IN THE SUPREME COURT OF FLORIDA

JESSE GUARDADO,

Appellant,

v.

CASE NO. SC05-2035
L. T. No. 6604-CC-903A

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR WALTON COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

W. C. McLAIN
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 606-8500

ATTORNEY FOR APPELLANT
FLA. BAR NO. 201170

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

CONSTITUTIONS

TABLE OF AUTHORITIES

PAGE(S)

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PRELIMINARY STATEMENT

The record on appeal consists of eight volumes. Volumes I and II contain the trial court clerk=s records and case pleadings.(Prefix AR@ in this brief) Volume III has two separately page numbered transcripts, one containing the plea hearing and other the hearing on death penalty motions. Volumes IV and V contains the transcripts of the penalty phase jury selection. Volumes VI through VIII contains the transcript of the penalty phase trial. Volume VIII also has two separately page numbered transcripts for the Spencer hearing and the sentencing hearing. All volumes containing transcripts will be referenced with the prefix AT@ and hearing identification if

needed for clarity. References to the appendix to this brief are designated with AApp.@

STATEMENT OF THE CASE AND FACTS

1.Procedural Progress Of The Case

A Walton County grand jury returned an indictment on October 14, 2004, charging Jesse Guardado with the first degree murder and robbery of Jackie Malone. (R1:5-6) On October 19, 2004, Guardado waived his right to a lawyer and pleaded guilty to both counts of the indictment. (T3:3-34) The court appointed defense counsel for purposes of representing Guardado for penalty phase and sentencing. (R1:17) A penalty phase jury was impaneled, and on September 15, 2005, the jury recommended a death sentence for the murder. (R2:298; T8:364-368) After a Spencer [v State, 615 So.2d 688 (Fla. 1993)] hearing (T8: *Spencer Hearing* 1-13), Circuit Judge Kevin C. Wells, on October 13, 2005, adjudged Guardado guilty, imposed a death sentence for the murder and 30 years imprisonment for the robbery. (R2:340-352; T8: *Sentencing Hearing* 1-35) (App. C)

The court filed a 13 page sentencing order explaining the aggravating and mitigating circumstances the court found. (R2:340-32)(App. A) In aggravation, the court found five circumstances:

(1) The capital felony was committed while the defendant was under a sentence or on conditional release.

(2) The defendant was previously convicted of a 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.

(4) The capital felony was especially heinous, atrocious or cruel.

(5) The capital felony was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification.

The court found no statutory mitigating circumstances, but 19

nonstatutory mitigating circumstances were found and weighed:

(1) The defendant entered a plea of guilty to the murder without a plea bargain. (great weight)

(2) The defendant fully accepted responsibility for his actions and blamed nobody else. (great weight)

(3) Expert testimony was that the defendant is not a psychopath and would not be a danger to others in prison. (moderate weight)

(4)The defendant could contribute to an open prison population and work as a plumber and as an expert in waste water treatment plant operations. (little weight)

(5)The defendant fully cooperated with law enforcement to quickly resolve this case. (great weight)

(6) The defendant has a good jail record while awaiting trial. (little weight)

(7) The defendant has consistently shown a great deal of remorse for his actions. (great weight)

(8) The defendant has suffered most of his adult life with an addiction problem to crack cocaine, which was the basis of his criminal actions. (some weight)

(9) The defendant has good family support system that could help him contribute to an open prison population. (moderate weight)

(10) The defendant testified that he would try to counsel other inmates to take different paths than what he has taken. (moderate weight)

(11)As a child, the defendant suffered a major trauma in his life by the crib death of a sibling. (moderate weight)

(12)As a child, the defendant suffered another major trauma in his life by being sexually molested by a neighbor. (moderate weight)

(13)The defendant has a lengthy history of substance abuse beginning in his early teenage years with substance abuse treatment commencing at age 14 or 15. (little weight)

(14) The defendant:s biological father passed away when the defendant was young and before the defendant developed lasting memories of him. (little weight)
(15)The defendant was raised by his mother, whom he considered loving and concerned, and by a stepfather, whom the defendant later came to respect. (little weight)

(16)The defendant was under emotional duress during the time frame of the crime. (little weight)

(17)The defendant does not suffer a mental illness or major emotional disorder. (little weight)

(18) The defendant offered to release his personal property, including his truck, to his girlfriend. (little weight)

(19) The defendant previously contributed to state prison facilities as a plumber and in waste water treatment work. (little weight)

A notice of appeal was filed on October 24, 2005. (R2:353)

2.Penalty Phase Trial

The State presented the circumstances of the homicide through the testimony of Investigator James Lorenz, who explained his investigation and presented the recorded

confession Jesse Guardado freely provided, and the testimony of the medical examiner, Dr. Andrea Minyard. (T6:24; T7:154) Additional witnesses testified about a prior attempted robbery which occurred on the same day as the homicide, victim impact information, and Guardado=s conditional release status. (T7:142, 146, 178, 186, 192, 196, 206) Judgments for four prior robbery convictions from Orange and Seminole Counties were also introduced. (T7:204-206)

On the morning of September 15, 2004, the body of Jackie Malone was discovered inside her home. (T6:24-25) Investigator James Lorenz of the Walton County Sheriff=s department responded to the residence. (T6:24-25) Malone=s body was laying behind the couch and there appeared to be several wounds to the head and bleeding around the nose, mouth, throat and chest. (T6:26-27) Investigation determined that some items were missing: a jewelry box, a briefcase, a purse, a wallet, a checkbook and a cell phone. (T6:28-29)

On September 21, 2004, Detective Forgione of the Niceville Police Department told Investigator Lorenz that Jesse Guardado wanted to speak to the someone from the Walton Sheriff=s Department because he had done something wrong. (T6:29-30,122) Forgione was investigating a different matter, and he had obtained consent to search Guardado=s truck which had been left

in a Wal-Mart parking lot. (T6:30) Lorenz contacted Guardado during the search of his truck, and after the search, Guardado left with Lorenz. (T6:30) While Lorenz rode in the back seat with Guardado, Guardado spontaneously said, AThat lady didn=t deserve what I did to her.@ (T6:30) Lorenz was not questioning him at that time. (T6:31) Guardado was tearful during this conversation. (T6:31) At that time, Lorenz told Guardado that he could not speak to him at that time because he had received a call that Assistant Public Defender Lenny Platteborze had contacted the sheriff=s department and wanted to speak to Guardado. (T6:31) Guardado consulted with Platteborze, and after the consultation, Guardado told the investigators that he wanted to talk to them, even though against the legal advice given to him. (T6:31) Investigators Lorenz, Roy and Garrett conducted a recorded interview during which Guardado confessed to killing Jackie Malone. (T6:32-102, 112-118)

