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In the Supreme Court of Florida

JESSE GUARDADO,

Appellant,

v. CASE NO. SC12-1040

STATE OF FLORIDA,

Appellee.
_____/

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

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, the defendant 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 a postconviction appeal in a capital case. The facts of this case, as recited in the Florida Supreme Court's direct appeal opinion, are:

> Guardado was indicted on charges of murder in the first degree and robbery with a weapon based on events occurring on or about September 13, 2004, in Walton County, Florida. Guardado pled guilty to both counts on October 19, 2004. Before the penalty phase, Guardado filed several motions that were denied, including a motion to declare Florida's death penalty unconstitutional. On September 12-15, 2005, a penalty phase jury convened and heard evidence in support of aggravating and mitigating factors.
>
> At the time these crimes were committed, Guardado had served time in prison, having been sentenced to twenty years for the crime of robbery with a deadly weapon in Orange County, Florida, and fifteen to twenty years for the crimes of robbery and robbery with a weapon in Seminole County, Florida. The Seminole County sentences ran concurrent with the Orange County sentence. He was placed on conditional release supervision on January 1, 2003, with the conditional release to expire on February 6, 2014.
>
> Guardado had known the victim of the present crimes, 75-year-old Jackie Malone, since 2003, and had rented places to live from her. Guardado had been a guest in her home, including a few overnight stays when he was between rentals. He received assistance from Ms. Malone on numerous occasions including financial assistance, and she had assisted him in getting the job with the local water treatment plant which he held at the time of the crime. Guardado knew certain things about Ms. Malone, including the fact that she kept some money on hand in her wallet.
>
> On the day in question, September 13, 2004, Guardado wanted to get high and continue his recent crack cocaine binge. Desperate for money to fix his truck and obtain drugs, Guardado decided to rob a local grocery store. His attempted robbery with a knife was thwarted by one of the employees. Still desperate for money, Guardado decided to rob and murder Ms. Malone that night because she lived in a secluded area and because she would open her home to him based on their prior trusting relationship.
>
> Guardado arranged to drive his girlfriend's vehicle to work for the night shift. He generally maintained a change of clothes in his girlfriend's car because of the nature of his work at the treatment plant. On this occasion he made sure

there were clothes in the car because a hurricane was due to make landfall in a few days. In addition to leaving clothes in the car, Guardado armed himself with a metal "breaker bar." He next drove to the parking lot at the Wal-Mart in DeFuniak Springs, where he got a kitchen knife from his disabled truck that was parked there. With both weapons in his possession, he then drove his girlfriend's car to Ms. Malone's house.

Ms. Malone had already retired for the night so Guardado continually knocked on her door to awaken her. Guardado identified himself by name when she came to the door. She greeted Guardado, and he told her he needed to use the telephone. When she turned away to allow him to enter the house, he pulled the "breaker bar," which was hidden behind his back in his pants, and struck her repeatedly about her head. Ms. Malone raised her hands in defense, and then fell to the living room floor. Ms. Malone did not die from the numerous blows with the "breaker bar," so Guardado pulled the kitchen knife and stabbed her several times, then slashed her throat.

Guardado said he hit her on the head with the "breaker bar" and thought that would have killed her, but it did not, so he hit her several more times. He also said that when she fell on the floor behind the couch it seemed she was not going to die so he stabbed her with the knife, including to the heart, so it would be over. However, Guardado confessed, "It just seemed not to go that way, she would not die." After beating and stabbing Ms. Malone, Guardado went to her bedroom, looked through her belongings for money and valuables, and took her jewelry box, briefcase, purse, and cell phone.

Dr. Minyard, a forensic pathologist and Chief Medical Examiner for Walton County, testified concerning the cause of death and her review of the autopsy report and photographs. Dr. Minyard testified that Ms. Malone suffered several injuries including (1) 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) five stab wounds to the chest, (6) a fracture of the finger, and (7) incised wounds to the right hand. The evidence further revealed Ms. Malone was conscious at least through the time that Guardado inflicted the stab wound to her heart. Dr. Minyard said the fracture and wounds to Ms. Malone's hands were consistent with the victim attempting to fend off repeated blows from the breaker bar and her attacker, by reaching or grabbing for the knife.

Guardado v. State, 965 So.2d 108, 110-111 (Fla. 2007).

The procedural history as recited by the Florida Supreme Court is:

> On September 15, 2005, the jury returned a unanimous recommendation that Guardado be sentenced to death. After the jury's advisory sentence, Guardado waived a *Spencer* hearing,[1] and the trial court found his waiver to be voluntary. The trial court stressed however, that Guardado would be offered another opportunity to present additional mitigation before sentencing. The trial court set final sentencing for September 30, 2005, and requested sentencing memoranda from the State and Guardado. The State requested a *Spencer* hearing despite Guardado's waiver of such a hearing. On September 30, 2005, over Guardado's continued assertion of waiver, the trial court held a *Spencer* hearing, received additional mitigation evidence, and set final sentencing for October 13, 2005.
>
> On October 13, 2005, based on the evidence presented at the penalty phase proceeding and the Spencer hearing, the trial court sentenced Guardado to death for the first-degree murder of Ms. Malone. On the count of robbery with a weapon, Guardado was sentenced to thirty years' imprisonment with the sentence to run consecutive to the murder count.
>
> The trial court made detailed findings on the aggravating and mitigating factors. The court found five aggravating factors: (1) the capital felony was committed by a person under sentence of imprisonment or on conditional release supervision; (2) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (to wit: armed robbery, April 9, 1984; robbery with a deadly weapon, July 6, 1990; robbery, January 23, 1991; robbery with a weapon, January 23, 1991; attempted robbery with a deadly weapon, February 17, 2005); (3) the capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or escape after committing, a robbery with a weapon; (4) the capital felony was especially heinous, atrocious, or cruel (HAC); and (5) the crime was committed in a cold, calculated and premeditated manner (CCP).
>
> Guardado did not ask the trial court to consider any statutory mitigating circumstances, and the trial court did not find any. The trial court did find nineteen nonstatutory mitigating factors (ten as requested by Guardado, seven additional ones based upon review and consideration of the

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

defense expert at the *Spencer* hearing, and two that were suggested by the State).[2] The trial court gave the jury's advisory sentence and recommendation great weight and considered and weighed the aggravating and mitigating circumstances. The trial court found, as did the jury, that

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[2] The nonstatutory mitigating factors and the weight given by the trial court are: (1) defendant entered a plea of guilty to first-degree murder without asking for any plea bargain or other favor in exchange (great weight); (2) defendant has fully accepted responsibility for his actions and blames nobody else for this crime (great weight); (3) defendant is not a psychopath pursuant to expert testimony and would not be a danger to other inmates or correctional officers should he be given a life sentence (moderate weight); (4) defendant could contribute to an open prison population and work as a plumber or an expert in wastewater treatment plant operations should he be given a life sentence (little weight); (5) defendant fully cooperated with law enforcement to quickly resolve the case to the point of helping law enforcement officers recover evidence to be used against him at trial (great weight); (6) defendant has a good jail record while awaiting trial with not a single incident or discipline report (little weight); (7) defendant has consistently shown a great deal of remorse for his actions (great weight); (8) 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) defendant has a good family and a good family support system that could help him contribute to an open prison population (moderate weight); (10) defendant testified he would try to counsel other inmates to take different paths than he has taken should he be given a life sentence (moderate weight); (11) as a child, defendant suffered a major trauma in his life by the crib death of a sibling (moderate weight); (12) as a child, defendant suffered another major trauma in his life by being sexually molested by a neighbor (moderate weight); (13) defendant has a lengthy history of substance abuse (marijuana and Quaaludes) during early teen years, graduating to alcohol and cocaine and substance abuse treatment beginning about age 14 or 15 (little weight); (14) defendant's biological father passed away before defendant developed any lasting memories of him (little weight); (15) defendant was raised by his mother, whom he always considered loving, thoughtful and concerned, and by a stepfather he later came to respect (little weight); (16) defendant was under emotional duress during the time frame of this crime (little weight); (17) defendant does not suffer a mental illness or major emotional disorder (little weight); (18) defendant offered to release his personal property, including his truck, to his girlfriend (little weight); and (19) defendant previously contributed to state prison facilities as a plumber and in wastewater treatment work (little weight).

> the aggravating circumstances outweighed the mitigating circumstances.

Guardado, 965 So.2d at 111-113 (footnotes included).

On appeal to the Florida Supreme Court, Guardado raised four issues: (1) whether the trial court properly denied appellant's request to discharge counsel at the *Spencer* hearing; (2) whether there was competent, substantial evidence to support the trial court's finding of the heinous, atrocious and cruel aggravating circumstance; (3) whether there was competent, substantial evidence to support the trial court's finding of the cold, calculated and premeditated aggravating circumstance; and (4) 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. The Florida Supreme Court affirmed the convictions and death sentence. *Guardado v. State*, 965 So.2d 108 (Fla. 2007).

Guardado then sought certiorari review in the United States Supreme Court raising the *Ring* claim. The United States Supreme Court denied certiorari review on February 19, 2008. *Guardado v. Florida*, 552 U.S. 1197, 128 S.Ct. 1250, 170 L.Ed.2d 90 (2008). So, Guardado's conviction and sentence became final on February 20, 2008.

On October 15, 2008, Guardado filed his first 3.851 motion in this Court raising eight claims. On May 29, 2010, Guardado's third state post-conviction counsel filed an amended motion for post-conviction relief raising four claims of ineffectiveness of trial counsel. On June 21, 2010, the State filed an answer to the 3.851 motion agreeing to an evidentiary hearing on all four claims with

the exception of some subclaims. On July 6, 2010, the trial court conducted a *Huff* hearing. The trial court determined that an evidentiary hearing should be conducted on all four claims but not on the *Witherspoon* excluded jurors claim. On November 21, 2011, the trial court conducted an evidentiary hearing on the claims.

Penalty phase

Investigator Lorenz testified. (Vol. VI 23-131). 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 them the place where he purchased the crack and they passed that information on to the narcotics unit. (Vol. VI 129).

At the penalty phase, 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 test, 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 2½ 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 convictions 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 particularly 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 aggravators. (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).

Spencer hearing

Prior to the *Spencer* hearing[3], Guardado stated his wish to waive the *Spencer* hearing. (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).

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 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).

Guardado 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).

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

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).

Evidentiary hearing testimony

At the start of the evidentiary hearing, post-conviction counsel withdrew claim I, which was a claim on ineffectiveness for not filing a motion to suppress. (Evid. H. at 6-7). Postconviction counsel Clyde Taylor requested that the court "take judicial notice" of four or five letters of support included in exhibit D of the original 3.851 motion filed by original post-conviction counsel, Ryan Truskosky. (Evid. H at 9). The letters were from Linda Synde Warren, the defendant's step-sister; Bennie Guardado, the defendant's brother; Darby Rents; and Donna Porter. (Evid. H at 9). Postconviction counsel stated that they were not going to testify and that two of these people were not available to testify due to health problems without particularly identifying them. (Evid. H at 11). The State objected (Evid. H at 11). The trial court took the request under advisement. (Evid. H at 11).

At the evidentiary hearing conducted in state court, eight witness were called to testify. Postconviction counsel called six witnesses to testify: 1) Rhodene Mathis, a retried warden with Florida Department of Corrections; 2) Pasty Umlauf, Guardado's mother; 3) Elizabeth Padgett, (née Darby Rentz), a friend; 4) Jesse Guardado, the defendant; 5) Joanna Johnson, a social worker who specializes in addiction; and 6) Greg Prichard, a mental health expert. Two of these witnesses testified telephonically - Colonel Mathis and Guardado's mother. And the State presented two witnesses: 1) defense counsel John Gontarek; and 2) Jason Cobb, co-counsel.

Rhodene Mathis, a retired warden with Florida Department of Corrections, testified that she worked at Sumter Forestry Camp for approximately ten years from 1996 until 2006. (Evid. H. at 18). She was a major at the camp and knew the defendant Jesse Guardado because Guardado was an inmate at the camp. (Evid. H. at 18-19). She could not recall whether Guardado was ever a discipline problem while at the camp or if he ever tested positive for drugs. (Evid. H. at 20-21). Basically she only recalled the name. (Evid. H. at 21). She testified that Guardado was a good worker. (Evid. H. at 21). She did not recall any discipline reports involving Guardado. (Evid. H. at 22). She may have been contacted regarding Guardado at the time of his trial but she could not recall who contacted her. (Evid. H. at 21,22). She could have pulled Guardado's records at the time and answered questions regarding his conduct at the time of the trial. (Evid. H. at 22). Major Mathis would have had access to Guardado's records and files at that time in 2005. (Evid. H. at 22).

On cross, she explained that Guardado would have had to meet the criteria for being in Sumter because it was a minimum security classification. (Evid. H. at 25-26). Guardado worked in the wastewater treatment plant which was tied to the institution itself while at Sumter. (Evid. H. at 26,27). There was not a whole lot she could add. (Evid. H. at 26).

