de novo*. Cf. *United States v. Reed*, 2006 WL 1320246, *3, n.4 (11th Cir. May 16, 2006)(reviewing *Apprendi* claim *de novo*); *United States v. Petrie*, 302 F.3d 1280, 1289 (11th Cir. 2002)(observing that the applicability of *Apprendi* is a question of law reviewed *de novo*).

Merits

This Court has repeatedly rejected *Ring* claims. Indeed, since the decision in *Ring*, this Court has rejected such claims in over fifty cases. *Marshall v. Crosby*, 911 So.2d 1129, 1134, n.5 (Fla. 2005)(listing the numerous cases rejecting *Ring* claims in a footnote).[10] Guardado, while acknowledging this Court's

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[10] *Robinson v. State*, 865 So.2d 1259 (Fla. 2004); *Smith v. State*, 866 So.2d 51 (Fla. 2004); *Parker v. State*, 873 So.2d 270 (Fla. 2004); *Guzman v. State*, 868 So.2d 498 (Fla. 2003); *Davis v. State*, 875 So.2d 359 (Fla. 2003); *Zakrzewski v. State*, 866 So.2d 688 (Fla. 2003); *Henry v. State*, 862 So.2d 679, 681 (Fla. 2003); *Owen v. State*, 862 So.2d 687, 704 (Fla. 2003); *Johnston v. State*, 863 So.2d 271, 286 (Fla. 2003), *cert. denied*, 541 U.S. 946, 124 S.Ct. 1676, 158 L.Ed.2d 372 (2004); *Cummings-El v. State*, 863 So.2d 246, 253 (Fla. 2003); *Anderson v. State*, 863 So.2d 169, 189 (Fla. 2003), *cert. denied*, 541 U.S. 940, 124 S.Ct. 1662, 158 L.Ed.2d 363 (2004); *Jones v. State*, 855 So.2d 611, 619 (Fla. 2003); *Rivera v. State*, 859 So.2d 495, 508 (Fla. 2003); *Davis v. State*, 859 So.2d 465, 480 (Fla. 2003); *Stewart v. State*, 872 So.2d 226 (Fla. 2003); *Conde v. State*, 860 So.2d 930, 959 (Fla. 2003), *cert. denied*, 541 U.S. 977, 124 S.Ct. 1885, 158 L.Ed.2d 475 (2004); *McCoy v. State*, 853 So.2d 396, 409 (Fla. 2003); *Owen v. Crosby*, 854 So.2d 182, 193 (Fla. 2003); *Fennie v. State*, 855 So.2d 597, 611 (Fla. 2003), *cert. denied*, 541 U.S. 975, 124 S.Ct. 1877, 158 L.Ed.2d 471 (2004); *Caballero v. State*, 851 So.2d 655, 664 (Fla. 2003); *Nelson v. State*, 850 So.2d 514, 533 (Fla. 2003), *cert. denied*, 540 U.S. 1091, 124 S.Ct. 961, 157 L.Ed.2d 797 (2003); *Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003); *Allen v. State*, 854 So.2d 1255, 1262 (Fla. 2003); *Wright v. State*, 857 So.2d 861, 878 (Fla.2 003), *cert. denied*, 541 U.S. 961, 124 S.Ct. 1715, 158 L.Ed.2d 402 (2004); *Blackwelder v. State*, 851 So.2d 650, 653 (Fla. 2003); *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003); *Cooper v. State*, 856 So.2d 969, 977 (Fla. 2003), *cert. denied*, 540 U.S. 1222, 124 S.Ct. 1512, 158 L.Ed.2d 159 (2004); *Pace v. State*, 854 So.2d 167, 172 (Fla. 2003), *cert. denied*, 540 U.S. 1153, 124 S.Ct. 1155, 157 L.Ed.2d 1049 (2004); *Butler v. State*, 842 So.2d 817, 834 (Fla. 2003); *Harris v. State*, 843 So.2d 856, 870 (Fla. 2003); *Lawrence v. State*, 846 So.2d 440, 456 (Fla.2003); *Banks v. State*, 842

decisions in *Bottoson v. Moore*, 833 So.2d 693, 694 (Fla. 2002) and *King v. Moore*, 831 So.2d 143, 144 (Fla. 2002), does not acknowledge this solid wall of precedent rejecting *Ring* claims.

Guardado presents no argument as to how there can possibly be any violation of his right to a jury trial where he had a jury in his penalty phase that recommended death by a vote of 12-0. (Vol II 298). Any arguments regarding the need for a unanimous jury recommendation do not apply to his case and he has no standing to raise such an issue. *Burch v. Louisiana*, 441 U.S. 130, 132, n.4 (1979)(holding that one of the defendants who was convicted by a unanimous six-person jury lacked standing to raise a non-unanimous challenge to his conviction). Guardado improperly asks this Court to reconsider its position regarding *Ring* in general rather than in his particular case.