Guardado told the investigators that he first met Jackie Malone after his release from prison in May of 2003. (T6:55) He had a job for the City of DeFuniak as water treatment plant operator.(T6:55) Jackie Malone was in the real estate business and also had some rental property. (T6:55-56) Guardado rented a mobile home from Malone. (T6:55-56) Later, Guardado moved and Malone released him from his rental contract. (T6:56) After a

failed relationship and a couple of problematic housing arrangements, Guardado returned to Malone for assistance. (T6:56-59) Malone allowed Guardado to stay in her own home for a few days until she offered him another rental property. (T6:59-60) During this time, Malone would also, on occasions, loan money to Guardado. (T6:59-60) Guardado said he had become addicted to crack cocaine, and the money he borrowed usually went to buy drugs. (T6:59-60)

On the night of the homicide, Guardado needed money. (T6:38-39) His truck was broken down, and he had to drive his girlfriend=s car. (T6:38-39) Since he still owed money to Malone, she had stopped loaning him money. (T6:40) He knew she usually had some cash in her wallet and he went to her house to take the money and kill her if necessary. (T6:39-40,52-53, 75) When he arrived at her house around 10:00 p.m., Malone was asleep. (T6:39, 74) He carried a breaker bar, a tool used to loosen tight nuts or bolts, which he had in his girlfriend=s car with the intent to use it to work on her front wheel. (T6:40, 51) Additionally, he carried an old kitchen knife he had found and usually kept in his truck. (T6:41) Guardado knocked on the door until Malone awoke and answered the door. (T6:39, 74) He asked to use her telephone, and she turned and walked back into the residence with the implied invitation for him to come inside.

(T6:40) When she turned, Guardado hit her in the head with the breaker bar. (T6:40, 74) He hit her repeatedly until she fell by the couch. (T6:41, 74) Guardado then tried to stab her in the heart, and finally, he cut her throat. (T6:41-43, 74) Because she did not bleed much from the throat cut, he thought she must have been dead. (T6:41-42) Guardado took Malone=s purse, briefcase and jewelry box and fled. (T6:44,75-76) He burned his clothes, the breaker bar and the knife in the woods, and he used the extra clothes he carried for work. (T6:45, 49-50, 77) After work the next day, Guardado cashed checks on Malone=s account at a store and used money to buy crack cocaine.(T6:46-48, 78-79)

Investigator Lorenz testified that Guardado was cooperative with law enforcement and seemed very remorseful for his actions. (T6:121-129) Guardado approached the officers and volunteered his confession, against the explicit advice of counsel not to talk the investigators. (T6:126) He did not ask for favors or a plea bargain in exchange for his statement. (T6:127) Guardado was tearful while talking about the crime and seemed to the investigator to be genuinely remorseful. (T6:126, 129) On one occasion, waiting in a patrol car while a search for evidence was made, Guardado suggested to the officer with him that she should let him run and then shoot him to end the pain for everyone involved. (T6:124) During the investigation, Guardado

provided information to assist in recovering physical evidence and also tried to provide information about drug crime activity in the area. (T6:128-129)

Dr. Andrea Minyard, the chief medical examiner, testified about the autopsy of Jackie Malone which had been performed by Dr. Karen Kelly, who was no longer working at the medical examiner=s office. (T7:154-156) Minyard testified that she had the notes, photographs and other materials related to the autopsy and was able to give her own opinion about the manner and cause of death. (T7:156-157) Minyard stated that Malone was a normally developed 75-year-old woman who had suffered several wounds to the head, neck, chest, hands, fingers, arms and buttocks. (T7:158) There were a total of twelve scrapes, bruises and lacerations to the head and face which appeared to be due to blunt force trauma. (T7:159-160) Some bruising also appeared underneath the scalp. (T7:160) Additionally, there were two incised wounds to the neck made with a sharp instrument. (T7:160) One of these wounds cut through to the windpipe. (T7:164) Five stab wounds were found to the chest. (T7:160) One incised wound made with a sharp instrument was found on the right hand. (T7:160-161) She also had fractures to the fingers of both hands. (T7:160) In Minyard=s opinion, the cause of death

was the stab wounds to the heart and the blunt head trauma.(T7:171)

Based on the wounds found to the hands, Minyard concluded that Malone was conscious a the time she was beaten and stabbed. (T7:171-172) She thought the fractures and incise wound to the hand were consistent with defensive wounds. (T171-172) However, Minyard agreed that the wounds may not have been defensive ones, and Malone could have lost consciousness quickly after the initial blows to the head. (T7:173-174) The fractures to the fingers could have happened upon the first blows to the head. (T7: 173) Malone could have fallen to the floor unconscious before the stabbing occurred, and her hand could have been laying on her chest and may have been in a position to be nicked during one of the stab wounds.
(T7:174) Minyard testified that the twelve blows to the head and the five stab wounds to the chest would have happened very quickly. (T7:174) The stab wound to the heart would have stopped the heart from beating in a couple of seconds. (T7:174-175) She also stated that with a quick attack and death, the suffering would have been very limited. (T7:175-176)

Four witnesses testified to victim impact evidence. (T7:178,186, 192, 196) Jackie Malone=s two sons, Mark Malone and Patrick Malone, Betsy Lindsay Malone, who developed a mother-

daughter relationship with Jackie Malone and changed her name, a friend and former business partner, Ray Padgett. (T7:178, 186, 192, 196) They testified that Jackie Malone was kind, loving and supportive of others. (T7:179, 187-188, 194-196, 197-198) She was always involved with her children and grandchildren. (T7:184, 187-189) She worked in real estate for much of her life, but she was active in many other areas to help people. (T7:180, 188-190, 197-200) She was interested in helping low-income people find housing, she helped people with their personal finances and sometimes loaned them money for them to be able to rent or buy a home. (T7:180-181,197-200) She worked as a guardian ad litem, served on the hospital board, and was active in the Democratic Party. (T7:180, 191, 197) She was active in her church and taught Sunday School. (T7:181-182)

The State presented certified judgments against Guardado for four prior robbery convictions from Orange and Seminole Counties from 1983 and 1989. (T7:204-206) Gilbert Fortner, a probation officer, testified that Guardado had been released from custody in January 2003, and was under Fortner=s supervision under conditional release at the time of the homicide. (T7:207-208) Also, the State presented testimony about an attempted robbery of a Winn Dixie store clerk, occurring on the same day as the homicide, to which Guardado pleaded guilty. (T7:142-151)

The defense presented the testimony of a clinical psychologist, Dr. James Larson. (T7:222) Larson conducted an evaluation of Guardado. (T7:228) He reviewed Guardado=s arrest reports, depositions, family background, criminal history, work history and the results of intelligence and personality testing. (T7:228-231) Intelligence testing placed Guardado in the upper part of the average range with a verbal score of 108, a performance score of 100 and a full scale score of 105. (T7:233-234) Larson found this consistent with his training in plumbing and waste water treatment plant operations. (T7:230-233) The personality testing and other evaluation lead Larson to conclude that Guardado was not suffering from major mental illness since he was not psychotic and did not have hallucinations. (T7:233-241) Larson did find depression which was consistent with Guardado=s circumstances. (T7:236-237) The personality testing showed elevated scores pertaining to addiction which was consistent with Guardado=s history of substance abuse beginning when he was 14 years-old.(T7:237-238) At the time of the homicide, Larson concluded that Guardado was under emotional distress due to job loss and adjustment problems, and he had relapsed into drug use **B**- including a two-week crack cocaine binge leading up to the homicide. (T7:242, 250) Larson found no symptoms that Guardado was a psychopath **B**- he took responsibility

for his actions and exhibited genuine remorse for what he had done.(T7:238-239, 243) Based own the psychological evaluation and Guardado=s prior successful prison life adjustment, Larson concluded that Guardado would lead a useful life in a prison setting. (T7:244)