Pasty Umlauf, Guardado's mother, also testified via telephone. (Evid. H. at 28-29). She lived in Wilmington, Ohio, at the time of the trial but visited Florida and traveled to DeFuniak Springs for the trial. (Evid. H. at 29, 30). Guardado's trial

attorney, Mr. Gontarek, had contacted her shortly before the trial. (Evid. H. at 30). While she was willing to testify, Mr. Gontarek told her that her testifying would upset Jesse, so she did not testify. (Evid. H. at 31). Jesse Guardado's sister, Linda, was also present for the trial but his brothers were not. (Evid. H. at 30).

She testified that there were trouble and deaths in the family when Guardado was young (Evid. H. at 34). His father died when Jesse was young and a brother died as well. (Evid. H. at 34). Guardado was in a juvenile facility because "he got involved with some wrong people" and began using drugs. (Evid. H. at 34). He had a drug problem from his early teens. (Evid. H. at 35).

His mother drove Guardado to Mary Ester, where an aunt lives, when he was released from prison. (Evid. H. at 35-36). Guardado got a job at a wastewater plant in Mary Ester; was not doing drugs; and "it was going well" initially. (Evid. H. at 36). Guardado was then offered a job at DeFuniak Springs in wastewater and fresh water. (Evid. H. at 36). The company offered moving expense and promises that he would move up quickly - it "sounded like the ideal situation." (Evid. H. at 37). Guardado moved to DeFuniak Springs. (Evid. H. at 37). He had no backup at his job and it was "increasingly hard for him." (Evid. H. at 38). Guardado began to have trouble coping with life outside prison. (Evid. H. at 38). He had a D.U.I. conviction and his mother felt it was drugs. (Evid. H. at 38). Guardado lost his job and he lost weight. (Evid. H. at 39).

She did not call probation to tell them she was worried about him. (Evid. H. at 39). She meet his first probation officer in DeFuniak, who died, but not the second probation officer. (Evid. H. at 40).

A former girlfriend of Guardado's, Donna Porter, emailed her about the murder. (Evid. H. at 39). She testified at the evidentiary hearing that she would have been willing to testify at the trial and was available because she attended the trial. (Evid. H. at 40).

On cross-examination, his mother testified that counsel did not tell her that Guardado did not want her to testify, just that counsel thought it would upset Guardado. (Evid. H. at 41). She remembered that her son initially refused counsel and pled guilty (Evid. H. at 42-43). She recounted that Guardado had "great remorse" and "he just didn't want any defense." (Evid. H. at 43). Her son resisted both her attempts and his attorney's attempts to present a defense but Guardado "finally" agreed to let Mr. Gontarek defend him. (Evid. H. at 43). She thought his defense was "very poor." (Evid. H. at 43). The prosecutor pointed out to her that defense Ex. # 2 in the penalty phase was a letter from her. (Evid. H. at 44).

She testified that Guardado wanted several other people called to testify that Mr. Gontarek did not call. (Evid. H. at 44). The prosecutor pointed out that Guardado refused to allow Mr. Gontarek to present more mitigation at the *Spencer* hearing. (Evid. H. at 45). She did not remember the details in the letter she wrote. (Evid. H. at 46). She had written that Guardado's drug problems

were the root of this but she had not mentioned his father and brother dying in the letter. (Evid. H. at 46).

Elizabeth Darby Padgett, (née Darby Rentz), a friend, testified in person. (Evid. H. at 47-48). Her friend Donna Porter was dating Guardado. (Evid. H. at 49). She meet Guardado in 2003. (Evid. H. at 49). She knew Guardado for six or nine months. (Evid. H. at 51). She described Guardado was "very pleasant"; "fun" and a "gentleman" (Evid. H. at 51). But Guardado started drinking "more and more." (Evid. H. at 52). Guardado was not the same person; there was "anger in his face" (Evid. H. at 52). Guardado was using meth and crack cocaine. (Evid. H. at 52). She was aware that he was arrested for DUI about this time. (Evid. H. at 52). She was living with Donna Porter and Porter's new boyfriend, John Renfro at this time. (Evid. H. at 53).

Guardado lived there also after he was released from jail for the DUI, sleeping on the couch in the den. (Evid. H. at 53). Donna's new boyfriend did not want him there and he was "doing things" (Evid. H. at 55). Guardado when he was living with them would come home under the influence of drugs and alcohol which was a complete change from his behavior when she first met him. (Evid. H. at 56). Guardado was on a "downhill slide." (Evid. H. at 55).

Guardado's attorneys did not contact her to testify. (Evid. H. at 56). No investigator contacted her either. (Evid. H. at 56). Dr. Larson, who testified as the defense mental health expert at the penalty phase, did not contact her either. (Evid. H. at 56).

On cross-examination, she testified that Donna Porter's statement to the sheriff that she had stopped dating Guardado 18

months prior to the murder did not "sound right." (Evid. H. at 57). She thought it was not that long before the murder. (Evid. H. at 58). She could not recall the date of Guardado's arrest for DUI. (Evid. H. at 58).

She wrote a letter on Guardado's behalf at one time. (Evid. H. at 59). She did not recall whether she wrote the letter before or after the death sentence was imposed. (Evid. H. at 59). She wrote the letter when Donna Porter told her that she was writing a letter and then she offered to write one also. (Evid. H. at 59). She faxed a copy of the letter to the Judge. (Evid. H. at 60).

On redirect, post-conviction counsel introduced the letter as exhibit #1 (Evid. H. at 62). The letter was dated September 24, 2008. (Evid. H. at 63). She signed the letter as Darby Rentz. (Evid. H. at 64). Her letter expressed the sentiment that it was not Guardado but drugs that killed Jackie. (Evid. H. at 64). She stated that Guardado would not "ever hurt someone, much less kill them." (Evid. H. at 65). She was not aware that Guardado broke into Donna Porter's home. (Evid. H. at 64). She did not attend the trial nor did she hear the details of Guardado's confession (Evid. H. at 65). She did not know the details of Guardado's prior conviction either. (Evid. H. at 65). When informed that the prior crimes were robberies, she responded that "but he was young back then." (Evid. H. at 66).

The defendant, Jesse Guardado, testified in his own behalf at the evidentiary hearing. (Evid. H. at 67). At first, he represented himself *pro se* and entered a plea. (Evid. H. at 68). But recognizing the depth and amount of legal points and talking

with his mother, he requested that an attorney be appointed for the penalty phase. (Evid. H. at 68). Mr. Gontarek was appointed. (Evid. H. at 68). His meetings with Mr. Gontarek were "few and far between" and he may "have seen him six times for a total of an hour." (Evid. H. at 69). Because Guardado had already entered a plea pro se, Mr. Gontarek's representation was limited to the penalty phase. (Evid. H. at 69-70). Mr. Gontarek did not ask him for information, rather Mr. Gontarek emphasized the importance of cooperating fully with Dr. Larson. (Evid. H. at 70).

Guardado testified that he gave Mr. Gontarek names of associates to contact. (Evid. H. at 70). He remembered giving the names of Darby Rentz, Donna Porter, and Lois Reichle to Mr. Gontarek. (Evid. H. at 71). Guardado, however, "probably" told his attorney not to bother Lois because of a brain aneurysm and problems with her emotional stability. (Evid. H. at 71). Guardado could not remember whether he gave Mr. Gontarek the name of his employers because it had been over seven years ago. (Evid. H. at 71).

He also talked to Mr. Gontarek about character witnesses from D.O.C. because he had been in prison most of his adult life, they were the people who knew him best. (Evid. H. at 72). He had spent approximately 22 years in prison. (Evid. H. at 73). Guardado gave Mr. Gontarek the names of Major Mathis, Mark Mestrovich, and John Harris from Sumter. (Evid. H. at 72). He only had one Disciplinary Reports (D.R.s) at Sumter but the lab said it was a false positive. (Evid. H. at 72-73).

He also testified that Mr. Gontarek told him that he did not want his mother to testify because the prosecutor would "go at her

in an aggressive manner" which might upset Guardado. (Evid. H. at 70). Guardado never told Mr. Gontarek to call his mother; rather, he "deferred to Mr. Gontarek in all matters to his expertise." (Evid. H. at 70). He followed him - whatever Mr. Gontarek told him, he went with. (Evid. H. at 71).

Guardado testified that very little was explained to him about the mental health expert's role. (Evid. H. at 73). He did not know what his function was. (Evid. H. at 74). Approximately ten days after his arrest, Guardado gave a confession. (Evid. H. at 74). He was coming down from a cocaine binge at the time he confessed. (Evid. H. at 74). At the time he knew what was happening. (Evid. H. at 74). He tried to get an understanding of why he did what he did from Dr. Larson. (Evid. H. at 75). Guardado stated that it was "not in his nature to be that aggressive." (Evid. H. at 75). He noted that he had a history to violent crimes including armed robberies. He acknowledged "to be successful as an armed robber, you have to be aggressive" but that there was no actual violence in any of his prior crimes. (Evid. H. at 75).

Guardado testified that Mr. Gontarek did not explain the concept of statutory aggravators to him. (Evid. H. at 76). The time they spent together was "minimal at best." (Evid. H. at 76). He only meet with co-counsel Mr. Cobb in the courtroom. (Evid. H. at 76). He was given Cobb's telephone number and told to call co-counsel Cobb with any questions. (Evid. H. at 76). He tried to call but the call was not accepted because it was a collect call from the jail. (Evid. H. at 76). He attempted to call Mr. Gontarek several times but could only reach his secretary. (Evid. H. at 18). The

attorney/client relationship got worse over time and Guardado became "more and more frustrated." (Evid. H. at 77,78). Mr. Gontarek told him that he and Judge Wells had tried cases together, so he thought everything was good. (Evid. H. at 77-78).

During jury selection, which was conducted in the judge's chambers, he and both his attorneys were present. (Evid. H. at 79). Guardado did not tell Mr. Gontarek which jurors he wanted; rather, he left that decision to Mr. Gontarek because he was "the expert." (Evid. H. at 80). He did not recall the choice between juror #8 and juror #15 or any discussions regarding the choice. (Evid. H. at 80). He remembered that the victim was the realtor of the son of one of the jurors, Pamela Pennington. (Evid. H. at 18). He did not personally approve that juror serving. (Evid. H. at 81). His attorneys did not consult with him about the individual jurors.

Juror Hall knew three of the officers involved in the investigation - Captain Sunday, Rome Garrett, and James Lorenz. (Evid. H. at 18). Officer Lorenz bought insurance from juror Hall in the past. (Evid. H. at 81). Guardado did not remember being asked about retaining juror Hall by his attorneys. (Evid. H. at 82).

The conversation Guardado remembered having with his attorneys during jury selection was about the foreman of the jury who was a woman, who had been "associated with law enforcement in some fashion." (Evid. H. at 82). Guardado testified that his attorney told him that jurors with a law enforcement background would be good jurors because they would be objective and view things impartially. (Evid. H. at 82,83).

Juror William Cornelius informed the court that his great aunt and uncle were killed at Maxwell Air Force Base. (Evid. H. at 83-84). The attorneys did not consult with him about the individual jurors. (Evid. H. at 84). Guardado testified that he would not want jurors whose family members were homicide victims. (Evid. H. at 84). Guardado testified he had no say in the decision to keep William Cornelius on the jury. (Evid. H. at 84).

Guardado testified as to his life-long drug use. (Evid. H. at 84). "Pretty much" any time he was free, he was using. (Evid. H. at 84-85). He started drinking as a teenager and was using marijuana in junior high school (Evid. H. at 85). He was using cocaine intravenously by 16 years of age. (Evid. H. at 85). He did not explain his history of drug use to his attorneys because "the opportunity never presented itself." (Evid. H. at 85). He did discuss his history of drug use with Dr. Larson. (Evid. H. at 86). He told his lawyers that he was on a binge when the murder occurred. (Evid. H. at 86).

He was released from Sumter Forestry Camp on January 1, 2003. (Evid. H. at 87). He met the victim Ms. Malone who got him a trailer down off 90. (Evid. H. at 88). His original probation officer, "who was like a bloodhound" died. (Evid. H. at 88). He only recalled two drug tests being performed on him while he was on probation. (Evid. H. at 88). His new probation officer did not regularly check on him. (Evid. H. at 89). He started dating Donna Porter. (Evid. H. at 89). His drinking "got more and more involved." (Evid. H. at 90).

The backup that his employer promised him did not materialize. (Evid. H. at 90). On one occasion a one-ton cylinder of chlorine was leaking (Evid. H. at 91). There are supposed to be two people to deal with such a leak but he could not get a second person and he "wrestled with that one-ton cylinder all night." (Evid. H. at 91). He did not pay him for his numerous hours of overtime but would make it up to him down the road. (Evid. H. at 91).

He became more stressed and ran back to drugs and alcohol. (Evid. H. at 91). He was using crack daily and finding the next one was his main purpose. (Evid. H. at 92). He lost his job with the City of Defuniak because he had a DUI while on call. (Evid. H. at 92). He had to rewire this 440 pump and electricity was his weakest skill. (Evid. H. at 92-93). When he was going home he was pulled over for DUI and lost his job. (Evid. H. at 93). On the night of the murder he had been drinking and drugging. (Evid. H. at 93).

On cross-examination, the prosecutor asked what kept Guardado from telling his attorneys all of this. (Evid. H. at 94). Guardado responded that it was the lack of time spent with his attorneys. (Evid. H. at 94). Assistant Public Defender Lenny Platteborze first represented Guardado. (Evid. H. at 95). APD Platteborze advised Guardado immediately before his confession, not to talk with the officers. (Evid. H. at 95). Guardado rejected that advice and told APD Platteborze to leave. (Evid. H. at 95). The prosecutor's point was that Guardado clearly let his attorney know what he wanted to do and Guardado responded: "No. well, yeah, I guess you could say that." (Evid. H. at 96).

