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IN THE

SUPREME COURT OF FLORIDA

JESSE GUARDADO Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO.: SC 12-1040 Lower Case No.: 04-CF-903

INTIAL BRIEF OF APPELLANT (CORRECTED)

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PRELIMINARY STATEMENT

In this brief, the appellant, Jesse Guardado, is referred to by name, Appellant or as the defendant. The appellee is referred to as the State, Appellee, or the prosecutor. Citations to the post-conviction record on appeal (15 Volumes) are made by reference to the Volume number followed by the appropriate page numbers. For example, (Vol. III, pgs. 522-540) refers to pages 522-540 found within Volume III of the record.

Citations to the original record on appeal are made by reference to the original document number or the page numbers from the trial transcripts or jury selection that are not a part of the post-conviction record. For example, (R 252) refers to document number 252, (TT 250) refers to page 250 of the trial transcripts, and (JS 112) refers to page 112 from the jury selection transcripts.

STATEMENT OF THE CASE AND FACTS

Factual Summary of the Crime

The facts of this case were summarized in this Court's opinion affirming the judgment and death sentence, as follows:

> 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 this 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. (Vol. I, pgs. 3-5)

Guardado's Confession and Guilty Plea

Law enforcement officers first spoke with Guardado on September 21, 2004, several days after the murder and before he was arrested. (Vol. VII, pg. 1231) Without questioning from the officers, he blurted out "That lady didn't deserve what I did to her." (Vol. VII, pg. 1231-1232) Investigator James R. Lorenz assumed that he was referring to the victim, Ms. Malone. (Vol. VII, pg. 1232) Lorenz advised Guardado that he needed to speak with a public defender before he

could continue the conversation. (Vol. VII, pg. 1232) After consulting with the public defender, Guardado still wished to speak with law enforcement against the public defender's advice. (Vol. VII, pg. 1232)

During the subsequent interview, he confessed to killing Ms. Malone. (Vol. VII, pgs. 1240-1241) He explained that he was looking for money to buy drugs and that he went to her house to kill "[i]f that's what it was going to take." (Vol. VII, pgs. 1251, 1252, 1272) After the murder, Guardado bought crack cocaine, smoked it, and then went to work. (Vol. VII, pgs. 1246-1248, 1252, 1272, 1274, 1276, 1294)

Guardado also told the officers about his first experience with crack cocaine and stated, "I had no idea that stuff was so powerful. Just got to where I wanted it more and more, you know. And I kept telling myself, Oh, it's nothing; you can put it down whenever you get ready. But it just started grabbing harder and harder." (Vol. VII, pg. 1256) The day after the murder he continued to try to get money to buy more crack. (Vol. VII, pg. 1295)

He also explained why he attempted to rob a grocery store clerk, and stated, "Just going in there just for money to buy dope with. I tried to do it. He started hollering and I left." (Vol. VII, pg. 1293) He described his failed relationship with his live-in girlfriend, Lois Reichle, which ended as a result of his drug abuse. (Vol.

VII, pg. 1257-1258) After she moved out, he stated, "I just – I don't know; I guess I just effectively lost it; I just gave up." (Vol. VII, pg. 1258)

At arraignment, Guardado pleaded guilty to capital murder and robbery with a weapon in Walton County, without the assistance of an attorney. (Vol. I, pg. 2, 9; Vol. VIII, pgs. 1401-1431) In addition, he plead before the State announced that it would be seeking the death penalty, but with the knowledge that the State could seek the death penalty. (Vol. VIII, pg. 1419)

After Guardado pleaded guilty without an attorney, the trial court appointed John Jay Gontarek to represent him for the penalty phase. (Vol. I, pgs. 10-11) Prior to his appointment, Gontarek spent four (4) years as a prosecutor in the early 1980's, had been in private practice since 1984, and had experience with death cases. (Vol. V, pg. 848)

In addition, the trial court appointed Jason Andrew Cobb as co-counsel for the penalty phase. (Vol. IV, pg. 751, 769; R 183) Cobb had previously helped another prosecutor prepare a death penalty case during his three (3) years as an assistant state attorney. (Vol. IV, pgs. 751-752) He had been in private practice as a criminal defense attorney for about four (4) years before his appointment. (Vol. IV, pg. 752)