Jesse Guardado testified in his own behalf. (T7:278) He briefly testified about his family and his own work history as a certified plumber and water plant operator while in prison. (T7:278-283) During the time he was out of prison on conditional release, Guardado had some adjustment problems. (T7:284-286) He had spent almost twenty-one total years incarcerated. (T7:285-286) The biggest problem he faced was learning different social skills **B**- to interact with other people. (T7:286) In prison, he learned to keep emotions to himself and always had to be guarded with others. (T7:286) His family helped him upon his release. (T7:2886-287) At first he lived in Mary Esther and worked in Crestview. (T7:288) He then obtained a job as a lead operator of a waste water plant in DeFuniak. (T7:288-289) He started drinking and was arrested for a D.U.I. , lost his job, but his conditional release was reinstated. (T7:290) For a time, he worked in construction and later obtained a job in Niceville with the waste water plant. (T7:292) During this time, Jackie

Malone had helped him with his living arrangements and helped him get the Niceville job. (T7:291-292)

Guardado said that he also started using crack cocaine. (T7:300) In the beginning, he used crack occasionally, but the frequency of use increased. (T7:300) His substance abuse history started when he was young until he went to prison. (T7:299-300) Although he had used cocaine when he was young, he had not used crack cocaine. (T7:291) Once out of prison, he started drinking first and then started crack. (T7:300) The two weeks prior to the homicide, Guardado said he was on a crack cocaine binge. (T7:301-302) He described that the crack cocaine cravings make you Acrazy with need.@ (T7:302) He had spent hours searching through carpeting on the floor looking for a small piece of crack which may have dropped. (T7:302) On the day of the homicide, he was desperate for money to buy crack. (T7:292, 302) First, he tried to rob the store employee during the day as the employee was stocking shelves. (T7:305-307) Guardado ran away when the employee called for help. (T7:306-307) Later that night, he committed the homicide. (T7:305-306)

Guardado was deeply remorseful for killing Jackie Malone. (T7:293-297) She had been good to him, and he took responsibility for his crime. (T7:293-297) He said he decided to

confess and plead guilty as a way to atone for his actions and to minimize the ordeal for her family. (T7:293-297)

3.Spencer Hearing

At the conclusion of the penalty phase trial, Guardado waived the right to a Spencer hearing. (T8:370-372) However, the court left the date for the hearing available. (T8:372) After the filing of sentencing memoranda from both sides, the State asked for a Spencer hearing and the Court scheduled the hearing. (T8: *Spencer Hearing*, 2)(App. B) Again, Guardado asked to waive the hearing, and the following transpired:

> THE COURT: Previously you told me you do not wish to present a Spencer hearing or have any further mitigation presented on your behalf; is that right?
>
> THE DEFENDANT: I have no knowledge of any further mitigation that I can present.
>
> THE COURT: Okay. So you don't know of any other witnesses or any other mitigation that's out there that you want to present today; is that what you're telling me?
>
> THE DEFENDANT: Your Honor, if I could have a chance to speak with you outside of the public -- without the attorneys present where things can be said?
>
> THE COURT: No, sir.
>
> THE DEFENDANT: Well, if you can't do that, then I have nothing further to say.
>
> THE COURT: Thank you, Mr. Guardado. I can't do that; I'm not allowed to speak to you.

THE DEFENDANT: I'd like to make it known that I do not wish to have a Spencer hearing; I wish for sentencing to be imposed today. I have asked this Court, from day one, that I wanted this to be over with as expediently as possible. And at every turn, it's been delayed, delayed, and delayed. I understand it's of grave concern, but it's time to put it to an end.

THE COURT: Does the Defense wish to present any further mitigation?
MR. ELMORE: If I may be heard, Judge? It's my understanding that at this juncture in a capital proceeding, if the defendant instructs his counsel not to present further mitigation, that the proper procedure is for Counsel to advise the Court of what mitigation Counsel is aware of that Counsel would further present.

THE COURT: Okay.

(T8: *Spencer Hearing*, 3-4)

* * * *

THE COURT: All right. Thank you, Mr. Elmore. All right. Mr. Guardado, are you in fact instructing your attorneys not to present any further mitigation on your behalf?

THE DEFENDANT: Your Honor, I think what I'm trying to do here is trying to inform the Court that I no longer have representation. I understand that they were appointed by the Court. And I'm making my wishes known to the Court now that I am no longer comfortable with the representation that I have received. I think it's been inadequate and ineffective; I've been shown great indifference. That's the plight that I'm facing. I -- I can't -- I can't, in all good conscience, let these people speak for me anymore.

THE COURT: Let me ask you this question: What evidence did they not present that you had wished that they would present on your behalf?

THE DEFENDANT: Once again, these are things that I can't discuss in a public environment. I have -- I can show you why I no longer feel comfortable with them representing me; I can inform you of that. It was in January when he was appointed to represent me; approximately nine months ago, almost ten.

THE COURT: "He "being Mr. Gontarek?

THE DEFENDANT: Yes, sir. In that time, he has spent less than an hour in actual conference with me; less than an hour. I realize that I had been transferred to a state facility and it was a longer ride for him; that -- that he has other things that he has to attend to. But for the past month, I have been here. I have constantly asked him for information about my case; I did not receive anything.

THE COURT: It seems this is the first time that you've ever raised this issue with me. I don't believe you raised this issue at the penalty phase, did you?

THE DEFENDANT: Your Honor, after -- when we had the motions heard and you ruled on the motion that day, when I went back at the end of that hearing, I had a conversation with my attorney at this table. And I don't know if the bailiffs were here or not at the time. Mr. Elmore was here and he remembers well; he come up on the end of the conversation between me and Mr. Gontarek, at which time I asked him, When will I see you; that, I need to speak to you. He told me he would see me Monday. Monday was trial day. I didn't get to see him no more; that was the end of it. When I got back to the cell that day, I had somebody to call and say I no longer wished him to represent me. I spoke to my mother. She was so distraught that I was going to go through this without counsel that, against my better judgment, I allowed him to continue. After witnessing his performance and the lack of evidence that he put on, other than a psychologist that I was sent to see -- that was the only rebuttal he put on.

THE COURT: What evidence did you want him to present that he did not present?

THE DEFENDANT: Again, Your Honor, I cannot bring these things to light in a public situation; I cannot bring these things to light until sentence is imposed. I know that puts a burden on Your Honor. That's why I've asked and asked and asked that this be done as expediently as possible.