His mother begged him to be represented rather than appear *pro se*. (Evid. H. at 97). He considered having Mr. Gontarek dismissed but his mother begged him to keep counsel. (Evid. H. at 98). Guardado wanted counsel because he was in "over his head." (Evid. H. at 98). He did not see how Dr. Larson's tests were going to benefit him. (Evid. H. at 98).

Guardado insisted that he did not tell his attorney that he did not want his mother called to testify. (Evid. H. at 99). Rather, according to Guardado, Mr. Gontarek did not want his mother to testify for fear of his reaction to the prosecutor's cross-examination of his mother. (Evid. H. at 98). The prosecutor noted that at the *Spencer* hearing, Guardado was personally asked whether there was any additional mitigation that he wanted to present (Evid. H. at 101). Guardado stated that he become so flustered at the judge's questions, he just thought whatever. (Evid. H. at 101).

The prosecutor inquired as to what Guardado meant when he said at the *Spencer* hearing there was mitigation that he could not present in public. (Evid. H. at 101). Guardado requested the assistance of postconviction counsel to answer this question (Evid. H. at 101-102). He had the first inklings of being upset with Mr. Gontarek during the penalty phase. (Evid. H. at 102). Guardado was upset with Mr. Gontarek because he had laryngitis during the penalty phase. (Evid. H. at 103). He was also upset with Dr. Larson's testimony. (Evid. H. at 103). Guardado stated that he still did not want to talk about the additional mitigation in a public forum. (Evid. H. at 105). Guardado stated that he had

spoken with Dr. Larson; Dr. Prichard; and Ms. Johnson about the additional mitigation but he did "not wish to discuss it in an open forum like this one." (Evid. H. at 105). He became flustered at being struck down. (Evid. H. at 105).

Guardado relied on Mr. Gontarek's assurance that it would all be fine. (Evid. H. at 107-108). Mr. Gontarek told Guardado not to worry (Evid. H. at 108). Guardado felt that Mr. Gontarek led him to believe that he would get a life sentence by his "manner of talking." (Evid. H. at 108). Guardado admitted that Mr. Gontarek never explicitly assured him he would get a life sentence but he led Guardado to believe that he had "an inside track into getting this done." (Evid. H. at 108). His impression was that he would get a life sentence and he became "more and more upset, confused and frustrated" as it become clearer and clearer that he was going to get a death sentence. (Evid. H. at 108).

Guardado admitted that he was happy with the final jury selected. (Evid. H. at 108-109). Guardado admitted that he never said I don't want any of the three jurors that he is now challenging in the postconviction proceedings to Mr. Gontarek during the jury selection. (Evid. H. at 110). Guardado was not captain of the ship; rather, he deferred to Mr. Gontarek. (Evid. H. at 110-111). Guardado trusted Mr. Gontarek's judgment regarding jury selection. (Evid. H. at 111-112). Guardado did tell his attorney to strike a prospective juror who was glaring at him, which Mr. Cobb agreed to strike. (Evid. H. at 112). The prosecutor asked about what was happening in the jail and Guardado again asked for guidance from postconviction counsel before answering the

question. (Evid. H. at 113). Guardado said it was about treatment he was receiving at the jail. (Evid. H. at 114). On redirect, Guardado testified that he was totally dissatisfied with his lawyers by the time the *Spencer* hearing occurred. (Evid. H. at 115).

Co-counsel Jason Andrew Cobb then testified. (Evid. H. at 116-117). He was second chair counsel. (Evid. H. at 117). He was appointed in 2005. (Evid. H. at 117). Counsel Cobb had been a prosecutor for three years and a criminal defense attorney since 2001. (Evid. H. at 117-118). Cobb had never tried a capital penalty phase before. (Evid. H. at 118). He informed lead counsel, Mr. Gontarek, that he would like to gain experience and he had a local office in Defuniak; whereas, Mr. Gontarek's office was in Niceville or Valparaiso. (Evid. H. at 118,134). They went to the jail together to talk with Guardado. (Evid. H. at 118). They discussed penalty phase in capital cases. (Evid. H. at 119). Mr. Gontarek and Mr. Cobb discussed Guardado's stated desire not to have a penalty phase. (Evid. H. at 119). They explained that waiving the penalty phase required an additional hearing (Evid. H. at 119). They discussed mitigation. (Evid. H. at 122). The meeting lasted "at least an hour or possibly more." (Evid. H. at 123). Mr. Cobb meet with Guardado at a minimum two times at the jail. (Evid. H. at 123). The second meeting at the jail that Mr. Cobb had with Guardado was in response to Mr. Guardado's call about problems with visitation that he was having at the old jail. (Evid. H. at 123). Guardado had already entered a guilty plea at the time of his appointment (Evid. H. at 123). His role was to be the

connection between Mr. Gontarek and Guardado because Mr. Gontarek's office was not local. (Evid. H. at 124). Guardado was being held in solitary due to the nature of the charges and his phone calls were limited. (Evid. H. at 124). Mr. Cobb explained to Guardado that he could not make the jail change its policies. (Evid. H. at 125). These meetings occurred prior to the penalty phase on September 12 through September 14, 2005. (Evid. H. at 126).

Guardado never suggested any particular mitigation to them. (Evid. H. at 128). The focus of the mitigation was Dr. Larson's testimony and arguing to the jury that Guardado took responsibility for the crime and spared the victim's family a trial. (Evid. H. at 128). All three, Guardado and his two attorneys, discussed this mitigation, at the second meeting. (Evid. H. at 128-129). Mr. Cobb testified that Mr. Gontarek had "a lot more experience." (Evid. H. at 129). There was no mitigation that Guardado suggested that counsel refused to present. (Evid. H. at 129).

Regarding the glaring juror during jury selection, Mr. Cobb testified that that juror was stricken either for cause or peremptorily. (Evid. H. at 129-130). Mr. Cobb testified that he wrote notes to Guardado about the various jurors seeking his input. (Evid. H. at 130). Mr. Cobb testified that Guardado was actively involved in jury selection. (Evid. H. at 130). Guardado brought the glaring juror to the attention of Mr. Cobb via a note. (Evid. H. at 130). They discussed the positives and negatives of various jurors. (Evid. H. at 130). Guardado agreed with this attorney's choice of jurors. (Evid. H. at 131). While Mr. Gontarek made the

ultimate choices regarding the jurors, he conferred both with co-counsel Cobb and defendant Guardado. (Evid. H. at 131).

Mr. Cobb spoke with the defendant's mother and Donna Porter. (Evid. H. at 131). Ms. Porter did not want to testify. (Evid. H. at 131). Mr. Cobb was aware that he could have subpoenaed Ms. Porter. (Evid. H. at 132). He spoke with Guardado's mother on the telephone (Evid. H. at 144). He did not contact other family members. (Evid. H. at 144). He did not meet with either the investigator or Dr. Larson. (Evid. H. at 144).

Mr. Cobb discussed presenting prison history as mitigation. (Evid. H. at 132). They wanted to highlight that Guardado had the skill of wastewater management that he could use in prison. (Evid. H. at 132-133). Guardado himself testified as to this skill at the penalty phase. (Evid. H. at 133).

On cross-examination, Mr. Cobb testified that he was appointed in August 8, 2005 to be co-counsel. (Evid. H. at 135). This was about one month prior to the September 12, 2005 penalty phase. (Evid. H. at 135). Guardado told his attorney that he wanted the death penalty. (Evid. H. at 137). Guardado wanted to waive the penalty phase. (Evid. H. at 139). He wanted to be executed. (Evid. H. at 139).

Mr. Cobb characterized his role of being more of a paralegal or babysitter to a defendant who "complained continuously about minimal things." (Evid. H. at 139-140). Guardado's constant complaining was interfering with Mr. Gontarek's ability to prepare. (Evid. H. at 140).

Regarding juror Cornelius, whose great aunt and uncle were homicide victims, he had some positive aspects as a juror that outweighed this consideration. (Evid. H. at 141). Mr. Cobb did not recall the exact nature of the positive but he recalled that the juror was discussed with Guardado. (Evid. H. at 141). Regarding juror Earl Hall, who knew three of the police officers involved in the case, Mr. Cobb testified that he did not recall that particular juror. (Evid. H. at 141). But if Guardado did not like a particular juror he would write Mr. Cobb a note and the three of them would talk about that particular juror. (Evid. H. at 141). Regarding juror Pamela Pennington, who was a friend of the victim, Mr. Cobb did not recall her but he recalled that all of the jurors were discussed with Guardado. (Evid. H. at 142-143).

On redirect, Mr. Cobb clarified that Mr. Guardado did not want his attorneys to meet with his family. (Evid. H. at 144-145). Juror Cornelius had expressed the opinion that he was only somewhat in favor of the death penalty and that from his knowledge of the harsh conditions in prisons, life could be a harsher sentence than the death penalty. (Evid. H. at 145). Regarding juror Hall, they were not attacking the credibility of any officer because Guardado had entered a guilty plea. (Evid. H. at 145-146). So, a juror knowing some of the officers involved was not a problem. (Evid. H. at 146). Juror Pennington also stated that she only somewhat supported the death penalty. (Evid. H. at 147). He would have recommended striking any potential juror that exhibited actual bias. (Evid. H. at 148).

Postconviction counsel then called Joanna Johnson, a social worker who specialized in addiction. (Evid. H. at 149). She had been a social worker for 30 years and had published two books on addiction (Evid. H. at 149-150). She is the co-owner of Avalon Treatment Centers (Evid. H. at 150).

She evaluated Guardado using the A.S.I., the Addiction Severity Index. (Evid. H. at 153). She also administered the S.A.S.S.I. (Evid. H. at 153). She meet with Guardado twice at the prison. (Evid. H. at 153). Her partner is Dr. Jerry Burghout, a psychologist. (Evid. H. at 154).

They looked at the combined effect of cocaine, alcohol and sleep deprivation on Guardado. (Evid. H. at 154). The combination "might" have caused a psychosis. (Evid. H. at 154). She testified that it would be an extreme emotional disturbance. (Evid. H. at 155). She reviewed the documents and reports in this case. (Evid. H. at 156). His addiction was a mental health disorder. (Evid. H. at 156). She testified that he could not conform his conduct, finding both statutory mitigators applied. (Evid. H. at 157).

She testified that she disagreed with Dr. Larson's report because it did not identify substance abuse as a mental health disorder. (Evid. H. at 157). She also disagreed with Dr. Larson's conclusion that there were no emotional problems present because "anytime there is dependancy" that is an emotional problem. (Evid. H. at 158).

She noted that Guardado starting drinking when he was around 14 years old. (Evid. H. at 158). He also used marijuana in his preteen and early teens. (Evid. H. at 158). She also noted

Guardado's intravenous cocaine use which is "extreme" (Evid. H. at 158).

She doubted whether Guardado was "clean" while in prison because there is "extensive drug use in prison" (Evid. H. at 159). But if he was clean, she explained that a forced period of sobriety is not recovery. (Evid. H. at 160). Both his job and his breakup were stressors. (Evid. H. at 160). Guardado relapsed into drug use. (Evid. H. at 161). In a drug delirium the person does not have control - the drug has control. (Evid. H. at 163). She diagnosed serious chronic substance abuse. (Evid. H. at 165).

She testified that she "sort of disagreed" with Dr. Larson's conclusion of no psychosis. (Evid. H. at 165-166). Cocaine psychosis is similar to a blackout (Evid. H. at 166). Guardado's statement 10 days after the murder about first throwing away the knife and then burning the knife could be consistent with a blackout with the details coming back later. (Evid. H. at 167-168). She noted that 5% of Dr. Larson's work is addiction according to his report; whereas, 100% of her work is addiction. (Evid. H. at 169).

On cross-examination, she testified that she reviewed the trial testimony. (Evid. H. at 170). She was not certain whether she reviewed the transcript of Guardado's confession. (Evid. H. at 170). She did not listen to the tape recording of Guardado's confession. (Evid. H. at 170-171). She reviewed the police reports. (Evid. H. at 171). She admitted that Guardado could remember in detail what items he took after killing the victim. (Evid. H. at 172-173). The trial court asked her to explain how a

person's thinking can be "very clear" during a blackout. (Evid. H. at 174). She attempted to explain that the facts can be very specific during a blackout. (Evid. H. at 175).

The prosecutor asked her to explain which mental health mitigator applied. (Evid. H. at 175). She was not familiar with the language of either of the mental mitigators. (Evid. H. at 176).

The prosecutor questioned about why Guardado went to a rural area to murder in order to hide his criminal conduct. (Evid. H. at 177). She testified that there was "no hiding." (Evid. H. at 177). She characterized it as a situational incident driven by addiction which was exactly what Dr. Larson's report stated as well. (Evid. H. at 178). She believes that Dr. Larson does not understand addiction as well as she did from her almost 100% substance abuse practice. (Evid. H. at 178).