Voir Dire for Penalty Phase

Three jurors that were stricken and not seated on the jury are germane to this brief: James Tucker, David Hebert, and Teresa Clark. Tucker, a lawyer that practiced in corporate security and formerly clerked for a federal appellate judge, voiced his objection to the death penalty, but agreed that a jury should consist of individuals with diverse opinions, including those that oppose the death penalty. (Vol. VI, pgs. 1159, 1161) His concern related to due process issues:

> Well, I've given a fair amount of thought and – and I believe most of the statues the states have drafted, including Florida, raise significant issues both on the Fourth Amendment and Fourteenth Amendment due process. I also think the way they implement it is not consistent. Therefore, in theory, you could come up with some possible justifications for the death penalty laws. I think that life without parole does cover, you know, most of the purposes of the criminal law in this context. (Vol. VI, pg. 1161)

He understood the duty of the jury and its purpose, but thought, "it would be difficult" to set aside his personal opinions and follow the judges instructions. (Vol. VI, pgs. 1161-1162) When asked if he could impose the death penalty under certain circumstances, he replied, "I'm sorry. I don't think I could, under the Florida Statute." (Vol. VI, pg. 1161) The court asked if his beliefs would substantially impair his ability to follow the law, and Tucker twice stated, "I believe it would." (Vol. VI, pg. 1162)

The State moved to strike Tucker for cause and Guardado's counsel objected. (Vol. VI, pg. 1164) However, the court granted the State's motion and Tucker did not serve on the jury. (Vol. VI, pg. 1164)

David Hebert expressed a religious opposition to the death penalty. (Vol. VI, pg. 1168) The prosecutor explored whether his faith would substantially impair his ability to be fair and impartial:

> Q: Do you feel like your Catholic faith – If you were selected as a juror, do you feel like your catholic faith would substantially impair your ability to be a fair and impartial juror; that is, to consider personally imposing the death penalty?
>
> A: To be perfectly honest, I would hear both sides and try to be as fair as I can. But the effect of my religion on me, I really don't know what I would do, to tell you the truth.
>
> Q: Have you ever seen or heard about a case where, despite your faith, you said, "Well, I could personally vote to impose the death penalty in that case, even though I'm a Catholic and even though my religion opposes it?"
>
> A: My gut feeling would be yes, I probably could. But what I would really do under the circumstances, I really don't know until I'm there.
>
> Q: I appreciate your candor. You understand when we select a jury, we're trying to have jurors who have an open mind about the issue at hand. And so when I ask will you have an opposition, I'm trying to find out whether you're already leaning either way. Are you thinking, "Well, you know, I'm probably going to vote for life and that way I'll be -- you know, I'll feel better about my faith," or are you open minded about the death penalty?
>
> A: Like I said, 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.
>
> Q: Do you generally follow your faith?

A: Oh, absolutely; most of the time, yes; to the best of my ability that is.

Q: I understand; I understand. You've heard – I don't want to ask you to prejudge this case; okay? You've heard essentially what the case is about; that Mr. Guardado has pled guilty to robbing Jackie Malone and murdering her during that robbery. Do you feel like your faith would affect your ability to consider imposing the death penalty in such a case?

A: I think it would affect my decision, yes.

Q: All right. If I hear you correctly, you would – you'd like to follow the law?

A: Correct.

Q: And under the law of the State of Florida, the death penalty is available and the proper punishment in certain cases of first-degree murder. But you believe that your religious faith could substantially impair your ability to openly consider imposing the death penalty personally?

A: Yeah. (Vol. VI, pgs. 1168-1170)

When questioned by defense counsel, Hebert explained that he could follow the law, but that his religion would not be ignored:

Q: Would your religion substantially impair your ability to follow Judge Wells' instructions and the facts of the case?

A: 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.

Q: Okay.

COURT: That's an important question that Mr. Gontarek asked you, Mr. Hebert. I want you to listen to it again and think about it again before you answer. I think what he asked you is, you have some strong religious beliefs; that's okay. Would they substantially impair your ability to apply the evidence to the laws that the Court will instruct you on?

A: I don't know how to answer because --

COURT: You don't know what the instructions are going to be?

A: Yeah.