THE COURT: I would ask you one more time to think about what -- Because this is your chance to tell me. And so what I'm asking you one more time is, what evidence did Mr. Gontarek or Mr. Cobb not present that you wanted them to present?

THE DEFENDANT: Well, I am not of a legal mind; I mean I don't have the legal training to stand in this courtroom and argue with either Mr. Elmore or Mr. Gontarek about legal issues. I have no -- I can't -- I readily submit that their knowledge in that area is greater than mine. But it has always been my understanding that in order for evidence to be testified to, that it should have been presented in the court, made evident in the court.

THE COURT: Okay.

THE DEFENDANT: During the penalty phase hearing, evidence was testified to that was not presented in the court. No objection was made by my attorney. I don't know if a penalty phase differs from a guilt phase aspect of a trial, but there was definitely testimony made that I considered to be detrimental to my well being that was not objected to by my counsel.

THE COURT: Okay. So that's your objection is that Mr. Gontarek did not object to some evidence that came about in the penalty phase?

THE DEFENDANT: That and at no point did he object to anything. I have a medical examiner that did not perform the autopsy. True; she got up there and stated her qualifications as an expert in that field, but she did not perform the autopsy. And several times during her testimony she referred to herself in

the first person as the person performing that autopsy, which no objections were made. These are all matters that are reflected by the record and -- and can be researched by the record. And there are several instances -- I feel that if I had not made an objection, that the autopsy photos themselves would have been displayed on the wall six inches from my head while I sat there, if I had not objected. The only reason that I see that a move was made is because I brought the matter to light. I feel that if my attorney did not have great indifference, he might have met his burden. I feel that there has been a great indifference shown to me by my attorney. I no longer feel comfortable with their representation, Your Honor. I'm going to ask, once again, that the State impose sentence today.

THE COURT: Thank you, Mr. Guardado. Mr. Gontarek, at this time I would ask: What mitigation would you present today at this Spencer hearing if Mr. Guardado wished you to; what do you have?

MR. GONTAREK: I'd like to present the written examination from Dr. Larson's report, which was supplied to Mr. Guardado and the State, but just to supplement his testimony.

THE COURT: All right. That will be received.

MR. GONTAREK: And that's it, Judge.

THE COURT: Okay. All right. Anything further, Mr. Guardado, that you would like to say?

THE DEFENDANT: Just that I want -- I'd like to be sentenced today; I'd like to have the matter resolved. It's been continued and carried forth too long.

THE COURT: Certainly; I understand your request. And I believe I'm going to expedite the sentencing hearing on my trial week. I'm going to put it in on my trial week October 13th at 9 o'clock back in the same courtroom. I would ask the attorneys to resubmit their sentencing memorandums that they had submitted to the Court to reflect any changes.

MR. GONTAREK: Yes, Judge.

MR. ELMORE: For the record, I'll not be filing any amendment. I don't believe Dr. Larson's report affects the State's argument as far as aggravating circumstances. There are a couple of historical matters contained in his report that he took from Mr. Guardado that the Court might deem mitigating regarding the defendant's history. It will be obvious to the Court what those are. And I have no objection to the Court finding those matters as mitigating and giving them whatever weight the Court deems appropriate.

THE COURT: All right. The Court will then be in recess and the sentencing date will be October 13th at 9 o'clock. Okay. If everyone will please stay in the courtroom until Mr. Guardado is transported out? Thank you.

THE DEFENDANT: Your Honor, is the Court refusing to accept the fact that I no longer wish to have Mr. Gontarek and Mr. Cobb to represent me; is that what I'm understanding?

THE COURT: That's right. I'm not going to relieve them at this time. Anything further to come before the Court?

MR. ELMORE: No, sir.

THE COURT: All right.

(T8: *Spencer Hearing*, 5-12)

4.Sentencing

The court held a sentencing hearing on October 13, 2005. (T8: *Sentencing Hearing*, 2-34)(App. C) The court started the hearing with asking counsel if there was any legal reason why sentence should not be imposed. ((T8: *Sentencing Hearing*, 2)

After receiving a negative answer, the court read its lengthy sentencing order. (T8: *Sentencing Hearing*, 2-33) At one point, Guardado personally objected, the court noted the objection and admonished Guardado not to interrupt. (T8: *Sentencing Hearing*, 18-19) Guardado said, AThen I ask to be excused from the courtroom.@ (T8: *Sentencing Hearing*, 19) The court denied the request and continued with the reading of the order.

When the court asked Guardado to stand for the actual pronouncement of sentence, the following exchange occurred:

> THE DEFENDANT: Will I have a chance to speak here?
>
> THE COURT: No, sir.
>
> THE DEFENDANT: I don=t have a chance to enter anything into the record?
>
> THE COURT: No, sir.

(T8: *Sentencing Hearing*, 32) The court announced the sentence, then asked if there was anything else to be addressed before the court adjourned. The lawyers answered in the negative. The following exchange between Guardado and the court occurred:

> THE DEFENDANT: The defendant would like to speak.
>
> THE COURT: Not at this time, Mr. Guardado.
>
> THE DEFENDANT: What time; if I=m not allowed to speak now and place my objections before the Court now, when will I be allowed to?
>
> THE COURT: Go ahead and take him out and they can fingerprint him at the jail.

(T8: *Sentencing Hearing*, 33-34)

SUMMARY OF ARGUMENT

1. Jesse Guardado had waived his right to counsel and represented himself when he entered a guilty plea to the charges in this case. He agreed to accept counsel for the penalty phase proceedings. After the penalty phase trial, Guardado expressly asked that his court-appointed counsel be removed from the case at the Spencer hearing. He asserted that his lawyer had performed incompetently, he did not trust him, and he no longer wanted his counsel=s representation. The trial court listened to Guardado=s complaints about his lawyer, but did nothing but acknowledge the complaints and proceeded with counsel still in place. The trial court failed comply with the procedures of Nelson v. State, 274 So.2d 256, 258-259 (Fla. 4th DCA 1974), requiring the court to offer the defendant the option of proceeding with appointed counsel or self-representation. The trial court=s forcing Guardado to proceed with appointed counsel violated Guardado=s constitutional right to represent himself. See, Amends. VI, XIV U.S. Const.; Art. I, Sec. 9, 16 Fla. Const.; Faretta v. California, 422 U.S. 806 (1975).