She admitted that Guardado was not psychotic at the time he murdered the victim. (Evid. H. at 178). But "the drug takes almost a personality of their own" and "there is a period of time when the drugs actually talk to you." (Evid. H. at 179). Her diagnosis was "poly-substance dependence." (Evid. H. at 180).

She agreed with Dr. Larson's testimony about Guardado being under emotional duress. (Evid. H. at 181). She also agreed with Dr. Larson's testimony about Guardado being under the influence of a two-week cocaine binge. (Evid. H. at 181-182). She agreed with Dr. Larson about Guardado's substance abuse being elevated was consistent with his history (Evid. H. at 182).

Post-conviction counsel then presented Dr. Greg Prichard, a forensic psychologist. (Evid. H. at 183-184). Dr. Greg Prichard

testified that due to his prior experience in capital cases, he is familiar with statutory and non-statutory mental mitigation. (Evid. H. at 185,186,187).

Dr. Gregory Prichard did a psychological evaluation of Guardado. (Evid. H. at 185). Dr. Prichard evaluated Guardado for three hours at Florida State prison on July 28. (Evid. H. at 186). Dr. Prichard prepared a written report. (Evid. H. at 186). He reviewed Dr. Larson's September 2004 report and Dr. Larson's August 2008 report; Dr. Larson's testimony at the penalty phase; Ms. Johnson's and the Florida Supreme Court's opinion (Evid. H. at 186). Dr. Prichard concluded that both the statutory mental mitigators applied to Guardado's case. (Evid. H. at 187-188). Dr. Larson concluded that Guardado "was very much in full-brown relapse and full-blown addiction" (Evid. H. at 189). He was using crack cocaine on a daily basis. (Evid. H. at 189).

Dr. Prichard explained that the effect on the body from crack is "almost immediate and it's very intense " but a person comes down from the high very rapidly. (Evid. H. at 189). Obtaining more crack is an "obsessive compulsive issue" the person obsesses about getting more cocaine, often by any means necessary including violence. (Evid. H. at 190). They are no longer rational and do not think of the consequences of their actions. (Evid. H. at 190). While high, they are not able to apply moral brakes; they lose the ability to reason and be rational. (Evid. H. at 191). Often with addicts, when they are not using drugs, they are great people - they are "very kind and gracious." (Evid. H. at 192). But, when

using drugs, they can be "very violent and aggressive." (Evid. H. at 192).

Dr. Prichard testified that a severe emotional disturbance was present and Guardado was unable to conform his behavior due to his intoxication. (Evid. H. at 194). Dr. Prichard noted that Dr. Larson did not find either statutory mental mitigator. (Evid. H. at 195). Dr. Prichard also noted that Dr. Larson found no mental illness but "it could be argued" that there was mental illness present such as a "depressive illness or an anxiety illness" (Evid. H. at 195). Dr. Prichard disagreed with Dr. Larson's testimony that Guardado did not suffer from any emotional disorder because "addiction is an emotional issue." (Evid. H. at 195). Dr. Prichard agreed with Dr. Larson's conclusions that Guardado did not suffer from brain damage or psychosis (Evid. H. at 196).

On cross-examination, Dr. Prichard noted that Dr. Larson also stated on page 6 of his report that the cause of the murder was Guardado's addiction to cocaine. (Evid. H. at 199). Dr. Prichard's diagnosis was "poly-substance dependence" (Evid. H. at 199). Dr. Prichard's also diagnosed depression and anxiety but agreed with Dr. Larson that Guardado did not suffer from any major mental illness. (Evid. H. at 200). Dr. Larson found Guardado's cocaine addiction to be non-statutory mitigation, whereas; Dr. Prichard found the cocaine addiction to be statutory mitigation. (Evid. H. at 202). The prosecutor questioned the expert regarding his finding that extreme emotional mental mitigator applied. Dr. Prichard noted the stressed Guardado was under stress from losing his job and from breaking up with Donna Porter but the

prosecutor pointed out that Guardado was employed with a wastewater job in Niceville when he murdered the victim. (Evid. H. at 203-206). The prosecutor also noted Guardado had a new girlfriend. (Evid. H. at 206-207). Defense counsel rested. (Evid. H. at 209).

The State then called John Jay Gontarek, lead trial counsel, as a witness. (Evid. H. at 209). He was admitted to the Bar in 1980 and at least half of his practice since then had been criminal law. (Evid. H. at 210). He was a prosecutor from 1980 until 1984. (Evid. H. at 210). He office is in Fort Walton Beach, Florida. (Evid. H. at 210). He has handled forty or fifty capital cases including preparation and is qualified to handle capital cases. (Evid. H. at 211).

He was appointed to this capital case in late 2004 or January of 2005. (Evid. H. at 212-213). He personally meet with Guardado "numerous times." (Evid. H. at 213). Guardado had already pled guilty to this murder when he was appointed. (Evid. H. at 214).

The judge in this case, Judge Wells, had been co-counsel with him in an earlier murder case, in the Demetrius Thomas case. (Evid. H. at 215). Judge Wells was penalty phase counsel in the Thomas case and Mr. Gontarek informed Guardado that for this reason, Judge Wells was familiar with penalty phase litigation. (Evid. H. at 215). Mr. Gontarek did not inform Guardado that his prior professional relationship with the Judge would result in any favoritism to Guardado. (Evid. H. at 215). He informed Guardado that, based on his knowledge of prosecutor Elmore, pleading guilty would not result in a deal for life from the State. (Evid. H. at

216). But his pleading guilty could be a powerful mitigator. (Evid. H. at 216).

Mr. Gontarek's mitigation strategy was to bring in Dr. Larson, a "well known and respected" forensic psychologist. (Evid. H. at 217). He called Major Mathis who did not know him individually and was "not be able to offer anything favorable." (Evid. H. at 217). Mr. Gontarek had the impression that Major Mathis did not really know anything about Guardado. (Evid. H at 218). He thought he got Guardado's prison records and gave them to Dr. Larson. (Evid. H. at 218).

He sent the investigator, Annie Dunham, to interview Guardado's employer. (Evid. H. at 217). The information, however, was not helpful because his employer suspected Guardado of stealing equipment. (Evid. H. at 218). Guardado had been charged with stealing a chainsaw from his employer. (Evid. H. at 218).

Guardado did not want any mitigation presented originally (Evid. H. at 219). Mr. Gontarek contacted Guardado's mother, stepfather, and uncle. (Evid. H. at 219,229-230). The problem was that Guardado had been in prison for so long, that his family did not really have any contact with him. (Evid. H. at 230). Guardado was in prison from 1991 until he was released in 2003. (Evid. H. at 230). He had also been in prison previously, so any family life would be prior to 1984. (Evid. H. at 230).

Mr. Gontarek explained that he would rather focus on jail records rather than prison records because prison records can open up prior violent felonies. (Evid. H. at 219). Guardado had no D.R.s while in the jail. (Evid. H. at 219). Mr. Gontarek

presented Guardado's good conduct while in jail and the prosecutor did not dispute it. (Evid. H. at 220).

Mr. Gontarek spoke with Guardado's mother "a lot of times." (Evid. H. at 220-221). His mother encouraged Guardado to be involved in the development of mitigation but he "did not want to be bothered with it." (Evid. H. at 221). Mr. Gontarek asked the mother to testify "several times" and the mother refused. (Evid. H. at 222). Mr. Gontarek asked the mother to write a letter instead and she did that. The letter was defense exhibit #2. (Evid. H. at 222). Mr. Gontarek recalled that the prosecutor asked the judge to inquire if there was any additional mitigation that Guardado wanted to present and Guardado stated on the record that there was not. (Evid. H. at 222-223).

Mr. Gontarek had worked with Dr. Larson in the past and has had several death penalties overturned due to Dr. Larson's testimony. (Evid. H. at 223). Mr. Gontarek's billing records were introduced as an exhibit. (Evid. H. at 225).

Mr. Gontarek testified regarding jury selection. (Evid. H. at 226). Mr. Gontarek did not specifically recall jurors Pamela Pennington, Earl Hall or William Cornelius. (Evid. H. at 226). Guardado was actively involved in jury selection. (Evid. H. at 227). Mr. Gontarek would have removed a juror if Guardado insisted. (Evid. H. at 227). Mr. Gontarek testified that a juror such as Pamela Pennington who states that she was only somewhat in favor of the death penalty "would be someone I'd want to keep" (Evid. H. at 227).

Mr. Gontarek also explained that a juror who knew the officers, such as Earl Hall, would be a good juror because he was trying to show that Guardado fully cooperated by confessing as mitigation. (Evid. H. at 228). If the juror knew Rome Garrett and James Lorenz, both of whom were involved in the confession, that jury may be impressed by their testimony that Guardado cooperated. (Evid. H. at 228). The officers in fact testified that Guardado helped them to find physical evidence. (Evid. H. at 228). Mr. Gontarek testified that a juror such as William Cornelius who expressed the view that a life sentence could be a harsher sentence than the death penalty, is a good reason to retain that juror. (Evid. H. at 228-229).

On cross-examination, Mr. Gontarek testified that he was appointed in December of 2004. (Evid. H. at 231). It takes about 1½ hours depending on traffic to drive from Fort Walton Beach to DeFuniak Springs. (Evid. H. at 231). Mr. Gontarek's time slips show that he saw Guardado on December 16, 2004; Feburary 2, 2005; August 9, 2005 and August 18, 2005. (Evid. H. at 233). That was four visits prior to the penalty phase. (Evid. H. at 233). The December 16, 2004 bill was for three hours. (Evid. H. at 233). Postconviction counsel pointed out that most of that would have been travel (Evid. H. at 234). Mr. Gontarek explained that sometimes he visited Guardado starting from his house, which is significantly closer. (Evid. H. at 234). The August 9, 2005 bill was for four hours. (Evid. H. at 234). The August 18, 2005 bill was for 3.5 hours. (Evid. H. at 234). He meet with Guardado daily during the penalty phase. (Evid. H. at 235).

Mr. Gontarek knew that there were a significant number of statutory aggravators in the case including HAC, CCP, and prior violent felony. (Evid. H. at 235-236). The main mitigators were remorse and drug addiction, both of which were non-statutory. (Evid. H. at 236-237).

He did not remember why he did not read the mother's letter to the jury rather than letting the jury take the letter back to the jury room and read it themselves. (Evid. H. at 239). Mr. Gontarek agreed that reading the letter is far more effective, (Evid. H. at 239).

Dr. Larson did not have any statutory mitigation but did say that Guardado was not a psychopath. (Evid. H. at 240). He was not sure whether Dr. Larson had Guardado's DOC records. (Evid. H. at 242). He had many conversations with the mother in an attempt to get her to testify. (Evid. H. at 243). Mr. Gontarek thought he may have had "at least five" conversations with Guardado's mother about her testifying. (Evid. H. at 243). Guardado's girlfriend did not want to testify either. (Evid. H. at 244).

Mr. Gontarek noted regarding jury selection that he had only one peremptory challenge remaining. (Evid. H. at 245). But he did not recall the details of the jury selection. (Evid. H. at 245). While normally he would not want a juror who had two relatives murdered in a robbery, such a juror's statement about life in prison being a harsher sentence could trump that family history depending on the juror demeanor and tone. (Evid. H. at 245-246). A juror that says life is a harsher sentence and knows about prison conditions "does not come along that often" in his experience. (Evid. H. at 248).

And one of Mr. Gontarek's main arguments was going to be that a life sentence is terrible and would be worse than the death penalty. (Evid. H. at 248).

At the conclusion of the testimony, the trial court returned to the issue of the letters in Appendix D of the original 3.851 motion. (Evid. H. at 249). The prosecutor did not object provided the letters did not contain allegations that the person was not contacted by defense counsel. (Evid. H. at 249-250). Postconviction counsel stated that the letters only contained general background information. (Evid. H. at 249). The prosecutor objected to the part of Linda Snyde Warren's letter attacking the parole officer and postconviction counsel agreed to redact that statement. (Evid. H. at 250). The prosecutor objected to the bottom paragraph on the second page of Warren's letter. (Evid. H. at 250). The trial court redacted that paragraph. (Evid. H. at 250). The trial court then ordered written closing arguments from both parties within 60 days. (Evid. H. at 252-253).

Both parties filed written post-evidentiary hearing memorandums of law. Following the evidentiary hearing and the memos, the trial court denied the 3.851 motion in a written order. (PC Vol. VI 1068-1113).

SUMMARY OF ARGUMENT

ISSUE I

Guardado asserts that his trial attorneys, lead counsel John Gontarek and co-counsel Jason Cobb, were ineffective for failing to present available statutory mental mitigation based on Guardado's chronic alcohol and drug abuse. Guardado asserts defense counsel should have presented the testimony of an expert in drug addiction, such as Joanna Johnson, in addition to Dr. Larson, the mental health expert that was presented. He also asserts that counsel should have presented his drug addiction as statutory mental mitigation rather than as non-statutory mental mitigation. Postconviction counsel thinks that Dr. Prichard, whose opinion was that the drug addiction was extreme, should have been presented instead of Dr. Larson, who found only non-statutory mental mitigation based on drug use. There was no deficient performance because, as the trial court found, trial counsel presented the testimony of a mental health expert during the penalty phase to testify regarding cocaine addiction. Nor was there any prejudice because as the trial court found, the jury heard much the "same information" through that expert testimony Dr. Larson's testimony - that Guardado had "murdered the victim because of his addiction to cocaine." As the trial court concluded, the defendant failed to show that the outcome of the proceedings would have been different if the defendant's substance abuse had been labeled statutory rather than being labeled non-statutory.