COURT: Well, I think Mr. Elmore's done a pretty good job, and Mr. Gontarek, of explaining that this jury will be called on in making a recommendation. It doesn't have to be unanimous. You'll be asked to vote whether or not to recommend the death penalty or to recommend life without the possibility of parole. Those are the two options of the law as it applies to this case. The aggravating circumstances and the mitigating circumstances will be explained to you. But going in with these religious beliefs, do you feel like that they're going to impair your ability to follow the law and to apply the evidence to that law?

A: That's a very disheartening decision to make. I think it would impair it to a certain degree. (Vol. VI, pgs. 1174-1176)

In a final exchange, Hebert provided an additional explanation of his beliefs:

Q: Mr. Hebert, back to you for just one moment. In considering your religious feelings, do you feel that there are some cases that you could vote for the death penalty?

A: My mind says yes, but my heart says no. I really don't – like I said, I don't know what I would do under the circumstances. I've never been faced with this and always prayed that I would never be faced with it, so I really don't know what I would do. I know that it would haunt me for the rest of my life once I made that decision, though.

Q: If you followed the law and instructions and made your decision on that, would that haunt you?

A: The thing is, I don't know if I could just follow the law; that's what I'm saying. My religion weighs heavily on what I do every day of my life.

Q: Okay. Thank you. (Vol. VI, pgs. 1178-1179)

The State moved to strike Hebert for cause and stated, "And Mr. Hebert is obviously – due to his religious faith is the reason I would move to excuse him." (Vol. VI, pg. 1180) Defense counsel did not object and the court excused Hebert from the panel. (Vol. VI, pg. 1180)

Teresa Clark voiced an opposition to the death penalty, but assured the court that she could follow the law. (Vol. VII, pgs. 1194-1196) The State used a peremptory challenge to excuse Clark from the jury. (Vol. VII, pg. 1216)

Three jurors that presided over the penalty phase are germane to this brief: Pamela Pennington, Earl Hall, and William Cornelius.

Pennington knew the victim, who was her son's realtor, and worked with her when her son was trying to buy a house. (Vol. VI, pgs. 1141, 1183, 1184) They met in person "at least once or twice a week" over the course of several months. (Vol. VI, pg. 1184) They had no further contact after Ms. Malone found her son a house to purchase in 2000 or 2001. (Vol. VI, pgs. 1185-1186) She admitted that she liked her because she was a very nice lady. (Vol. VI, pgs. 1190, 1191) Despite her relationship, Pennington claimed that she could be fair and impartial. (Vol. VI, pgs. 1184, 1191)

The prosecutor asked her about her views toward the death penalty:

> Q: Ms. Pennington, the same question. Would you say that you strongly, somewhat, or slightly favor us having the death penalty available?

A: Somewhat. It's the same; under the circumstances.

Q: All right. If someone told you tomorrow, "We're abolishing the death penalty in the State of Florida," how would that affect you?

A: Well --

Q: Would you react by saying, "I don't know," or, "I don't care," or would you say, "No; that shouldn't happen; we need the death penalty?"

A: I would say no, that shouldn't happen.

Q: Could you personally vote to impose the death penalty in an appropriate case?

A: Yes, sir. (Vol. VI, pgs. 1182-1183)

Earl Hall disclosed that he had some familiarity with the facts of the case from reading the newspaper. (Vol. VI, pgs. 1137-1139, Vol. VII, pg. 1210) He also revealed that his family members knew the victim and expressed positive opinions of her. (Vol. VII, pg. 1210) Furthermore, he admitted that he knew officers that were involved with the investigation. (Vol. VII, pg. 1211) He described his relationship with the officers to the prosecutor:

Q: Investigator Garrett is a good – a close friend of long standing, both in family, my family, and myself. I've been knowing him for twenty-one, twenty-two years personally. And I have a son that worked with him before he went with the law enforcement and they were very close. Yeah, we're close. Investigator Lorenz used to be a client of mine when I sold insurance; that's been twenty years ago; up to twenty years ago. And he and his family had insurance with the company that I worked for, so I knew him from that. Officer Sunday, I don't actually know him; I know his father fairly well. My wife went to school with him back a long time back and so we've known him for a good many years and known the family.

Q: All right. If Investigator Garrett, who you've described as a close friend, testified, would you be able to fairly weigh his testimony with that of other witnesses?

A: Yes, I could.