2. The evidence in this case was insufficient to establish the heinous, atrocious or cruel aggravating circumstance. Sec. 921.141(5)(h), Fla. Stat. According to the trial court=s findings and the testimony, the attack resulting in this

homicide occurred rapidly and the victim quickly lost consciousness. The court erroneously instructed the jury that it could consider the HAC circumstance on such facts. Additionally, in the sentencing order, the trial judge improperly found HAC as an aggravating circumstance.(The jury and the trial court improperly considered the HAC circumstance rendering Guardado=s death sentence unconstitutional. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

3. The evidence presented in this case was insufficient to establish the cold, calculated and premeditated aggravating circumstance. Sec. 921.141(5)(i), Fla. Stat. The trial court erroneously instructed the jury that it could consider this circumstance. Furthermore, in his findings of fact to support the death sentence, the trial judge improperly found CCP as an aggravating circumstance. The homicide was the product of a desperate, compulsive act the result of Guardado=s crack cocaine use and likely drug withdrawal at the time of the crime. There is no evidence that the homicide was planned after a time of cold reflection as the circumstance requires. See, Jackson v. State, 648 So.2d 85 (Fla. 1994); White v. State, 616 So.2d 21 (Fla. 1993)(defendant high on cocaine prevented CCP finding); Richardson v. State, 604 So.2d 1107 (Fla. 1992)(evidence of

calculation without evidence of cold reflection not enought for CCP). Guardado=s death sentence has been unconstitutionally imposed due to the jury=s and the trial court=s erroneous consideration of the CCP aggravating circumstance. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

4. The trial court erroneously denied a motion to dismiss the death penalty in this case because Florida=s death penalty statute was unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Guardado acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141 Florida Statutes unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute=s continued validity, because the United States Supreme Court previously upheld Florida=s Statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S.Ct. 657 (2002). Guardado asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida=s statute.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN NOT CONDUCTING A PROPER INQUIRY PURSUANT TO NELSON V. STATE, WHEN THE DEFENDANT ASSERTED THAT HIS COURT APPOINTED COUNSEL WAS PERFORMING INCOMPETENTLY AND THE DEFENDANT NO LONGER WANTED TO BE REPRESENTED BY COUNSEL.

Jesse Guardado had waived his right to counsel and represented himself when he entered a guilty plea to the charges in this case. (T3:3-34) He agreed to accept counsel for the penalty phase proceedings. After the penalty phase trial, Guardado expressly asked that his court-appointed counsel be removed from the case at the Spencer hearing. (T8: *Spencer Hearing*, 1-13)(App. B) He asserted that his lawyer had performed incompetently, he did not trust him, and he no longer wanted his counsel=s representation. (T8: *Spencer Hearing*, 5-12) The trial court listened to Guardado=s complaints about his lawyer, but did nothing but acknowledge the complaints and proceeded with counsel still in place. (T8: *Spencer Hearing*,5-12) Guardado asked the court, A[I]s the Court refusing to accept the fact that I no longer wish to have Mr. Gontarek and Mr. Cobb to represent me; is that what I=m understanding?@ The Court responded, AThat=s right. I=m not going to relieve them at this time.@ (T8: *Spencer Hearing*, 11-12) The trial court failed to comply with the procedures of Nelson v. State, 274 So.2d 256, 258-259 (Fla. 4th DCA 1974), requiring the court to offer the defendant the option

of proceeding with appointed counsel or self-representation. Guardado=s continued assertions of his desire to discharge counsel was a request to represent himself, as he had been allowed to do in an earlier stage of the case. The trial court=s forcing Guardado to proceed with appointed counsel violated Guardado=s constitutional right to represent himself. See, Amends. VI, XIV U.S. Const.; Art. I, Secs. 9, 16 Fla. Const.; Faretta v. California, 422 U.S. 806 (1975).

The issue of whether a defendant has been denied is constitutional right to self-representation is a question of law reviewed on appeal under the de novo standard.

When a defendant seeks to discharge his lawyer and a ground is an allegation of incompetence of counsel, the trial court is required to make a series of inquiries and to give the defendant certain advice. This procedure was established in Nelson v. State, 274 So.2d 256, 258-259 (Fla. 4th DCA 1974), and this Court later adopted the ANelson inquiry@ in Hardwick v. State, 521 So.2d 1071, 1074-1075 (Fla.), cert. denied, 488 U.S. 871 (Fla. 1988):

> If incompetency of 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 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.
> Nelson v. State, 274 So.2d 256, 258-59 (Fla. 4th DCA 1973) (citation omitted)

Hardwick, 521 So.2d at 1074-75, *quoting* Nelson.

As Nelson outlined, the trial judge must inquire into the complaints about counsel=s performance. If the complaints are well founded, and the court has reasonable cause to believe that counsel is rendering ineffective assistance, the court must discharge counsel and appoint substitute counsel. If the complaints are not well founded, the court then must explain to the defendant that he is not entitled to new appointed counsel and he has two options -- proceed with current counsel or if he still wishes to discharge counsel, represent himself. When a defendant persists in seeking to discharge counsel, such action is deemed a request to represent himself. Hardwick, at 521. If the defendant chooses self-representation, the court must conduct an inquiry of the defendant to insure a knowing and intelligent waiver of the right to counsel in accord with Faretta v. California,422 U.S. 806 (1975). Hardwick; Nelson; see, also, Bodiford v.State, 665 So.2d 315 (Fla. 1st DCA

1995)(reversal required where court failed to advise defendant of right to represent himself) ; Jones v. State, 658 So.2d 122 (Fla. 2d DCA 1995). Competency to adequately represent oneself is not the test for a waiver of counsel. Faretta; Godinez v. Moran, 509 U.S. 389 (1993).

The trial court failed to comply with Nelson, failed to acknowledge Guardado=s request to represent himself, and, as result, denied Guardado his constitutional right to represent himself. Neither Guardado=s assertions nor the trial court=s responses were ambiguous:

> THE COURT: All right. Thank you, Mr. Elmore. All right. Mr. Guardado, are you in fact instructing your attorneys not to present any further mitigation on your behalf?
>
> THE DEFENDANT: Your Honor, I think what I'm trying to do here is trying to inform the Court that I no longer have representation. I understand that they were appointed by the Court. And I'm making my wishes known to the Court now that I am no longer comfortable with the representation that I have received. I think it's been inadequate and ineffective; I've been shown great indifference. That's the plight that I'm facing. I -- I can't -- I can't, in all good conscience, let these people speak for me anymore.
>
> THE COURT: Let me ask you this question: What evidence did they not present that you had wished that they would present on your behalf?
>
> THE DEFENDANT: Once again, these are things that I can't discuss in a public environment. I have -- I can show you why I no longer feel comfortable with them representing me; I can inform you of that. It was in January when he was appointed to represent me; approximately nine months ago, almost ten.

THE COURT: "He "being Mr. Gontarek?

THE DEFENDANT: Yes, sir. In that time, he has spent less than an hour in actual conference with me; less than an hour. I realize that I had been transferred to a state facility and it was a longer ride for him; that -- that he has other things that he has to attend to. But for the past month, I have been here. I have constantly asked him for information about my case; I did not receive anything.

THE COURT: It seems this is the first time that you've ever raised this issue with me. I don't believe you raised this issue at the penalty phase, did you?