ISSUE II

Guardado contends that trial counsel, lead counsel John Gontarek and co-counsel Jason Cobb, were ineffective for failing to challenge for cause three jurors and for not objecting to the prosecutor's challenge for cause of two other prospective jurors. IB at 79. The claim regarding the two prospective jurors stricken for cause is procedurally barred because it was not raised in the direct appeal. Only the issue of counsel ineffectiveness regarding the three actual jurors not challenged for cause is properly before this Court. Guardado, however, must establish actual bias on the part of these jurors and has not done so. The three actual jurors are: 1) Pamela Pennington, who knew the victim because the victim was her son's real estate agent; 2) Earl Hall, who knew both the victim and several of the officers who investigated the murder; and 3) William Cornelius, whose great aunt and uncle had been homicide victims 25 years ago. None of these three jurors was actually biased as required by this Court's precedent. All three assured the trial court that they could be fair and impartial.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT PRESENTING DRUG ABUSE AS MITIGATION? (Restated)

Guardado asserts that his trial attorneys, lead counsel John Gontarek and co-counsel Jason Cobb, were ineffective for failing to present available statutory mental mitigation based on Guardado's chronic alcohol and drug abuse. Guardado asserts defense counsel should have presented the testimony of an expert in drug addiction, such as Joanna Johnson, in addition to Dr. Larson, the mental health expert that was presented. He also asserts that counsel should have presented his drug addiction as statutory mental mitigation rather than as non-statutory mental mitigation. Postconviction counsel thinks that Dr. Prichard, whose opinion was that the drug addiction was extreme, should have been presented instead of Dr. Larson, who found only non-statutory mental mitigation based on drug use. There was no deficient performance because, as the trial court found, trial counsel presented the testimony of a mental health expert during the penalty phase to testify regarding cocaine addiction. Nor was there any prejudice because as the trial court found, the jury heard much the "same information" through that expert testimony Dr. Larson's testimony - that Guardado had "murdered the victim because of his addiction to cocaine." As the trial court concluded, the defendant failed to show that the outcome of the proceedings would have been different if the defendant's substance abuse had been labeled statutory rather than being labeled non-statutory.

Penalty phase

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 33). Defense counsel filed a notice of expert testimony of mental mitigation. (Vol. 1 185-186).

At the penalty phase, the defense called Dr. James Larson (Vol. VII 222-253). Dr. Larson, who is a clinical psychologist, testified as to the defendant's mental health. (T Vol. VII 223-253). Dr. Larson gave Guardado a battery of tests both including an I.Q. test, an academic achievement test, 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).

Dr. Larson testified that 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 2½ 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 convictions 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).

Evidentiary hearing

Postconviction counsel presented Ms. Johnson, a social worker with a specialization in addiction, and Dr. Prichard, a forensic psychologist, who testified that both statutory mental mitigators

applied.[4] Both testified that Guardado's drug use rose to the level of statutory mental mitigation.

The trial court's ruling

Following an evidentiary hearing, the trial court denied the 3.851 motion. (PC Vol. VI 1068-1113). The trial court rejected this claim of ineffectiveness. (PC Vol. VI 1103-1113). The trial court recounted the testimony of Ms. Johnson and Dr. Prichard at the evidentiary hearing. (PC Vol. VI 1104-1112). The trial court noted that Ms. Johnson disagreed with Dr. Larson and believed that substance abuse was a mental illness. (PC Vol. VI 1106-1108). The trial court noted that Dr. Prichard testified that both statutory mental mitigators applied based on cocaine addiction and that while there was no major mental illness, depression and anxiety were present. (PC Vol. VI 1108-1111,1111).

The trial court concluded that there was no ineffectiveness because trial counsel presented chronic alcohol and drug abuse as non-statutory mitigation. (PC Vol. VI 1112). The trial court noted that trial counsel presented Dr. Larson during the penalty phase. (PC Vol. VI 1112). The trial court also concluded that trial counsel presented the "same information" through Dr. Larson's testimony - that Guardado had "murdered the victim because of his addiction to cocaine." (PC Vol. VI 1113). The trial court, quoting *Dufour v. State*, 905 So.2d 42, 55-59 (Fla. 2005), found no prejudice because merely presenting different experts at the

[4] Their complete testimony is recounted in evidentiary hearing testimony section of this brief.

evidentiary hearing is not sufficient to warrant relief. (PC Vol. VI 1113). The trial court concluded that the defendant failed to show that the outcome of the proceedings would have been different if the defendant's substance abuse had been labeled statutory rather than being labeled non-statutory. (PC Vol. VI 1113).

Standard of review

The standard of review for a claim of ineffective assistance of counsel is *de novo*. *Rodgers v. State*, - So.3d -, -, 2013 WL 1908640, *3 (Fla. 2013)(explaining that this "Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing legal conclusions *de novo*" citing *Sochor v. State*, 883 So.2d 766, 771–72 (Fla. 2004)).

Merits

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial." *Rodgers v. State*, - So.3d -, -, 2013 WL 1908640, *3 (Fla. 2013)(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "As to the first prong, the defendant must establish that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id.* "For the second prong, *Strickland* places the burden on the defendant, not the State, to show a reasonable probability that the

result would have been different." *Rodgers*, - So.3d at -, 2013 WL 1908640 at *3 (citing *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383, 390-91, 175 L.Ed.2d 328 (2009)). *Strickland* does not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in that outcome." *Rodgers*, - So.3d at -.

Ineffective assistance of expert

This is actually a claim of ineffective assistance of mental health expert, not a claim of ineffective assistance of counsel. For example, Guardado complains that Dr. Larson "grossly understated the severity of Guardado's mental problems and overlooked the significance of the crack cocaine's influence on his behavior" and that he "did not explain the crippling effects of crack cocaine and the control it had over Guardado." IB at 66. He also complains that Dr. Larson "brushed aside Guardado's elevated depression score, indications of paranoia and anxiety because he believed that was typical for an incarcerated person. IB at 65 (citing T. Vol. VII 1340). Guardado's claim is that Dr. Larson did a poor job as a mental health expert, not that defense counsel Gontakek did a poor job as a lawyer. The claim focuses on the conduct of the mental health experts, not the conduct of the attorney.

There is no such claim as a claim of ineffectiveness of an expert. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998)(rejecting the notion that there is either a procedural or

constitutional rule of ineffective assistance of an expert witness); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir. 1990)(explaining that the ultimate result of recognizing a right to effective assistance of a mental health expert would be a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis); *Harris v. Vasquez*, 949 F.2d 1497, 1518 (9th Cir. 1990). This simply is not a claim of ineffectiveness of trial counsel.

The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) did not establish a claim of ineffective assistance of mental health expert. *Wright v. Moore*, 278 F.3d 1245 (11th Cir. 2002)(noting that an Sixth Amendment right to a mental competency examination is a "non-starter"); *Walls v. McNeil*, 2009 WL 3187066, 77 (N.D.Fla. Sept. 20, 2009)(citing cases). The basis of *Ake* was the Fifth Amendment due process clause, not the Sixth Amendment right to counsel. The Due Process Clause does not prescribe a malpractice standard for a court-appointed psychiatrist's performance. *Wilson*, 155 F.3d at 401. As the Eleventh Circuit has noted "the fundamental proposition" that the denial of due process "in the *Ake* sense must be due to trial court error: it must be the trial judge, not the mental health expert, who denies the defendant due process." *Blanco v. Sec'y, Fla. Dep't. of Corr.*, 688 F.3d 1211, 1228 (11th Cir. 2012). It is the mental health expert, himself, that is responsible for his diagnosis. *Moody v. Polk*, 408 F.3d 141, 150 (4th Cir. 2005)(rejecting a claim of ineffectiveness premised

on the expert uncertainties because the expert, "not trial counsel, had ultimate responsibility for his own expert report."). To entertain such claims would immerse judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998). *Ake* only established the due process right to funds for an expert, not a due process right to a good expert. *Ake*, 470 U.S. at 83, 105 S.Ct. at 1096 (an indigent defendant does not have a constitutional right to hire an expert "of his personal liking or to receive funds to hire his own."); *Blanco v. State*, 706 So.2d 7, 9–10 (Fla. 1997)(same quoting *Ake*). The fact that the expert's testimony "does not live up to" the defendant's expectations "cannot in any way be categorized as a trial court error." *Blanco*, 706 So.2d at 9. Nor can it be categorized as a trial counsel error.

This Court should clarify that it will not entertain claims of ineffective assistance of mental health expert in postconviction proceedings. This Court's caselaw is unclear on the matter. *Compare San Martin v. State*, 995 So.2d 247, 264 (Fla. 2008)(discussing a claim of ineffectiveness of counsel because the expert "never met with or talked to Defendant's family, never reviewed any reports or documents in the case, and never reviewed statements or interviewed witnesses in the case."), *with Wyatt v. State*, 78 So.3d 512, 528, n.14 (Fla. 2011)(stating because of the focuses on "defense counsel's alleged deficiencies rather than the deficiencies of his mental health expert, it is properly analyzed

under *Strickland*, as opposed to a claim under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).").

No deficient performance

Even if viewed as a claim of ineffectiveness, it is meritless. As to the first prong of *Strickland*, counsel's performance was not deficient. Defense counsel hired a well-recognized expert in mental mitigation and presented that expert in the penalty phase. *Hodges v. State*, 55 So.3d 515, 523 (Fla. 2010)(describing Dr. James Larson as "a psychologist specializing in forensic psychology.").[5] The mental health expert presented, Dr. Larson, was a "well known and respected" forensic psychologist. (Evid. H. at 217). Mr. Gontarek had worked with Dr. Larson in the past and has had several death penalties overturned due to Dr. Larson's testimony. (Evid. H. at 223). As Mr. Gontarek explained at evidentiary hearing, he does not control or direct the expert and cannot ask for a second expert merely because the first expert only found non-statutory mitigation as opposed to statutory mitigation. Defense counsel was entitled to rely on his mental health expert's experience and expertise. Lawyers are experts in the law, not experts in psychology, and the Sixth Amendment does not require that they be.

[5] Dr. Larson is noted as a mental health expert in 33 reported opinions from this Court starting in 1989. *Jackson v. Dugger*, 547 So.2d 1197 (Fla. 1989).

Counsel retained and presented a mental health expert. Counsel cannot be ineffective for not doing something that counsel, in fact, did. *Bates v. State*, 3 So.3d 1091, 1106, n.20 (Fla. 2009)(observing that counsel cannot be held ineffective for what counsel actually did); *Stephens v. State*, 975 So.2d 405, 415 (Fla. 2007)(explaining that counsel cannot be deemed ineffective for failing to object when, in fact, he did object.). Counsel presented drug abuse as mitigation.

Furthermore, defense counsel presented Guardado's chronic alcohol and drug abuse as non-statutory mitigation. Counsel's performance is not deficient for presenting evidence as non-statutory mitigation rather than statutory mitigation. *Cf. Nelson v. State*, 43 So.3d. 20, 32 (Fla. 2010)(rejecting a claim that trial counsel was ineffective for failing to request a jury instruction on statutory mental mitigation and relying on the catch-all mitigation instruction instead where counsel was concerned the jury would not give proper weight to the non-statutory mitigation if certain mitigation was singled out as being statutory).

In *Dufour v. State*, 905 So.2d 42, 55-59 (Fla. 2005), the Florida Supreme Court rejected a claim that counsel was ineffective for failing to consult a second mental health expert. The first mental health expert produced an "unfavorable" report finding that the defendant had antisocial behavior, showed little signs of a conscience, had average intelligence, and could not provide any psychiatric dynamic or reason behind the killing. *Dufour*, 905 So.2d at 55. Dufour asserted that counsel was ineffective for not consulting a second mental health expert to obtain a more favorable

report. The Court concluded that "Dufour has failed to demonstrate that counsel was deficient in securing a mental health expert." *Dufour*, 905 So.2d at 56. The Court noted that it was "not a case where counsel never attempted to meaningfully investigate mitigation." Rather, counsel consulted a mental health expert and once counsel properly investigates mental mitigation, "counsel is entitled to great latitude in making strategic decisions." The Florida Supreme Court stated that "trial counsel was not ineffective simply because after receiving an initial unfavorable report from Dr. Gutman they did not proceed further to seek additional experts for mental mitigation evidence." The Florida Supreme Court also concluded that the first expert's "evaluation is not rendered less competent simply because Dufour was able to provide conflicting testimony at the evidentiary hearing." *Dufour*, 905 So.2d at 57 citing *Jones v. State*, 732 So.2d 313, 320 (Fla.1999) (stating that the evaluation by a mental health expert is not rendered less competent simply because the appellant provided conflicting testimony). The Florida Supreme Court also concluded "that trial counsel conducted a reasonable investigation into mental health mitigation, which is not rendered deficient simply because Dufour was able to secure more favorable mental health testimony in the postconviction proceeding." The Florida Supreme Court explained that "[s]imply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief." *Dufour*, 905 So.2d at 58-59 citing *Carroll v. State*, 815

So.2d 601, 618 (Fla. 2002)(stating: the "fact that Carroll has now secured the testimony of more favorable mental health experts simply does not establish that the original evaluations were insufficient.") and *Cherry v. State*, 781 So.2d 1040, 1052 (Fla. 2000)("The fact that Cherry found a new expert who reached conclusions different from those of the expert appointed during trial does not mean that relief is warranted....")).