Q: The same question for Investigator Lorenz and Captain Sunday?

A: Most definitely. (Vol. VII, pgs. 1211-1212)

Hall answered that he was "strongly" in favor of the death penalty. (Vol. VII, pg. 1199) He agreed to hold the State to its burden and consider mitigating circumstances. (Vol. VII, pg. 1200) He claimed that he was capable of recommending a life sentence if it were appropriate. (Vol. VII, pg. 1214)

Prospective Juror William Cornelius reported that his great aunt and uncle were murdered during a robbery. (Vol. VII, pgs. 1147, 1152-1153) Cornelius did not provide any details of the murders, as his knowledge was limited. (Vol. VII, pg. 1153) He denied that their murders would affect his ability to serve as a juror. (Vol. VII, pg. 1154)

Cornelius stated that he was "somewhat" in favor of the death penalty. (Vol. VII, pgs. 1150, 1156) He was then asked about the severity of a life sentence compared to a death sentence:

Q: And what have you thought about a life sentence being harsher?

A: Being in construction, I was on the construction of three new federal prisons and on one under way, which was Lewisberg. And I saw what they went through in that – in that prison serving for a long time.

Q: You saw what the inmates went through?

A: Yes.

Q: You felt like that was a very severe punishment?

A: On that one, yes. (Vol. VI, pg. 1157)

Neither Pennington, Hall, nor Cornelius were stricken for any reason and were accepted by both the State and Appellant. (JS 356, 357)

State's Evidence Presented at the Penalty Phase

The State sought to prove five aggravating circumstances: (1) the capital felony was committed by a person convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation; (2) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence; (3) 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 (hereinafter referred to as HAC); and (5) the crime was committed in a cold, calculated, and premeditated manner (hereinafter referred to as CCP). (Vol. I, pg. 7)

James R. Lorenz, an investigator for the Walton County Sheriff, testified about his role in the investigation. (Vol. VII, pg. 1226) He worked alongside Investigator Rome Garrett (identified as a good friend of Juror Hall) on the case. (Vol. VII, pg. 1229) He investigated the crime scene and took photographs. (Vol. VII, pgs. 1228-1230)

Lorenz told the jury about meeting Guardado at his request, and his confession that followed. (Vol. VII, pgs. 1231-1235) The prosecutor played a redacted audio and video recording of the confession for the jury. (Vol. VII, pgs. 1236-1297)

Lorenz testified that he believed Guardado was remorseful during his confession because at one point Guardado choked up and became teary-eyed. (Vol. VII, pgs. 1318, 1321) Guardado did not ask Lorenz for any favors in return for his confession. (Vol. VII, pg. 1319, 1321)

The Supreme Court summarized the testimony of the medical examiner, Dr. Minyard, in the opinion affirming the sentence, as follows:

> 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 incused 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. (Vol. I, pgs. 5-6)

Summary of Mitigation Evidence Presented

Dr. James Larson, a forensic psychologist, testified for the defense. (Vol. VII, pgs. 1327-1355) His task was to conduct a mitigation evaluation. (Vol. VII, pg. 1332) Larson met with Guardado four times and reviewed arrest reports, depositions of the investigators, his family history, work history, and his criminal history. (Vol. VII, pgs. 1332-1333, 1334-1335) Larson conducted tests to assess Guardado's personality and intellectual functioning. (Vol. VII, pg. 1334)

Larson did not find any "significant psychological or psychiatric symptoms." (Vol. VII, pgs. 1336-1337) He tested in the upper-average range for intellectual functioning. (Vol. VII, pgs. 1337-1338) Larson found him to be slightly depressed and paranoid, which he found to be situational due to his incarceration and legal trouble. (Vol. VII, pg. 1340) Larson opined that Guardado had significant, genuine remorse for the murder. (Vol. VII, pgs. 1345-1346)

Larson, who admitted that only five percent of his practice was devoted to drug treatment, (Vol. VII, pg. 1351) discussed his opinions about Guardado's drug use and stated:

> A: Moving away from the clinical scales, some other scales are called Kent scales. And this is where the test got a lot more sophisticated. These deal with various items relating to substance abuse and attitudes toward substance abuse; if the subject abused substances for significant periods of time; items that predict the likelihood that someone would become a substance abuser. When you look at those items on a fourteen-year-old, you can pretty well predict that they will abuse

substances by the late twenties because there is a history of substance abuse dating back to teenage years. As you would expect, those cluster of scores having to do with substance abuse -- addiction to substances, attitudes, beliefs, and values that support substance abuse -- that those scores are elevated.