So.2d 788, 793 (Fla. 2003); *Grim v. State*, 841 So.2d 455, 465 (Fla. 2003); *Lugo v. State*, 845 So.2d 74, 119 (Fla. 2003); *Jones v. State*, 845 So.2d 55, 74 (Fla. 2003); *Kormondy v. State*, 845 So.2d 41, 54 (Fla. 2003); *Doorbal v. State*, 837 So.2d 940, 963 (Fla. 2003); *Anderson v. State*, 841 So.2d 390, 408 (Fla. 2003); *Cole v. State*, 841 So.2d 409, 431 (Fla. 2003); *Conahan v. State*, 844 So.2d 629, 642 (Fla. 2003); *Spencer v. State*, 842 So.2d 52, 72 (Fla. 2003); *Porter v. Crosby*, 840 So.2d 981, 987 (Fla. 2003); *Lynch v. State*, 841 So.2d 362, 366 (Fla. 2003); *Lucas v. State*, 841 So.2d 380, 389 (Fla. 2003); *Fotopoulos v. State*, 838 So.2d 1122, 1136 (Fla. 2002); *Israel v. State,* 837 So.2d 381, 394 (Fla. 2002); *Bruno v. Moore*, 838 So.2d 485, 492 (Fla. 2002); *Marquard v. State*, 850 So.2d 417, 431 (Fla. 2002); *Chavez v. State*, 832 So.2d 730, 767 (Fla. 2002); *Washington v. State*, 835 So.2d 1083, 1091 (Fla. 2002); *Bottoson v. Moore*, 833 So.2d 693, 694 (Fla. 2002); *King v. Moore*, 831 So.2d 143, 144 (Fla. 2002).

Moreover, this Court has repeatedly observed that the prior violent felony aggravator takes a case outside the scope of *Ring*. *Marshall*, 911 So.2d at 1135 & n.6 (observing that even if *Ring* were to call Florida's jury override procedures into question, Marshall's nine prior violent felonies are an aggravating circumstance that takes his sentence outside the scope of *Ring*'s requirements and listing cases where the court relied on the presence of the prior violent felony aggravating circumstance when denying *Ring* claims); *Johnston v. State*, 863 So.2d 271, 286 (Fla. 2003)(stating that the existence of a "prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt"), *cert. denied*, 541 U.S. 946, 124 S.Ct. 1676, 158 L.Ed.2d 372 (2004). The prior violent felony aggravator was found in this case. Guardado had five prior convictions for various types of robbery. Guardado's prior convictions take his case outside the scope of *Ring*.

Guardado's reliance on *Marshall v. Crosby*, 911 So.2d 1129 (Fla. 2005), is misplaced. First, in *Marshall*, the Florida Supreme Court reaffirmed its position that Florida's death penalty statute is constitutional based on prior United States Supreme Court precedent. *Marshall*, 911 So.2d at 1134-1135. Moreover, in *Marshall*, the Florida Supreme Court explained that

the presence of the prior violent felony aggravating circumstance takes a death sentence outside the scope of *Ring*. *Marshall*, 911 So.2d at 1135 & n.6 (observing that even if *Ring* were to call Florida's jury override procedures into question, Marshall's nine prior violent felonies are an aggravating circumstance that takes his sentence outside the scope of *Ring*'s requirements and listing cases where the court relied on the presence of the prior violent felony aggravating circumstance when denying *Ring* claims). Here, as in *Marshall*, one of the aggravators was the prior violent felony aggravator. Even the concurrence and dissent in *Marshall* is of no use to Guardado. *Marshall* was an override case. *Marshall*, 911 So.2d at 1130 (noting that while the jury recommended life, "[t]he trial court, however, rejected the jury's recommendation and imposed a sentence of death."). This is not an override case. The jury recommended death by a vote of 12-0 in this case. It was the override aspect of the case that troubled both the concurrence and the dissent in *Marshall*. Justice Lewis, in his concurrence, reiterated his concern that a trial judge's override of a jury's life recommendation stands in apparent "irreconcilable conflict" with the holding of *Ring*. He believes that a "trial court simply cannot sentence a defendant to death through findings of fact rendered completely without, and in the case of a jury

override, directly contrary to, a jury's advice and input." The trial court in this case did not impose a death sentence directly contrary to the jury's advice and input. In this case, the trial court followed the jury's advice and input. The dissent in *Marshall* was also concerned about the override aspect of the case, albeit for the perceived failure to follow the *Tedder*[11] standard rather than *Ring*. No part of *Marshall* - the majority, the concurrence, or the dissent - applies to a case, such as this one, where there was a unanimous recommendation of death from the jury.