Here, as in *Dufour*, all that occurred is that postconviction counsel was able to obtain more favorable mental health experts for the evidentiary hearing - and only slightly more favorable at that - which does not warrant any relief. Dr. Larson's underlying diagnosis of drug addiction did not differ from that of Ms. Johnson or Dr. Prichard. *Morton v. State*, 995 So.2d 233, 242 (Fla. 2008)(rejecting a claim of ineffectiveness where the diagnosis of mental health expert presented at trial "did not significantly differ from the diagnoses of the mental health professionals presented at the evidentiary hearing."). "As this Court has repeatedly held, a defendant cannot establish that trial counsel was ineffective in obtaining and presenting mental mitigation merely by presenting a new expert who has a more favorable report." *Wyatt v. State*, 78 So.3d 512, 533 (Fla. 2011)(citing *Peede v. State*, 955 So.2d 480, 494 (Fla. 2007) and denying a claim that counsel was ineffective for failing to present the testimony of a mental health expert to establish the nexus between child abuse and drug usage and the crime). Basically, the defense expert presented at the evidentiary hearing disagreed with the defense expert presented at the penalty phase. Dr. Pritchard disagreed with Dr.

Larson. But that does not make trial counsel ineffective. Nor does it make Dr. Larson incompetent - experts often disagree. There was no deficient performance.

No prejudice

There was no prejudice. There is no prejudice from counsel presenting Guardado's addiction as non-statutory rather than statutory mitigation because the trial court found drug addiction to be mitigating. As the direct appeal opinion notes, the trial court found that the "defendant has suffered most of his adult life with an addiction problem to crack cocaine which was the basis of his criminal actions" which it accorded some weight and that the "defendant has a lengthy history of substance abuse (marijuana and Quaaludes) during early teen years, graduating to alcohol and cocaine and substance abuse treatment beginning about age 14 or 15" which it accorded little weight. *Guardado v. State*, 965 So.2d 108, 112, n.2 (Fla. 2007). Additionally, the trial court found that the "defendant was under emotional duress during the time frame of this crime" which it accorded little weight. *Guardado*, 965 So.2d at 112, n.2. The trial court considered Guardado's addiction as the basis for three non-statutory mitigators all of which it accorded weight.

The trial court would be unlikely to accord drug addiction any more weight based solely on the label "statutory." While Guardado's drug addiction is certainly unfortunate; it is also self-induced, unlike such mitigation as mental retardation or child abuse.

Additionally, for there to be any real prejudice, the trial court would have not only had to find both statutory mental mitigators based on drug abuse but the trial court would have had to additionally find that both statutory mental mitigators outweighed the five aggravating factors including both HAC and CCP. Drug abuse does not outweigh the five aggravators.

Guardado's reliance on *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328 (11th Cir. 2011), is misplaced. IB at 64. The Eleventh Circuit found that counsel's decision not to present a mental health expert to testify as to the defendant's "horrendous" child abuse was deficient performance which prejudiced the defendant. At the penalty phase, defense counsel presented one witness, Cooper's mother, to testify regarding his childhood but she did not testify as to the abuse. Defense counsel did not present Dr. Merlin, who was retained by counsel, who could have testified regarding the abuse.

Cooper does not apply. The Eleventh Circuit itself has characterized *Cooper* as an "outlier" that conflicts with *Cullen v. Pinholster*, – U.S. –, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). *See Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1259 (11th Cir. 2012)(rejecting a claim of ineffectiveness fo failing to present limited intelligence and abusive childhood as mitigation). This case is the converse of *Cooper*. Here, unlike *Cooper*, defense counsel presented the mental health expert that he retained to testify regarding mitigation. Here, defense counsel Gontarek presented Dr. Larson. There was no deficit performance unlike *Cooper*. Furthermore, there was no prejudice. Both *Cooper* and

Holsey involved child abuse where abuse was either not presented at all or only mentioned in passing at the penalty phase. But child abuse is simply more mitigating than drug abuse. Child abuse is beyond the control of the victim and the abuse occurs when the defendant is a vulnerable child but drug abuse is not beyond the control of the defendant and usually occurs when the defendant is an adult or, at least, a teenager. Drug abuse is self-induced and due to the defendant's own conduct. Mitigation is simply more powerful when the factor is not within the personal control of the defendant than when it is. This is why intoxication was not often a successful defense. *Odom v. State*, 782 So.2d 510, 512 (Fla. 1st DCA 2001)(Padovano, J., concurring)(observing that "most experienced criminal lawyers and judges would be hard pressed to come up with a single example of a case in which the defense of voluntary intoxication succeeded."). Juries viewed the intoxication defense with skepticism because it was the defendant's own conduct of drinking that made him intoxicated, not some outside force. And juries view drug abuse as mitigation in much the same manner. *Cooper* is simply inapposite.

ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING JURY SELECTION? (Restated)

Guardado contends that trial counsel, lead counsel John Gontarek and co-counsel Jason Cobb, were ineffective for failing to challenge for cause three jurors and for not objecting to the prosecutor's challenge for cause of two other prospective jurors. IB at 79. The claim regarding the two prospective jurors stricken for cause is procedurally barred because it was not raised in the direct appeal. Only the issue of counsel ineffectiveness regarding the three actual jurors not challenged for cause is properly before this Court. Guardado, however, must establish actual bias on the part of these jurors and has not done so. The three actual jurors are: 1) Pamela Pennington, who knew the victim because the victim was her son's real estate agent; 2) Earl Hall, who knew both the victim and several of the officers who investigated the murder; and 3) William Cornelius, whose great aunt and uncle had been homicide victims 25 years ago. None of these three jurors was actually biased as required by this Court's precedent. All three assured the trial court that they could be fair and impartial.

Jury selection

Jury selection was first conducted en masse but the remainder of jury selection was conducted in the judge's chambers in small groups. (T. Vol. IV 4-75). The record reflects that the defendant and his two attorneys were present for the small group voir dire. (T. Vol. IV 76).

Juror William Cornelius was questioned with two other prospective jurors (T. Vol. IV 76). Juror Cornelius when asked to characterize his support for the death penalty as being strong, somewhat or slightly favoring the penalty, responded: "somewhat" (T. Vol. IV 78). It depended on the circumstances of the incident (T. Vol. IV 78-79). He had never been aware of circumstances surrounding some murder that he said to himself I could personally vote for the death penalty. (T. Vol. IV 80-81). He had read about serial murders that he thought the death penalty would be an appropriate punishment however. (T. Vol. IV 81). He could personally vote for the death penalty "if he had to." (T. Vol. IV 81-82). Some of juror Cornelius's family were victims of crime. (T. Vol. IV 85). His great aunt and great uncle had been homicide victims 25 years ago. (T. Vol. IV 85). They were killed at Maxwell Air Force Base. (T. Vol. IV 85). It was a robbery at the P.X. but they never found out who did it. (T. Vol. IV 86). He did not know the details such as whether they had been shot because he was a child when the murders occurred. (T. Vol. IV 86). Someone robbed the P.X. and his great aunt and uncle were working at the P.X. (T. Vol. IV 87). The prosecutor inquired whether the murders would affect his ability to serve in this murder and robbery case and juror Cornelius responded: "No. it doesn't have anything to do with that." (T. Vol. IV 87).

Defense counsel questioned juror Cornelius about whether he had any thoughts in favor of life in prison for murder and he responded: "Yes, sir. I have thought about it." (T. Vol. IV 92). Defense counsel asked him about his thoughts and juror Cornelius

responded: "being in construction, I was on the construction of three new federal prisons and on one under way which was Lewisburg and I saw what they went through in that prison serving a long time." (T. Vol. IV 92-93). Juror Cornelius thought it was a very severe punishment. (T. Vol. IV 93). Juror Cornelius stated he was totally neutral on death versus life "at this point." (T. Vol. IV 95). If he felt, based on the evidence and judge's instructions, that life without parole was the appropriate punishment, Juror Cornelius would stand by that decision regardless of the other jurors. (T. Vol. IV 95-96). Neither the prosecutor nor defense counsel attempted to strike Juror William Cornelius for cause. (T. Vol. IV 97-98).

Prospective Juror James Tucker was questioned with two other prospective jurors. (T. Vol. IV 98). The prosecutor asked Tucker if he was opposed to the death penalty, who responded that he was. (T. Vol. IV 98). He stated his opposition was "philosophical and personal." (T. Vol. IV 99). Prosecutor Elmore asked Tucker if he would be able to vote for the death penalty in any case and he responded: "I don't believe so in the state of Florida, no." (T. Vol. IV 99). Defense counsel Gontarek asked Tucker if he was a lawyer and he stated that he practiced in the area of corporate security. (T. Vol. IV 109). He had been a law clerk for one of the judges on the Second Circuit. (T. Vol. IV 109-110). Defense counsel asked if there were certain circumstances, such as a serial killer, where he could impose the death penalty and Tucker responded that Florida's death penalty statutes raised "significant" due process issues. (T. Vol. IV 111). He stated that

life without parole covers most of the purposes for the criminal law in this context. (T. Vol. IV 111). Defense counsel asked him if he could put his personal feelings aside and he responded: "I'm sorry. I don't think I could under the Florida Statute." (T. Vol. IV 111-112). The judge then asked if his beliefs would substantially impair his ability to follow the law as it pertains to the death penalty and Tucker responded: "Yes, sir. I know my responsibilities and I believe it would." (T. Vol. IV 113). Asked again by the judge if his beliefs would substantially impair his abilities to serve, Tucker again said: "I believe it would." (T. Vol. IV 113).

The prosecutor moved to excuse Tucker for cause. (T. Vol. IV 115). Defense counsel Gontarek objected, stating that there could be certain circumstances, such as a mass murderer, that Tucker said he could impose the death penalty. (T. Vol. IV 115). The trial court asked defense counsel if he agreed that when the judge had asked him about his beliefs impairing his ability to serve, Tucker's response was yes, it would. (T. Vol. IV 115). Defense counsel agreed that the was Tucker's response. (T. Vol. IV 115). The trial court granted the prosecutor's challenge for cause and excused prospective Juror James Tucker for cause. (T. Vol. IV 115).

Prospective Juror David Hebert was questioned with two other prospective jurors. (T. Vol. V 215). The prosecutor asked if any of them were opposed to the death penalty and Hebert responded: "religiously, yes." (T. Vol. V 216). The prosecutor asked if the tenets of his religion included opposition to the death penalty and Hebert responded: "I'm a Catholic and I feel so, yes." (T. Vol. V

216-217). The prosecutor asked if his faith would substantially impair his ability to be a fair and impartial juror and Hebert responded that he did not really know what he would do. (T. Vol. V 217). The prosecutor asked if, despite his faith, he had ever heard of a case where he said to himself that in that case he could impose the death penalty and Hebert responded: "my gut feelings would be yes, I probably could. But what I would really do under the circumstances, I really don't know until I'm there." (T. Vol. V 217). The prosecutor asked if he would vote for life because he would feel better about his faith and Hebert responded: "my mind says to do one thing; my faith another; my heart another. All I can do is just try to be open. But I don't know what I'm going to do when I get in there, you know." (T. Vol. V 218). The prosecutor again asked if his faith would affect his ability to serve as a juror and Hebert responded: "I think it would affect my decision, yes." (T. Vol. V 218-219). Yet again the prosecutor asked if his faith would affect his ability and Hebert responded: "yeah." (T. Vol. V 219).

Defense counsel asked prospective Juror Hebert if he agreed that people should follow the law and if he could apply the law to the facts and he responded that he could do that. (T. Vol. V 226-227). Defense counsel explained that by following the instructions, he would be putting his religious feelings aside and Hebert responded: "This is true but my religion would still be a weighing factor in my decision, I think." (T. Vol. V 227). Defense counsel asked if his religion would substantially impair his ability to follow the instructions and Hebert responded: "I would try to follow the

instructions as best I can but what I'm saying is my religion would have some weight on my decision." (T. Vol. V 228). The judge then asked Hebert to listen to the question and think about it again before answering and the judge then asked him if his religion would substantially impair his ability and Hebert responded: "I don't know how to answer because . . ." (T. Vol. V 228). He then stated that his faith "would impair it to a certain degree." (T. Vol. V 229). Defense counsel asked him if there were some cases where he could vote for the death penalty and Hebert responded "my mind says yes but my heart says no." (T. Vol. V 232). And that such a decision "would haunt me for the rest of my life." (T. Vol. V 233). He stated that he did know if he "could just follow the law." (T. Vol. V 233).

The prosecutor challenged all three prospective jurors in this group for various reasons including that one could not be fair to the defendant. (T. Vol. V 234). Specifically, the prosecutor challenged prospective Juror David Hebert for cause based on his faith. (T. Vol. V 234). Defense counsel had no objection to removing all three of the prospective jurors in this group including Hebert. (T. Vol. V 234). The trial court excused all three of the prospective jurors including Hebert. (T. Vol. V 234).