Q: The substance scores were elevated with Mr. Guardado?

A. Yes. Which is like we would have expected, given his history. He gave me the history that he'd abused substances since adolescence. And of course, there was a criminal history of it. (Vol. VII pgs. 1340-41)

After Larson revealed the substance abuse scores, defense counsel asked him to provide the results of the test to determine if he was a psychopath:

Q: What about the Hare (phonetic) Psychopathy Check List?

A: The Hare Psychopathy Check List is a relatively new instrument developed to understand psychopaths. If you use the word "psychopath," what you're really talking about is criminal personality. If you go back a couple of hundred years, the French referred to it as criminal penalty. Psychiatrists have long been, and psychologists, interested in what is it that makes people criminals? This instrument is designed to look at the worst of the worst; the psychopaths. They are basically people that don't have a conscience; *they are parasitic*; *mooch off of people*; they can *frequently move*; tend to *have unstable jobs*. More importantly, they lack a conscience. They don't care about stealing or robbing from others; no respect for other people's property or lives. Some of the popular ones you've heard about are people like Ted Bundy with all the Gainesville murders and Danny Rollins, another serial killer who was involved in other Gainesville murders of coeds. So this instrument has been used for lots of purposes.

So for example, in psychiatric populations, sometimes you have people who malinger who are criminals; malinger psychiatric illnesses. And the check list will tend to pop up with those type of people. Sexual deviants, sexual offenders, the check list is

likely to find them; those people that are high on the chart tend to reoffend. That gives us an idea of what somebody's criminal makeup is like.

Some people in prison don't have criminal personalities at all; they got in a fight with their spouse and grabbed a knife to self protect and it ended up somebody getting hurt. Or somebody got a toy gun; the gun went off and so forth and so on. Normal people having these involvements.

So anyway, because -- to understand whether or not he's a psychopath, we gave him this particular instrument.

Q: Is a psychopath someone that has no remorse for what they may have done?

A: That's correct. A psychopath is someone who refuses to accept responsibility for what he did. That's another characteristic.

Q: How did Mr. Guardado do on the psychopathy check list?

A: Quite good. In spite of the number of years he spent in prison, his scores were about what you would expect from an average inmate; not what you would expect from the average inmate on death row or a psychopath. And he was not even high on the list; just in the average range of the population that they used when they -- Normally, that was inmates or a very large sample of inmates in federal institutions and county jails and so forth. And those norms are also about the same for people in England, Scotland, Wales, so forth. So one of the reasons his scores weren't high is because he -- does have empathy; he does have caring; in spite of his criminal activity, he has a conscience; he has remorse. And so for those kinds of reasons, he does not fit the category of the worst of the worst; the Ted Bundy type; not the psychopathic type.

Q: In your opinion, he would not be considered a psychopath?

A: Absolutely would not.

Q: Absolutely what?

A: He absolutely would not be considered a psychopath. (Vol. VII, pgs. 1341-1343)(*Emphasis* added.)

Larson opined that Guardado would "make a good adjustment to prison" based upon his history in prison and the Walton County jail. (Vol. VII, pgs. 1344-1345) In addition, he thought Guardado could make a contribution to a prison population without posing any danger to others. (Vol. VII, pgs.1346-1347) When asked if he thought Guardado was under any emotional duress when he committed the murder, he responded:

> He describes -- and it makes since [sic] if you stop and think about it -- that he was under emotional duress in this time frame. He had been incarcerated most of his adult life; when he got out of prison, he didn't know how to take a credit card and buy gas with it; he was out of touch with society. He got a D.U.I., lost a job, a job that he liked very much and was good at. He got another job and lost it. So he was having economic problems; he was having problems adjusting to society. And then he turned to his old habits of using cocaine and became -- He didn't make it clear. *I don't consider him a drug addict*. He relapsed and went on a crack cocaine binge for approximately two weeks prior to the alleged incident. So in that sense, I think he was under considerable stress prior to the incident. (Vol. VII, pg. 1345)(*Emphasis* added.)