Guardado's reliance on *State v. Steele*, 921 So.2d 538 (Fla. 2005), is equally misplaced. In *Steele*, the Florida Supreme Court explained that, even if *Ring* applied in Florida, it would require only that the jury make a finding that at least one aggravator exists. Given the requirements of section 921.141 and the language of the standard jury instructions, such a finding is implicit in a jury's recommendation of a sentence of death. *Steele*, 921 So.2d at 546. The *Steele* Court relied on *Jones v. United States*, 526 U.S. 227, 250-251, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), in which the United States Supreme Court explained that in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct.

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[11] *Tedder v. State*, 322 So.2d 908 (Fla. 1975)

2055, 104 L.Ed.2d 728 (1989), "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." So, according to the Florida Supreme Court in *Steele*, a jury's recommendation of death means the jury found an aggravator, which is all *Ring* requires. Under the logic of *Steele* and *Jones*, even if the Florida Supreme Court receded from *Bottoson* and *King*, Guardado's death sentence would still comply with *Ring* because the jury in this case found an aggravator. The trial court properly denied the *Ring* challenge to Florida's death penalty statute.

Remedy

Guardado asserts that his case should be remanded for the imposition of a life sentence. IB at 48. This is not the appropriate remedy for a violation of the Sixth Amendment right to a jury trial. If a violation of the right to a jury trial occurs, which there was not in this case, the appropriate remedy is, of course, to provide the defendant with a jury. If the problem is that there was no jury, the solution is to get a jury, not let the defendant get an automatic life sentence regardless of how deserved the death penalty is. Double jeopardy is not a problem because the entire core of a *Ring*

claim is that the defendant did not have a jury decide the issue and therefore, he was not put in jeopardy in the first place. The very nature of a *Ring* claim means there was no first jeopardy. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003) (holding that although the Double Jeopardy Clause applies to capital sentencing hearings, it does not prohibit a second capital sentencing hearing when the first capital jury made no findings with respect to the aggravating circumstances because "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal'" and the jury's deadlock on whether to impose the death penalty which "made no findings with respect to the alleged aggravating circumstance" was a "non-result", not an acquittal). Imposition of a life sentence is not the correct remedy for a violation of *Ring*.

SUFFICIENCY OF THE EVIDENCE

Although not raised as an issue on appeal, this Court normally has an independent duty to address the sufficiency of the evidence for a conviction. *Buzia v. State*, 2006 WL 721612, *12 (Fla. March 23, 2006)(explaining that "[a]lthough Buzia has not challenged the sufficiency of the evidence, we have the independent duty to review the record in each death penalty case

to determine whether competent, substantial evidence supports the murder conviction); Fla. R. App. P. 9.142(a)(6)(stating: "In death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."). While normally this Court reviews the sufficiency of the evidence to sustain a conviction regardless of whether the issue is raised on appeal, this case is an exception. Guardado waived any insufficiency claim by entering a guilty plea and stipulating to the factual basis.

At the plea colloquy, the defendant waived the factual basis for the charges but the prosecutor preferred to state the factual basis. (Vol. III 28-29). The prosecutor then stated the factual basis of the charges in the indictment as: on September 13, 2004, the defendant entered the residence of Jackie Malone at 436 Thornton Road, DeFuniak Springs, Florida, armed with a knife and steel bar. (Vol. III 32). While inside, he bludgeoned Ms. Malone with the steel bar and stabbed her several times with the knife causing her death and obtained her purse with $80.00 U.S. Currency as well as her checkbook, cell phone and jewelry. (Vol. III 32). The prosecutor noted that on September 21, after being advised of his *Miranda* rights and after having public defender Mr. Platteborze appointed to advise him, Guardado

confessed to the murder and robbery of Ms. Malone. (Vol. III 32-33). Guardado did not object to any factual assertion made by the prosecutor during the plea colloquy.

His guilty plea was not an *Alford* plea. *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162 (1970)(explaining that an *Alford* plea is 'a plea containing a protestation of innocence when . . . a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.'). Guardado is not asserting his innocence. Indeed, Guardado testified at the penalty phase and admitted his guilt. Any claim of insufficiency of the evidence was affirmatively waived by entering a guilty plea and stipulating to the factual basis.

PROPORTIONALITY

Although not raised as an issue on appeal, this Court has an independent duty to address the proportionality of the death sentence. *England v. State*, 2006 WL 1472909, *14 (Fla. May 25, 2006)(noting: "this Court conducts a review of each death sentence for proportionality, regardless of whether the issue is raised on appeal."); Fla. R. App. P. 9.142(a)(6)(stating: "In death penalty cases, whether or not insufficiency of the

evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief.”). Here, there are five aggravators, including the prior violent felony aggravator, the CCP aggravator and the HAC aggravator. All three of these aggravators are weighty aggravators. There are no statutory mitigators present in this case. The death sentence is proportionate in this case.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the convictions and death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to W.C. McLain, 301 South Monroe Street Suite 401, Tallahassee FL 32301 this 22nd day of August, 2006.

_____

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.