THE DEFENDANT: Your Honor, after -- when we had the motions heard and you ruled on the motion that day, when I went back at the end of that hearing, I had a conversation with my attorney at this table. And I don't know if the bailiffs were here or not at the time. Mr. Elmore was here and he remembers well; he come up on the end of the conversation between me and Mr. Gontarek, at which time I asked him, When will I see you; that, I need to speak to you. He told me he would see me Monday. Monday was trial day. I didn't get to see him no more; that was the end of it. When I got back to the cell that day, I had somebody to call and say I no longer wished him to represent me. I spoke to my mother. She was so distraught that I was going to go through this without counsel that, against my better judgment, I allowed him to continue. After witnessing his performance and the lack of evidence that he put on, other than a psychologist that I was sent to see -- that was the only rebuttal he put on.

THE COURT: What evidence did you want him to present that he did not present?

THE DEFENDANT: Again, Your Honor, I cannot bring these things to light in a public situation; I cannot bring these things to light until sentence is imposed. I know that puts a burden on Your Honor. That's why

I've asked and asked and asked that this be done as expediently as possible.

THE COURT: I would ask you one more time to think about what -- Because this is your chance to tell me. And so what I'm asking you one more time is, what evidence did Mr. Gontarek or Mr. Cobb not present that you wanted them to present?

THE DEFENDANT: Well, I am not of a legal mind; I mean I don't have the legal training to stand in this courtroom and argue with either Mr. Elmore or Mr. Gontarek about legal issues. I have no -- I can't -- I readily submit that their knowledge in that area is greater than mine. But it has always been my understanding that in order for evidence to be testified to, that it should have been presented in the court, made evident in the court.

THE COURT: Okay.

THE DEFENDANT: During the penalty phase hearing, evidence was testified to that was not presented in the court. No objection was made by my attorney. I don't know if a penalty phase differs from a guilt phase aspect of a trial, but there was definitely testimony made that I considered to be detrimental to my well being that was not objected to by my counsel.

THE COURT: Okay. So that's your objection is that Mr. Gontarek did not object to some evidence that came about in the penalty phase?

THE DEFENDANT: That and at no point did he object to anything. I have a medical examiner that did not perform the autopsy. True; she got up there and stated her qualifications as an expert in that field, but she did not perform the autopsy. And several times during her testimony she referred to herself in the first person as the person performing that autopsy, which no objections were made. These are all matters that are reflected by the record and -- and can be researched by the record. And there are several instances -- I feel that if I had not made an objection, that the autopsy photos themselves would have been displayed on the wall six inches from my

head while I sat there, if I had not objected. The only reason that I see that a move was made is because I brought the matter to light. I feel that if my attorney did not have great indifference, he might have met his burden. I feel that there has been a great indifference shown to me by my attorney. I no longer feel comfortable with their representation, Your Honor. I'm going to ask, once again, that the State impose sentence today.

THE COURT: Thank you, Mr. Guardado. Mr. Gontarek, at this time I would ask: What mitigation would you present today at this Spencer hearing if Mr. Guardado wished you to; what do you have?

MR. GONTAREK: I'd like to present the written examination from Dr. Larson's report, which was supplied to Mr. Guardado and the State, but just to supplement his testimony.

THE COURT: All right. That will be received.

MR. GONTAREK: And that's it, Judge.

THE COURT: Okay. All right. Anything further, Mr. Guardado, that you would like to say?

THE DEFENDANT: Just that I want -- I'd like to be sentenced today; I'd like to have the matter resolved. It's been continued and carried forth too long.

THE COURT: Certainly; I understand your request. And I believe I'm going to expedite the sentencing hearing on my trial week. I'm going to put it in on my trial week October 13th at 9 o'clock back in the same courtroom. I would ask the attorneys to resubmit their sentencing memorandums that they had submitted to the Court to reflect any changes.

MR. GONTAREK: Yes, Judge.

MR. ELMORE: For the record, I'll not be filing any amendment. I don't believe Dr. Larson's report affects the State's argument as far as aggravating circumstances. There are a couple of historical matters contained in his report that he took from Mr.

> Guardado that the Court might deem mitigating regarding the defendant's history. It will be obvious to the Court what those are. And I have no objection to the Court finding those matters as mitigating and giving them whatever weight the Court deems appropriate.
>
> THE COURT: All right. The Court will then be in recess and the sentencing date will be October 13th at 9 o'clock. Okay. If everyone will please stay in the courtroom until Mr. Guardado is transported out? Thank you.
>
> THE DEFENDANT: Your Honor, is the Court refusing to accept the fact that I no longer wish to have Mr. Gontarek and Mr. Cobb to represent me; is that what I'm understanding?
>
> THE COURT: That's right. I'm not going to relieve them at this time. Anything further to come before the Court?
>
> MR. ELMORE: No, sir.
>
> THE COURT: All right.

(T8: *Spencer Hearing*, 5-12)(App. B)

At the sentencing hearing on October 13, 2005, Guardado again attempted to assert his right to represent himself and tried to speak in his own behalf. (T8: *Sentencing Hearing*, 2-34)(App. C) He attempted to object at one point, but the court told him not to interrupt. (T8: Sentencing Hearing, 18-19) After the court read the sentencing order and was about to announce the sentence, Guardado again asked to speak, but the court denied his request:

> THE DEFENDANT: The defendant would like to speak.

> THE COURT: Not at this time, Mr. Guardado.
>
> THE DEFENDANT: What time; if I=m not allowed to speak now and place my objections before the Court now, when will I be allowed to?
>
> THE COURT: Go ahead and take him out and they can fingerprint him at the jail.

(T8: *Sentencing Hearing*, 33-34)(App. C)

The trial court=s failure to properly consider Guardado=s request to discharge his lawyers on the grounds of ineffective assistance and in failing to afford Guardado his option of self-representation violated Guardado=s right represent himself and due process. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Guardado urges this Court to reverse his sentence and remand his case for resentencing.

ISSUE II

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The evidence in this case was insufficient to establish the heinous, atrocious or cruel aggravating circumstance. Sec. 921.141(5)(h), Fla. Stat. According to the trial court=s findings and the testimony, the attack resulting in this homicide occurred rapidly and the victim quickly lost consciousness. The court erroneously instructed the jury that it could consider the HAC circumstance on such facts. (T7:212-217, 274; T8:351-352) Additionally, in the sentencing order, the trial judge improperly found HAC as an aggravating circumstance.(R2:340-352; T8: *Sentencing Hearing* 1-35)(App. A & C) The jury and the trial court improperly considered the HAC circumstance rendering Guardado=s death sentence unconstitutional. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Guardado now urges this Court to reverse his death sentence and remand for imposition of a sentence of life imprisonment.

The sufficiency of the evidence to support an aggravating circumstance is a question of law reviewed under the de novo standard.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court defined the aggravating circumstance provided for in Section 921.141(5)(h), Florida Statutes and the type of crime to which it applies as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to in- flict a high degree of pain with utter in- difference to, or even enjoyment of the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily tor- turous to the victim.

Ibid at 9. Later, in Cheshire v. State, 568 So.2d 908 (Fla. 1990), this Court further explained the HAC circumstance:

> The factor of heinous, atrocious or cruel is proper only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter in- difference to or enjoyment of the suffering of another.

568 So.2d at 912. To qualify for the HAC circumstance, Athe crime must be both conscienceless or pitiless and unnecessarily torturous to the victim.@ Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992).