The prosecutor clarified that the reasons for his duress were due to the "culture shock" that accompanied his reintroduction to society after a long prison stay, his cocaine addiction, and his inability to maintain employment. (Vol. VII, pgs. 1351-1353) However, Larson did not believe that Guardado was under any extreme mental or emotional disturbance. (Vol. VII, pg. 1348) Nor did he think Guardado acted under extreme duress or that his capacity to appreciate the

criminality and conform his conduct was substantially impaired. (Vol. VII, pgs. 1348-1349)

Guardado testified at the penalty phase contrary to his attorney's advice. (Vol. VII, pgs. 1357, 1386-1387) He began by describing his family and his work history. (Vol. VII, pgs. 1358-1360) He testified that he wanted to continue working in prison. (Vol. VII, pg. 1361) He explained the difficulty he experienced after being released from prison back in to society. (Vol. VII, pgs.1364-1365) He explained the circumstances that prompted his reintroduction to drug use – losing his job because of a DUI arrest. (Vol. VII, pgs.1366-1367)

He told the jury that Ms. Malone was very supportive of him and wrote a letter on his behalf when he was facing prison after his DUI. (Vol. VII, pg.1367) She would help him pay his rent and offered him a place to stay when he had nowhere else to go. (Vol. VII, pgs. 1367-1369) After losing another job and his drug use increased, she helped find him another job while he was renting a house from her. (Vol. VII, pg. 1369)

Guardado explained why he confessed to the police:

> I didn't see any way that I could try to amend what I had done other than to say I did it and I'm sorry. If there was anything that I could do at this point; if I could trade lives, if I could go back in time; if there was anything that I could do, I would do it. There is -- There's no excuse for what I did and -- and I don't -- to this day, I don't know why I did it. I wake up many nights reliving it. I hope I continue to relive it; I don't ever want to forget. (Vol. VII, pg. 1371)

He then explained why he pleaded to the court without a plea bargain:

> A: Because I feel that's the only way that I could atone. I just -- I didn't want -- I -- I don't -- Anything that I do from this point forward can never repay, can never do away with or repay what I done. The only thing that I can try and do at this point is try and offer any kind of solace or ease that I can offer any of the surviving people in this; not only on her side of it, but on my side as well. I have family, too, that are suffering by this. And I don't mean to belittle anything that y'all have lost.
>
> Q: You felt that a plea would --
>
> A: I didn't want anybody to have to view the things that you viewed today. I surely didn't want you to see those things. I -- I didn't want anybody to have to hear this. I just wanted this to be over. I did it. Do what you have to do and let's be done with it. I -- I can't say it enough. There's nothing that I can do from this point -- or from that point to change or to lessen what I've done. (Vol. VII, pg. 1372)

The prosecutor asked more questions about his substance abuse problem. (Vol. VII, pgs. 1375-1378) Guardado reported that he was under the influence of either drugs or alcohol during all of his previous crimes. (Vol. VII, pg. 1375) Despite his history, upon his release from prison he was not required to receive substance abuse counseling. (Vol. VII, pg. 1375) He immediately began using alcohol, which increased until he was arrested for the DUI. (Vol. VII, pg. 1376) Then he tried crack cocaine and his usage increased to the point that it became an overriding factor in his life:

> The two weeks prior to the murder. It was a -- It was a -- not just an every day, but it was an every awake moment that my mind was geared to finding and getting crack. But prior to that, it was becoming closer and closer. I remember one time before, Mr. Fortner, who testified earlier, was my probation officer. The one that was prior to

> him came by the room one night and I mean I had just exhaled when I opened the door; I had just exhaled a lung full of smoke when I opened the door to talk to him. It was bad enough that I was using. But to pinpoint a specific time period of when it became a problem, I can't really tell you, but I do know that the two weeks prior to that, to me killing Jackie, was a very stressful and in-need time. (Vol. VII, pgs. 1376-1377)

At the conclusion of his testimony, his attorney read a letter from the county jail and submitted it as evidence. (TT pgs. 220-21) The jail letter reported that he was not a discipline problem during his time of incarceration. (R 279; TT pgs. 220-21) Immediately thereafter, counsel submitted a letter from Guardado's mother, Patsy Umlauf, but chose NOT to read it for the jury. (Vol. VII, pgs. 1383-1384; TT pg. 221) Umlauf's letter pleaded to save her son's life and described how crack drove him to commit the crime. (R 280-283)