Juror Pamela Pennington was questioned with two other prospective jurors. (T. Vol. V 234). Juror Pamela Pennington when asked to characterize her support for the death penalty as being strong, somewhat or slightly favoring the penalty, responded: "somewhat" and it would depend on the circumstances. (T. Vol. V 238). She did not think that the death penalty should be

abolished. (T. Vol. V 239). Juror Pamela Pennington stated that she knew the victim Jackie Malone. (T. Vol. V 240). When her son was trying to buy a house, they worked with her for months, so she knew the victim "from a business perspective." (T. Vol. V 240). She meet with the victim once or twice a week for a matter of months when her son was buying a house. (T. Vol. V 241). This occurred in 2000 or 2001. (T. Vol. V 242). She had no contact with the victim since then. (T. Vol. V 242-243). The prosecutor asked her if her acquaintance with the victim would affect her ability to be fair and impartial, she responded "I think I could be fair." (T. Vol. V 240). The prosecutor then asked her if she could make a fair and legal decision based on the whether the State proved that aggravating circumstances existed which outweigh the mitigating circumstances, and she responded: "Yes." (T. Vol. V 241).

Defense counsel asked juror Pamela Pennington if she understood that the death penalty is imposed only in a very narrow set of circumstances and she responded: "Yes, sir." (T. Vol. V 245). Defense counsel also asked juror Pamela Pennington if she was going to be able to set aside those feelings or business relationship with the victim and make her decision based on the law. (T. Vol. V 246). Juror Pamela Pennington responded: "Yes, sir. It was just a business knowing her; it wasn't - (T. Vol. V 246). Defense counsel interrupted her. Defense counsel then asked her if "maybe life in prison could even be worse than the death penalty? And she responded: "Yes, sir." (T. Vol. V 246-247).

The prosecutor then asked juror Pamela Pennington if it would be fair to say she liked Ms. Malone and she responded: "She was a very

nice lady, yes." (T. Vol. V 247-248). She was satisfied with the work she did for her son and there were no problems. (T. Vol. V 248). She repeated that it would not affect her ability to render a fair and impartial decision. (T. Vol. V 248-249). Neither the prosecutor nor defense counsel attempted to strike Juror Pamela Pennington for cause. (T. Vol. V 253).

Juror Earl Hall was questioned with two other prospective jurors as well. (T. Vol. V 302). Juror Earl Hall stated that he was strongly in favor of the death penalty and could personally vote to impose the death penalty. (T. Vol. V 309). Juror Earl Hall, however, "most definitely" agreed that he would have to weigh mitigating circumstances. (T. Vol. V 310). Juror Earl Hall had heard about the case through the newspaper and some of his family had discussed the case. (T. Vol. V 321). His family had positive opinions about the victim. (T. Vol. V 322). When the prosecutor asked juror Hall if the newspaper article or his family's opinions would affect his ability to render a fair and impartial verdict, he responded: "No, it would not." (T. Vol. V 322).

Juror Hall knew several of the investigators with the sheriff's office. (T. Vol. V 322). Juror Hall knew Investigator Garrett; Investigator Lorenz, and Captain Sunday. (T. Vol. V 322). Investigator Garrett was a "close friend of long standing" (T. Vol. V 322). Juror Hall knew Investigator Garrett for over twenty years. (T. Vol. V 322). Juror Hall's son worked with Investigator Garrett and "they were very close." (T. Vol. V 322). Investigator Lorenz was a client of juror Hall's twenty years ago when he sold insurance. (T. Vol. V 322). Juror Hall did not actually know

Captain Sunday. (T. Vol. V 323). Rather, Juror Hall knew Captain Sunday's father "fairly well." (T. Vol. V 323). Juror Hall's wife went to school with Captain Sunday's father. (T. Vol. V 323). Juror Hall stated that although he was close friends with Investigator Garrett he could fairly weigh his testimony like that of any other witness. (T. Vol. V 323). This was also "most definitely" true of both Investigator Lorenz and Captain Sunday. (T. Vol. V 323).

Juror Hall's son was charged with burglary and theft. (T. Vol. V 324). His son pled guilty and was given probation which he successfully completed. (T. Vol. V 325). Juror Hall felt his son was treated fairly. (T. Vol. V 325).

Defense counsel asked Juror Hall if he would weigh Investigator Garrett's testimony more based on his friendship and he responded "No, sir." (T. Vol. V 327). Juror Hall stated that he "would take it strictly on its value." (T. Vol. V 327). Neither the prosecutor nor defense counsel attempted to strike Juror Earl Hall for cause. (T. Vol. V 327-328).

During jury selection, the prosecutor used seven peremptory challenges. (T. Vol. V 299-300; 328; 353). And the defense used nine peremptory challenges. (T. Vol. V 299-300; 328). As the prosecutor noted, ten peremptory challenges are allowed in a capital case. (T. Vol. V 301). The prosecutor struck prospective juror Clark peremptorily. (T. Vol. V 327-328). The actual 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. (DAR. Vol II

227; T. Vol. V 356, 357). The alternate jurors were Edwin Cuchens and Dottie Kitch. (R. Vol II 227; T. Vol. V 356).

The trial court's ruling

The trial court granted an evidentiary hearing regarding the three actual jurors (Pennington, Hall and Cornelius) but did not conduct an evidentiary hearing regarding the three prospective jurors that did not serve (Tucker, Herbert and Clark) because postconviction counsel conceded at the case management conference that no evidentiary hearing was required regarding the three prospective jurors. (PC Vol. VI 1074; 1119-1120).

The trial court rejected this claim of ineffectiveness. (PC Vol. VI 1073-1088). The trial court first discussed prospective jurors Tucker, Herbert, and Clark, who did not serve, as a straight *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) violation.[6] (PC Vol. VI 1074-1081). The trial court discussed each of the three prospective jurors. (PC Vol. VI 1074-1081).

The trial court recounted prospective juror James Tucker's responses during jury selection including that he was "sorry" but he did not think he could put his personal feelings aside and impose death and that he believed his views would impair his

[6] *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)(holding "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.").

ability to follow the law. (PC Vol. VI 1074-1076). The trial court also noted that trial counsel in fact objected to the prosecutor's challenge for cause. (PC Vol. VI 1075 & n.15). The postconviction court then found that Tucker was properly challenged for cause. (PC Vol. VI 1076).

The trial court recounted prospective juror David Herbert's responses during jury selection including that he did not really know what the effect of his religious beliefs would be on his ability to impose the death penalty. (PC Vol. VI 1076-77). Herbert stated that his mind would be saying to do one thing but his faith and heart another. (PC Vol. VI 1077). He thought his Catholic faith would affect his decision. (PC Vol. VI 1077). Upon being asked a third time by the prosecutor if his religion would impair his ability to impose death, Herbert responded "Yeah." (PC Vol. VI 1077). The trial court also recounted defense counsel attempts to rehabilitate Herbert. (PC Vol. VI 1077-78). When asked by the trial court if his religion would impair his ability to impose death, Herbert responded "it would impair it to a certain degree" and that the decision would "haunt him for the rest of his life." (PC Vol. VI 1078). The postconviction court then found that Herbert was properly challenged for cause. (PC Vol. VI 1078-79). And that if defense counsel would have objected to the challenge for cause, any such objection "would likely have been overruled." (PC Vol. VI 1079).

The trial court noted that prospective juror Clark was in fact stricken peremptorily by the prosecutor and was not challenged for cause. (PC Vol. VI 1079-1080). The trial court noted that there is

simply nothing defense counsel can do regarding the prosecutor's use of his peremptory challenges and that *Witherspoon* is limited to for-cause challenges. (PC Vol. VI 1080). And therefore, the trial court concluded that trial counsel cannot "be found deficient for failing to object to a peremptory strike." (PC Vol. VI 1080).

The trial court then addressed the three actual jurors. (PC Vol. VI 1081-88). The trial court noted that defense counsel had only one peremptory challenge at the end of jury selection. (PC Vol. VI 1081). The trial court found as a matter of fact that Guardado was actively involved in jury selection. (PC Vol. VI 1081-82).

The trial court addressed actual juror Pennington (PC Vol. VI 1082-83). The trial court found that jury selection established that she never stated that she was a personal friend or a co-worker of the victim. (PC Vol. VI 1082). Rather, the victim helped the juror's son buying a home, as a realtor, three years before the murder (PC Vol. VI 1082). Pennington indicated that she would be impartial despite her son's business relationship with the victim. (PC Vol. VI 1083). She was also "only somewhat" in favor of the death penalty. The trial court noted that both defense counsel testified that they wanted Pennington on the jury based on her "lukewarm sentiment regarding the death penalty" and that this was a "sound strategic decision." (PC Vol. VI 1083). The trial court also noted that the defendant failed to demonstrate that she was an "unfair or partial juror." (PC Vol. VI 1083).

The trial court addressed actual juror Hall, who knew three of the officers involved in the investigation of the case: Captain Sunday, Investigator Garrett, and Investigator Lorenz. (PC Vol. VI

1083-86). The trial court found that Hall never stated that he personally had any feelings regarding the victim. (PC Vol. VI 1084). The trial court also noted that only Investigator Lorenz testified at the penalty phase. (PC Vol. VI 1084). And that juror Hall indicated that, despite his familiarity with these officers, he would be able to fairly weight the evidence. (PC Vol. VI 1084). He assured the trial court that he could be fair and impartial. (PC Vol. VI 1086). The trial court noted that defense counsel Gontarek planned on using the defendant's full cooperation as mitigation. (PC Vol. VI 1085). The trial court concluded that there was no evidence presented that juror Hall was an "unfair or partial juror." (PC Vol. VI 1085).

The trial court addressed actual juror Cornelius whose great aunt and uncle who were victims of a homicide during a robbery, twenty-five years ago when he was young. (PC Vol. VI 1086-88). He testified that this experience would not affect his ability to serve on the jury. (PC Vol. VI 1086). He was only somewhat in favor of the death penalty. (PC Vol. VI 1087). And defense counsel Gonterak testified that a juror such a Cornelius who feels life in prison is worse than the death penalty is rare and he wanted Cornelius as a juror based on his view. (PC Vol. VI 1088). The trial court also noted that the defendant failed to establish that Cornelius was an unfair or partial juror. (PC Vol. VI 1088).

Procedural bar/fundamental error

The claim regarding prospective jurors Tucker and Herbert is procedurally barred because it should have been raised in the

direct appeal. *Johnson v. State*, 104 So.3d 1010, 1027 (Fla. 2012)(stating: "[c]laims that should have been raised on direct appeal are procedurally barred from being raised in collateral proceedings" citing *Freeman v. State*, 761 So.2d 1055, 1063 (Fla. 2000)). If Guardado wished to raise a straight *Witherspoon* violation regarding these two jurors, he need to do so in the direct appeal. Any straight *Witherspoon* issue regarding either of these two prospective juror stricken for cause is procedurally barred.

Appellate counsel seems to be raising this issue as a matter of trial court error and fundamental error. Guardado invokes the concept of fundamental error but fundamental error is direct appeal concept. Fundamental error concerns the right to a fair trial, not the right a "fair" postconviction proceedings. There is "no due process right to collateral review at all." *Ryan v. Gonzales*, 133 S.Ct. 696, 704 (2013)(citing *United States v. MacCollom*, 426 U.S. 317, 323, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976)). Fundamental error does not apply in postconviction proceedings. Guardado may not invoke the concept of fundamental error to evade the procedural bar. This Court should decline to address the claims regarding prospective jurors Tucker and Herbert.

Standard of review

The standard of review for a claim of ineffective assistance of counsel is *de novo*. *Rodgers v. State*, - So.3d -, -, 2013 WL 1908640, *3 (Fla. 2013)(explaining that this "Court employs a mixed standard of review, deferring to the postconviction court's factual

findings that are supported by competent, substantial evidence, but reviewing legal conclusions *de novo*" citing *Sochor v. State*, 883 So.2d 766, 771-72 (Fla. 2004)).

Merits

To prove a claim of ineffective assistance of counsel in jury selection, Guardado must establish that one of three actual jurors was bias and he has not done so. In *Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007), this Court held that when a claim of ineffective for failing to raise or preserve a cause challenge to a particular juror, the defendant must demonstrate that that particular juror was actually biased. This Court explained that "actual bias means bias-in-fact" and that "the evidence of bias must be plain on the face of the record." *Id.* at 324. The defendant must show that the juror was "actually biased, not merely that there was doubt about her impartiality." *Owen v. State*, 986 So.2d 534, 550 (Fla. 2008). Furthermore, this standard applies to both claims of ineffectiveness relating to for-cause challenges and to claims of ineffectiveness relating to peremptory challenges. *Owen*, 986 So.2d at 550.