The trial court made the following findings of fact in support of the HAC circumstance in this case:

4. **The capital felony was especially heinous, atrocious, or cruel(**A**HAC@).** See Section 921.141(5)(h) Florida Statutes. 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 Ms. Malone's home (including a few overnight stays when he was in between rentals) and 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 obtain crack cocaine for his personal use and recent crack cocaine binging,decided to go to 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 Ms. Malone's home. Ms. Malone had gone to bed for the night. When the 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 Ms. Malone turned away from the defendant to allow him to enter the house, the defendant then pulled the Abreaker bar@ from his pants behind his back and struck Ms. Malone with repeated brutal blows about her head. Ms. Malone raised herhand 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 a 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 and 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. The 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 the knife, including to her 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 of incarceration at Marianna, he had a job cutting beef, so he knew how to slash across the 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, (3)a subarachnoid hemorrhage, (4) at least two incised wounds on the neck, (5) stab wounds to the chest, (6)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 with 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's attempt 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 as 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 Apre-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, which would have rendered the victim unconscious from a few seconds to a couple of minutes for the time to fill up this 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 establishesbeyond 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 the 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 Mrs. 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>.

(R2:340-352)(App. A)

Contrary to the trial court=s conclusion, these facts do not establish the HAC circumstance. The wounds were administered rapidly, the victim became unconscious quickly. Dr. Minyard concluded that Malone was conscious a the time she was beaten and stabbed. (T7:171-172) She thought the fracture and incise wound to hands were consistent with defensive wounds. (T171-172) However, Minyard agreed that the wounds may not have been defensive ones at all, and Malone could have lost consciousness quickly after the initial blows to the head. (T7:173-174) The fractures to the fingers could have happened upon the first blows to the head. (T7: 173) Malone could have fallen to the floor unconscious before the stabbing occurred, and her hand could have been laying on her chest and may have been in a position to be nicked during one of the stab wounds. (T7:174) Minyard testified that the twelve blows to the head and the five stab wounds to the chest would have happened very quickly. (T7:174) The stab wound to the heart would have stopped the heart from beating in a couple of seconds. (T7:174-175) She also stated that with a quick attack and death, the suffering would have been very limited. (T7:175-176) Dr. Minyard=s testimony is consistent with the manner the homicide transpired as Guardado stated in his confession. (T6:32-102, 112-118) Additionally, the crime

scene did not show evidence of a prolonged struggle. (T6:25-29) This was not a homicide where the victim experienced long-lasting, severe pain. This was not a homicide where the manner of the killing was designed to produce suffering.

Guardado=s case falls within the category of cases in which this Court has disapproved the HAC circumstance where the victim suffered only a brief time before unconsciousness and death. See, Zakrewski v. State, 717 So.2d 488, 490, 492 (Fla. 1998)(victim struck unconscious before killed with blows to the head and strangulation); Brown v. State, 644 So.52 (Fla. 1994)(evidence on decomposed body showed three stab wounds which would not have caused immediate death) Elam v. State, 636 So.2d 1312 (Fla. 1994)(victim beaten with a brick and suffered defensive wounds in an attack which lasted about one minute and victim lost consciousness by the end of the attack); Rhodes v. State, 547 So.2d 1201 (Fla. 1989)(victim perhaps knocked out or semi-conscious at the time of her death by strangulation); Scott v. State, 494 So.2d 1134 (Fla. 1986)(victim run over and pinned under car and died by suffocation but evidence does not reveal if victim conscious at the time of suffocation); Jackson v. State, 451 So.2d 458 (Fla. 1984)(victim conscious only moments after first shot and not conscious when other acts over a time produced death);

Herzog v. State, 439 So.2d 1372 (Fla. 1983)(victim unconscious or semi-conscious and offered no resistence throughout the attack). Although this Court has approved the HAC circumstance in cases where the victim died from multiple stab wounds, those cases were accompanied by other facts, not present in this case, showing that the victim suffered for an extended time. Guzman v. State, 721 So.2d (Fla. 1998)(19 stab wounds, serveral hacking wounds, blunt force wounds causing skull fractures); Mahn v. State, 714 So.2d 391 (Fla. 1998)(multiple stab wounds and seversal defensive wounds); Belcher v. State, 851 So.2d 678 (Fla. 2003)(evidence of a struggle in two rooms and victim raped prior to strangulation and drowning which cause unconsciousness within a minute). The evidence in these cases contrasts with the evidence in Guardado=s case of a rapid attack which caused unconsciousness quickly. Application of the HAC circumstance to this case is not supported by the evidence.

The consideration of the HAC factor in the jury=s and trial court=s sentencing determination incorrectly skewed the process in favor of death. Guardado now urges this Court to reverse his death sentence and either remand for imposition of a life sentence or for resentencing before a newly empaneled jury.

ISSUE III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The evidence presented in this case was insufficient to establish the cold, calculated and premeditated aggravating circumstance. Sec. 921.141(5)(i), Fla. Stat. The trial court erroneously instructed the jury that it could consider this circumstance. (T7:212-217, 274; T8:352-353) Furthermore, in his findings of fact to support the death sentence, the trial judge improperly found CCP as an aggravating circumstance.(R2:344-345)(App.A) The homicide was the product of a desperate, compulsive act the result of Guardado=s crack cocaine use and likely drug withdrawal at the time of the crime. There is no evidence that the homicide was planned after a time of cold reflection as the circumstance requires. See, Jackson v. State, 648 So.2d 85 (Fla. 1994); White v. State, 616 So.2d 21 (Fla. 1993)(defendant high on cocaine prevented CCP finding); Richardson v. State, 604 So.2d 1107 (Fla. 1992)(evidence of calculation without evidence of cold reflection not enought for CCP). Guardado=s death sentence has been unconstitutionally imposed due to the jury=s and the trial court=s erroneous consideration of the CCP aggravating circumstance. Art. I, Secs. 9, 16, 17 Fla. Const.;

Amends. V, VI, VIII, XIV U.S. Const. Guardado now urges this Court to reverse his death sentence and remand for imposition of a sentence of life imprisonment.

The sufficiency of the evidence to support an aggravating circumstance is a question of law reviewed under the de novo standard.

This Court has defined the CCP aggravating factor as requiring the proof of four elements. See, Jackson v. State, 648 So.2d 85 (Fla. 1994); Walls v. State, 641 So.2d 381 (Fla. 1994). As discussed in Walls, the four elements are defined as follows:

> Under Jackson, there are four elements that must exist to establish cold calculated premeditation. The first is 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." Jackson [648 So.2d at 89] ...
>
> * * * *
>
> Second, Jackson requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." Jackson, ...
>
> * * * *
>
> Third, Jackson, requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder.

* * * *

> Finally, Jackson states that the murder must have "no pretense of moral or legal justification." ... Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide ...