During closing arguments, the prosecutor used Larson's testimony to argue that the crime was committed in a cold, calculated, and premeditated manner:

> You haven't heard a psychologist come in here and say, 'Oh, he was in a frenzy where he didn't know what he was doing.' Dr. Larson told y'all, No, that's not the way it was; he had the capacity to appreciate what he was doing; he wasn't insane; he wasn't emotionally disturbed. Calm and cool. (TT pgs. 327-328)

The prosecutor also pointed out that Larson, "told you that in his professional opinion, the defendant was not under any substantial emotional duress; he didn't suffer from an emotional disorder when he committed this crime;

he just wanted drugs." (TT pgs. 333) He also drew attention to other parts of Larson's testimony:

> Dr. Larson, Dr. James Larson, came in here; a psychologist with a great wealth of experience in talking to criminals and murderers and trying to find out from a clinical psychology standpoint what was going on in their mind when they committed their crimes. I want you to remember that Dr. Larson said that Jesse Guardado was not insane; he was not mentally ill in any way; he was not suffering from an extreme mental or emotional disturbance. He had the capacity to appreciate the criminality of his conduct; he knew right from wrong the very moment he was murdering Jackie Malone, in Dr. Larson's professional opinion. Well, I mean it's – we didn't need him to tell us that, but he told us and that's the way it is. He also told us Jesse Guardado is not too dumb to understand what he was doing; he has above average intelligence. I summed it up at the end with Dr. Larson: what your saying is he's not insane; he's got above average intelligence; he wasn't under any extreme emotional or mental disturbance; he just needed to get some drugs?
>
> That's right, Mr. Elmore.
>
> Nothing Dr. Larson says mitigates this crime. Now, he talked a little bit about how Mr. Guardado had a hard time adjusting to society. But we've already talked about that. I mean come on; all he had to do was obey the law and get a job. He told you he loved his job. It does not outweigh this atrocity. (TT pgs. 334-35)

Larson's testimony was also used to rebut the suggestion that Guardado's drug use mitigated the crime. The State argued, "Dr. Larson didn't tell you that he wasn't unable [sic] to choose; he told you he was able to choose." (TT pgs. 338)

The Death Sentence

By unanimous vote, the jury recommended the death penalty. (Vol. I, pg. 101) The trial court made detailed findings on the aggravating and mitigating

factors. (Vol. I, pgs. 101-113) 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). (Vol. I, pgs. 102-106)

The trial court found nineteen (19) non-statutory mitigating factors (ten as requested by Guardado, seven additional ones based upon review and consideration of the defense expert at the Spencer hearing, and two that were suggested by the State. (Vol. I, pgs. 107-108) The non-statutory mitigating factors and the weight given by the trial court were: (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). (Vol. I, pgs. 108-113)

The trial court gave the jury's advisory sentence and recommendation great weight and considered and weighed the aggravating and mitigating circumstances. (Vol. I, pg. 113) The trial court found, as did the jury, that the aggravating circumstances outweighed the mitigating circumstances. (Vol. I, pg. 113)

This Court affirmed his judgment and sentence. (Vol. I, pgs. 1-26) Thereafter, Guardado filed a motion for post-conviction relief (Vol. I, pgs. 57-95), and an amended motion for post-conviction relief. (Vol. II, pgs. 316-336)

Grounds Raised in the Appellant's Motion for Post-Conviction Relief

Guardado raised the following post-conviction claims in his original motion: (1) ineffective assistance of counsel for failing to call character witnesses during

the penalty phase; (2) ineffective assistance of counsel for failing to challenge multiple prospective jurors for cause and to object to the state's challenge for cause of persons who expressed mild objection to death penalty; (3) ineffective assistance of counsel for failing to object to a victim-impact statement; (4) due process violation depriving Guardado of a fair trial and proper appellate review because numerous side bar conferences were held during trial in his absence and were not reported; (5) ineffective assistance of counsel for failing to challenge the Florida Supreme Court's unfair and constitutionally flawed proportionality review; (6) lethal injection as a means of capital punishment and Florida's lethal injection procedures are constitutionally flawed and amount to cruel and unusual punishment; (7) Florida's clemency procedures are not constitutional; and (8) the defendant cannot attain a fair clemency hearing because the Governor of Florida, Charlie Crist, was the attorney general for the defendant's case on appeal. (Vol. I, pgs. 57-137) Only grounds (1) and (2) were ultimately pursued and the remaining claims were later abandoned. (Vol. IV, pg. 598)