This Court routinely rejects claims of ineffectiveness in jury selection where no actual bias on the part of any juror has been established. *See Merck v. State*, 2013 WL 264437, 5 (Fla. 2013)(rejecting a claim of ineffectiveness for failing to strike two jurors who were predisposed to vote for the death penalty and explaining that if a lawyer's error did not result in the seating of a biased juror, then postconviction relief on the basis of the

lawyer's alleged ineffectiveness is not appropriate, citing *Carratelli*); *Johnston v. State*, 63 So.3d 730, 744-45 (Fla. 2011)(rejecting a claim of ineffectiveness for not sufficiently questioning a juror who was exposed to pre-trial publicity because the defendant failed to demonstrate actual bias on the part of the juror, citing *Carratelli*); *Troy v. State*, 57 So.3d 828, 836-38 (Fla. 2011)(rejecting a claim of ineffectiveness for failing to strike a juror, who knew about the case from a newspaper and who was a member of the same local chamber of commerce as the victim's father, either for cause or peremptorily because a shared an affiliation with the same professional organization does not establish actual bias, citing *Carratelli*); *Smithers v. State*, 18 So.3d 460, 464 (Fla. 2009)(rejecting a claim of ineffectiveness for not challenging a juror for cause based on the juror's views of the death penalty because the juror was not actually biased, citing *Carratelli*); *Lugo v. State*, 2 So.3d 1, 16 (Fla. 2008)(rejecting a claim of ineffectiveness for not questioning a juror regarding being a victim of a crime at work because the juror was not actually biased because he stated during voir dire that he could be fair, listen to the evidence, and follow the law, citing *Carratelli*).

Guardado fails to meet the *Carratelli* standard because he has not established any of the three jurors in question was actually biased on the face of the record. And he has failed to meet *Carratelli* standard regarding the two excused jurors as well.

The three actual jurors

Counsel's performance was not deficient for failing to strike jurors Pamela Pennington; William Cornelius; and Earl Hall. None of these three jurors was subject to being challenged for cause. All of these jurors assured the trial court that they could be fair and impartial which is the standard for a cause challenge. Each of these jurors unequivocally stated that they could be fair. A juror's unequivocal assurances of impartiality generally means that they cannot be stricken for cause.

A juror, such as juror William Cornelius, having relative who was not an immediate family member being the victim of the same type of crime is not sufficient to establish actual bias. *Banks v. State*, 46 So.3d 989, 995 (Fla. 2010)(rejecting a claim that the trial court erred in denying the challenge for cause of a juror whose daughter was recently the victim of a robbery because that juror assured the trial court that his daughter's recent robbery would not affect his ability to be fair).[7] A juror, such as juror Pamela Pennington, having an relative who had a business acquaintanceship with the victim is not sufficient to establish

[7] On occasion, a prospective juror may be so closely related to a murder victim and so involved with the prosecution of that case, that the juror should be stricken for cause. *Smith v. State*, 28 So.3d 838, 860 (Fla. 2009)(holding that a parent who testified as a witness during his own daughter's murder trial should have been stricken for cause). Such is not the case with juror Cornelius. The victims of the long ago murder were his great aunt and uncle, not his own child. And there was no indiction that he was particularly close to them. He was a small child when the murders occurred and he did not know any of the facts of the crime such as how they were killed. Nor did juror Cornelius testify in any trial related to those murders. There was no trial because the perpetrator of the PX robbery/murders was never caught.

actual bias. *Mills v. State*, 462 So.2d 1075, 1079 (Fla. 1985)(holding the trial court did not error in denying a challenge for cause because neither the juror's distant relationship to the victim's family nor his acquaintance with the defendant negated his declaration of impartiality); *cf. United States v. Calabrese*, 942 F.2d 218, 224-25 (3d Cir. 1991)(concluding a juror who merely had a passing acquaintance with one of the defendants was not biased citing cases). A juror, such as Earl Hall, having a business relationship with one of the investigators, who testified at the penalty phase, twenty years ago does not amount to actual bias. *United States v. Bradshaw*, 787 F.2d 1385, 1390 (10th Cir. 1986)(finding no bias even though a juror had prior business dealings with key Government witnesses). Neither Pennington nor Cornelius nor Hall were subject to for-cause challenges. Guardado failed to show actual bias on that part of any of these three jurors.

Peremptory challenges

Rather, defense counsel would have had to remove all three of these jurors via peremptory challenges. But defense counsel could not have peremptorily stricken all three of these jurors. This claim of ineffectiveness is premised on the faulty premise that defense counsel had an unlimited number of peremptory challenges; he did not. Defense counsel used nine peremptory challenges, he only had one peremptory challenge remaining. Guardado does not point to any "wasted" peremptory challenge by identifying any of

the nine peremptory challenges that should not have been made. While trial courts, on occasion, grant an additional peremptory challenge to cure any potential problem regarding a denial of a "for cause" challenge that was a close call, Guardado points to no such situation. Counsel's performance is not deficient for not doing the impossible. Defense counsel could not have peremptorily stricken all three of these jurors.

Furthermore, it was a reasonable strategic decision not to peremptory strike jurors Cornelius and Pennington regardless of any other considerations. They were good jurors for the defense. Both juror Cornelius and juror Pennington expressed lukewarm support for the death penalty which was the most important consideration in this jury selection. Guilt was not at issue in this case because the defendant entered a plea. Rather, these jurors were still "good" jurors for the defense based on their lack of strong support for the death penalty regardless of one being acquainted with the victim and the other one having distant family members being murder victims decades ago. These other considerations were minor compared to these jurors' attitude to the death penalty. It was a reasonable strategic decision to select jurors who were not strong supporters of the death penalty in a case where the only issue was the sentence of life or death. Counsel's performance was not deficient for not attempting to remove either of these defense-friendly jurors.

Regarding juror Hall, there was no deficient performance either. Guardado entered a guilty plea to this murder. As lead defense counsel Gontarek testified at the evidentiary hearing, he actively

wanted juror Hall because the investigator that he was good friends with was involved in the confession. Additionally, the confession went toward proving guilt and there was no guilt phase because Guardado entered a plea. The sole issue in this case was the appropriate penalty. Furthermore, while juror Hall expressed strong support for the death penalty, he also had a son who had pled guilty to burglary and theft. His son had taken responsibility for his crime by pleading guilty, just as Guardado had done. One of the main themes of defense counsel's mitigation case was remorse and responsibility and this type of mitigation could be expected to resonant with juror Hall.

But even assuming deficient performance for not peremptorily striking Juror Hall, there was no prejudice. Juror Hall stated that although he was close friends with Investigator Garrett he could fairly weigh his testimony like that of any other witness. (T. Vol. V 323). And Investigator Garrett did not testify at penalty phase. Nor did Captain Sunday testify at the penalty phase. It was Investigator Lorenz who testified. (Vol. VI 23-131). Juror Hall was good friends with Garrett, not Lorenz. Juror Hall had a long-ago business relationship with Investigator Lorenz, not a current friendship. While Investigator Lorenz was a client of Hall's twenty years ago when he sold insurance, such a long-ago business relationship does not amount to actual bias. Juror Hall also stated that he "most definitely" could fairly weigh the testimony of both Captain Sunday and Investigator Lorenz. (T. Vol. V 323). Juror Hall was not actually biased as required by

Carratelli and therefore, there was no prejudice. Counsel was not ineffective for failing to peremptorily strike Juror Hall.

Two prospective jurors stricken for cause

As a claim of ineffectiveness, it is meritless. As the trial court found, defense counsel did, in fact, object when the prosecutor challenged Tucker for cause. (PC Vol. VI 1074-75 at n.15 citing T. 115). Counsel objected. Counsel's performance cannot be found deficient for not doing something that he, in fact, did. *Bates v. State*, 3 So.3d 1091, 1106, n.20 (Fla. 2009)(observing that counsel cannot be held ineffective for what counsel actually did); *Stephens v. State*, 975 So.2d 405, 415 (Fla. 2007)(explaining that counsel cannot be deemed ineffective for failing to object when, in fact, he did object.).

Alternatively, even if counsel had not objected, there was no deficient performance because Tucker was properly excused for cause. Prospective juror Tucker, a lawyer, objected to Florida's death penalty statutes because of "due process issues." (T. Vol. VI 1159, 1161). Basically, Tucker believed that Florida's death penalty was unconstitutional which is certainly a valid basis for the prosecutor challenging him for cause. A juror who objects to an entire law would not vote to impose the death penalty regardless of the particular facts of the case because that juror's objection to the death penalty is not premised on any particular facts. Rather, this is juror nullification. *United States v. Appolon*, 695 F.3d 44, 64-65 (1st Cir. 2012)(holding a jury instruction informing

the jury they have a duty to convict if the government proves its case which by implication suggested that jurors lacked the power to nullify was not error because jurors may have the power to ignore the law, but their duty is to apply the law and they should be so instructed). A juror who will not follow the law is properly stricken for cause.

And this is equally true of prospective juror Herbert. He was repeatedly asked by both the prosecutor and the judge whether he could put aside his religious objections to the death penalty and he basically responded that he could not. He could not assure the trial court that his faith would not substantially impair his ability to serve as an impartial juror. Rather, he stated that his faith would affect his decision. Prospective juror Herbert was properly stricken for cause as well.

Nor can counsel's performance be considered deficient for not doing the impossible. *Thompson v. Nagle*, 118 F.3d 1442, 1451 (11th Cir. 1997)(observing that "[f]ailure to do the impossible cannot constitute ineffective assistance of counsel."). Prospective juror Clark was stricken by the prosecutor, not for cause. (T. Vol. V 327-328). Defense counsel has no control over the prosecutor's use of peremptory challenges. It is a given that defense counsel usually wants the jurors that the prosecutor does not - and verse versa - that is the nature of peremptory challenges.

Any objection would have been both frivolous and futile because it would have been immediately overruled. The only valid objection to the prosecutor's use of peremptory challenges is based on *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), not

Witherspoon. *Witherspoon* applies only to for-cause challenges, not to peremptory challenges. *Holland v. Illinois*, 493 U.S. 474, 480, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990)(explaining that a prohibition upon the exclusion of cognizable groups through peremptory challenges "has no conceivable basis in the text of the Sixth Amendment, is without support in [the Supreme Court's] prior decisions, and would undermine rather than further the constitutional guarantee of an impartial jury."); *Bowles v. Sec'y, Dept. of Corr.*, 608 F.3d 1313 (11th Cir. 2010)(rejecting a claim that death-scrupled jurors may not be peremptorily stricken by the prosecutor); *Bell v. State*, 965 So.2d 48, 71 (Fla. 2007)(noted that the Court has "specifically held that the State may exercise peremptory challenges against jurors who express some opposition to the death penalty" citing *Morrison v. State*, 818 So.2d 432, 444 (Fla. 2002)); *San Martin v. State*, 717 So.2d 462, 468 (Fla.1998)(explaining a *Witherspoon* claim must be based on a juror who was removed for cause and that a *Witherspoon* claim based on peremptory challenges does not state "a proper basis for relief" because a prosecutor may peremptory strike prospective jurors who are opposed to the death penalty because both parties have the right to peremptorily strike persons thought to be inclined against their interests).

Guardado's reliance on *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976), is misplaced. IB at 85-86. *Davis* adopted a per se rule requiring a death sentence be vacated if it was imposed by a jury from which a prospective death-scrupled juror was erroneously excluded for cause. *Gray v. Mississippi*, 481 U.S.

648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987)(reaffirming *Davis*). But *Davis* does not apply in this postconviction case. *Davis* is not an ineffective assistance of counsel case. *Davis* did not hold that counsel is per se ineffective in not objecting to the removal of death-scrupled jurors for cause. *Strickland* does not have per se rules regarding counsel's conduct. *See Roe v. Flores-Ortega*, 528 U.S. 470, 478, 120 S.Ct. 1029, 1035, 145 L.Ed.2d 985 (2000)(rejecting a per se rule that trial counsel must always file a notice of appeal "as inconsistent with *Strickland*'s holding that the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."). If Guardado wanted to raise a straight *Witherspoon* violation regarding either of these two stricken jurors, he need to do so in the direct appeal. He certainly could have cited *Davis* and *Gray* in support of an argument that any violation of *Witherspoon* is not subject to harmless error analysis in his direct appeal brief. But *Davis* and *Gray* are of no use to him in his postconviction appeal brief.[8]

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[8] It is doubtful the United States Supreme Court would decide *Davis* and *Gray* in the same manner today. *Gray* was a 5-4 decision and the only member of the *Gray* Court still on the High Court is Justice Scalia, who wrote the dissent in *Gray*. There are few other areas of the law where the High Court has endorsed the use of the concept of per se reversible error and it is generally disfavored by the High Court. And this would be especially true when the prosecutor has remaining peremptory challenges. *Gray*, 481 U.S. at 679, 107 S.Ct. at 2062 (Scalia, J., dissenting)(observing that it is perfectly proper for prosecutor to remove death-scrupled jurors using peremptory challenges and that because defendants presumably use their peremptory challenges in the opposite fashion, the State's action simply does not result in juries deliberately tipped toward conviction or imposition of the death penalty). In this case, the prosecutor used seven peremptory challenges. (T. Vol. V 299-300; 328; 353). The prosecutor had three remaining peremptory

challenges which was more than enough to remove both these jurors. A prosecutor, who is tying a capital case and moves to strike a prospective juror for cause on the basis that the prospective juror cannot impose a death sentence and who has numerous peremptory challenges remaining, simply uses those remaining peremptory challenges to strike the juror. These two prospective jurors would have never sat on this jury regardless of whether trial counsel objected or not.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of postconviction relief.

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 email to Clyde Taylor of Taylor & Taylor, P.A., at ct@taylor-taylor-law.com this 19th day of June, 2013.

/s/ Charmaine Millsaps
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CERTIFICATE OF FONT AND TYPE SIZE

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

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