Walls, at 387-388. The facts of this case fail to establish these elements. Rather than a planned killing acted upon after cool reflection, the evidence shows a killing likely committed while Guardado was suffering from crack cocaine withdrawal. Guardado is entitled to this reasonable conclusion from the evidence which negates the CCP circumstance. See, Mahn v. State, 714 So.2d 398 (Fla. 1998); Geralds v. State, 601 So.2d 1157 (Fla. 1992). The trial court=s conclusions to the contrary are not supported by the evidence, and the CCP circumstance should be disapproved.

In finding this aggravating circumstance, the trial court made factual and legal conclusions:

> 5. **The crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner without any pretense of moral or legal justification**. (ACCP@). See Section 921.141 (5)(i), Florida Statutes. 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 13th, 2004, and committed an attempted robbery with a knife against a store employee, but was left with no money because the employee-victim thwarted the 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 Sheriiff=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 night, because of their prior trusting relationship. During his confession, the defendant admitted that he Aknew what he was going to do@, or words to that effect, when he drove to Ms. Malone's home. Also, when asked by Walton County Sheriff's Investigator Roy if he planned to kill Ms. Malone, the defendant answered, to the effect, Ayes 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 cool or calm reflection; he also made no claim that he was in a frenzied frame 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 before the advisory jury, during the course of his initial meeting with the defendant and while seated in the back seat of the investigator's vehicle, the defendant made a spontaneous statement to him to the effect that, AThat lady did not 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 such spontaneous statement to the law enforcement investigator. This aggravating circumstance was proved beyond a reasonable doubt.

(R2:344-345)(App. A)

First, the cold reflecting state of mind necessary for this aggravating circumstance is not present in this case. The court properly found that Guardado was in a state of desperation due to his crack cocaine use and recent binge usage. (R2:344) However, the court improperly failed to recognize that this state of mind is the exact opposite of the Acool, calm reflection@ needed to prove this aggravating circumstance. See, e.g., Jackson v. State, 648 So.2d 85, 89 (Fla. 1994); White v. State, 616 So.2d 21 (Fla. 1993)(defendant high on cocaine prevented CCP finding); Richardson v. State, 604 So.2d 1107 (Fla. 1992)(evidence of calculation without evidence of cold reflection not enough for CCP). While the court noted some evidence of planning, the mere evidence of planning is not enough. *Ibid*. Without the

cold and calm state of mind, the circumstance is simply not applicable.

In the sentencing order, the court states that no evidence refuted that Guardado lacked the cool and calm reflection required for the aggravating circumstance. (R2:345) This is incorrect. Dr. James Larson testified that Guardado was under stress and summarized as follows:

> He describes **B**- and it makes since[sic] of you stop and think about it **B**- that he was under emotional duress in this time frame. He had been incarcerated most of his adult life; when he got out of prison, he didn:t know how to take a credit card and buy gas with it; he was out o touch with society. He got a D.U.I., lost a job, a job that he liked very much and was good at. He got another job and lost it. So he was having economic problems; he was having problems adjusting to society. And then he turned to his old habits of using cocaine and became **B**- He didn:t make it clear. I don:t consider him a drug addict. He relapsed and went on a crack cocaine binge for approximately two weeks prior to the alleged incident. So in that sense, I think he was under considerable stress prior to the incident.

(T7:242)

Guardado testified to his crack cocaine addiction, the two-week usage binge and the psychological desperation for more cocaine he experienced due to effects of the drug. His substance abuse history started when he was young, continuing until he went to prison. (T7:299-300) Although he had used cocaine when he was young, he had not used crack cocaine.

(T7:291) Once out of prison, he started drinking first and then started crack. (T7:300) In the beginning, he used crack occasionally, but the frequency of use increased. (T7:300) The two weeks prior to the homicide, Guardado was on a crack cocaine binge. (T7:301-302) He said the crack cocaine cravings made you Acrazy with need.@ (T7:302) At one point, he had spent hours searching through carpeting on the floor looking for a small piece of crack which may have dropped. (T7:302) On the day of the homicide, he was desperate for money to buy crack. (T7:292, 302) Earlier in the day he tried to rob the store employee as the employee was stocking shelves. (T7:305-307) Guardado ran away when the employee called for help. (T7:306-307) Later that night, he committed the homicide. (T7:305-306)

The cold, calculated and premeditated aggravating circumstance was not proven beyond a reasonable doubt. This Court has disapproved the CCP aggravating circumstance in other cases where the defendant=s cocaine use negated the calm, cool state of mind needed to establish this factor. See, White v. State, 616 So.2d 21 (Fla. 1993)(jury improperly instructed to consider CCP and judge improperly found CCP where defendant on cocaine at time of homicide); Penn v. State, 574 So.2d 1079 (Fla. 1991)(CCP not established in case where defendant on cocaine binge the night he murdered his sleeping mother with a

hammer). As in those cases, the jury and judge in Guardado's case should not have considered the CCP circumstance in the sentencing decision. Guardado now asks this Court to reverse his death sentence.

ISSUE IV

THE TRIAL COURT ERRED IN NOT DISMISSING THE DEATH PENALTY AS A POSSIBLE SENTENCE BECAUSE FLORIDA=S SENTENCING PROCEDURES ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

The trial court erroneously denied a motion to dismiss the death penalty in this case because Florida=s death penalty statute was unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). (R1:46-78, 169-170, 196; T3: *Hearing on Death Penalty Motions*, 6-9) Ring extended the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences to the capital sentencing context.

Guardado acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141 Florida Statutes unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute=s continued validity, because the United States Supreme Court previously upheld Florida=s Statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002) and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S.Ct. 657 (2002). Additionally, Guardado is aware that this Court has held that it is without authority to

correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So.2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida=s death penalty statutes with the constitutional requirements of Ring. See, e.g., Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005)(including footnotes 4 & 5, and cases cited therein); State v. Steele, 921 So.2d 538. At this time, Guardado asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida=s statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida=s death penalty scheme, and declare Section 921.141 Florida Statutes unconstitutional. Guardado=s death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

For the reasons presented in this initial brief, Jesse Guardado asks this Court to reverse his death sentence and to remand this case to the trial court with directions to impose a sentence of life imprisonment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Charmaine Millsaps, Assistant Attorney General, Criminal Appeals Division, The Capitol, PL-01, Tallahassee, Florida, 32399-1050, and to Appellant, Jesse Guardado, #324342, F.S.P., 7819 N.W. 228th St., Raiford, FL 32026-1160, , on this ____ day of May, 2006.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief has been prepared using 12 point Courier New, a font that is not proportionately spaced.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

_____
W. C. McLAIN
Chief, Capital Appeals
Florida Bar No. 201170
Leon Co. Courthouse, #401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 606-8500

ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF FLORIDA

JESSE GUARDADO,

Appellant,

v.

CASE NO. SC05-2035
L. T. No. 6604-CC-903A

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX

TO

INITIAL BRIEF OF APPELLANT

Appendix A	Sentencing Order dated October 13, 2005
Appendix B	Transcript of Spencer Hearing September 30, 2005
Appendix C	Transcript of Sentencing October 13, 2005