The amended motion added to the ineffective assistance claim during the penalty phase, and challenged the admissibility of his confession and evidence obtained from his vehicle. (Vol. II, pgs. 327-329, 333-334) Ultimately, Guardado only pursued the ineffective assistance claims regarding jury selection and penalty phase mitigation.

Summary of Evidence From the 3.851 Hearing

When Gontarek first reviewed the case, he was aware that there were "powerful aggravators" in the case that he needed to rebut. (Vol. V, pg. 853) Upon first meeting Guardado, Gontarek was "very impressed" that he had confessed and taken responsibility for his actions. (Vol. V, pg. 851) Gontarek thought that his confession "would go a long way in mitigation," and would be a "powerful mitigator." (Vol. V, pgs. 851, 853) During this meeting, he recalled that Guardado did not want to present any type of mitigation and just wanted to go back to prison. (Vol. V, pgs. 856, 880)

Regardless, Guardado provided Gontarek with information that he thought would be helpful for mitigation, including information about his mother, stepfather, and uncle. (Vol. V, pg. 856) They also discussed reviewing his prison and jail records[1], as well as any psychological or emotional problems. (Vol. V, pgs. 856-57) Guardado believed his prison records were beneficial because they would show that he was a model prisoner with only one disciplinary action during his time at Sumter Work Camp. (Vol. IV, pgs. 706-707)

Guardado also asked Gontarek to contact his friends, Darby Padgett Rentz and Donna Porter, and his former employer to testify on his behalf. (Vol. IV, pg.

[1] However, Gontarek was not clear if he reviewed his prison records. He claimed that he preferred to look at county jail records because prison records could open the door to prior violent history. (Vol. V, pgs. 856-57, 879)

705) In addition, he asked Gontarek to contact character witnesses from Sumter Correctional Institution (Major Mathis, Mark Mestrovich, and John Harris) since "those are the people that know me best." (Vol. IV, pg. 706) He thought they would be beneficial because they saw him every day while he was incarcerated in prison for many years. (Vol. IV, pg. 706). Guardado explained that he wanted witnesses to tell the jury about his good character:

> Once -- Once I made up my mind to have an attorney represent me, yes, I did relay information. And I -- and in all fairness, you know, depending on when you talked to me about our relationship, it may have seemed that I was reluctant. But in my mind, that's why I brought an attorney in to represent me was to tell me, "Look; this is what you need to do; this is how you got to do this if you intend to do what you want to do." You know, and when those things -- when those conversations didn't materialize because of the minimum amount of time that we spent, there was nothing I could do. I mean, you know, I got -- I get more and more frustrated. But yes, you know, I -- I did want certain people called. I wanted people to know and I wanted to know, most of all, why this happened the way it happened. (Vol. IV, pg. 712)

Gontarek's investigation plan was to present testimony of a forensic psychologist, "to talk to the defendant's family who would talk to me", and otherwise talk with Guardado's friends, family, and employers. (Vol. V, pg. 854) He spoke with Guardado's mother, Patsy Umlauf, over the telephone "a lot of times." (Vol. V, pgs. 858, 880) He recalled that she was focused on encouraging her son to participate in the process. (Vol. V, pg. 858) When he asked if she would

testify for her son, he claimed that Umlauf refused, so he asked her to write a letter instead. (Vol. V, pgs. 859, 880)

Guardado recalled that Gontarek did not want his mother to testify, and stated:

> [Gontarek] expressed to me that he didn't want her to testify for fear that it would upset me and that Mr. Elmore's cross of her would probably be the reason that I would be upset because, you know, it's his -- Mr. Elmore's job to, you know, try and point out things that, you know -- or go at her in an aggressive manner that may -- that might upset me. (Vol. IV, pg. 704)

Umlauf's memory matched her son's recollection. She swore that she was ready and willing to testify for her son, but Gontarek instructed her otherwise. (Vol. IV, pgs. 665, 674) As a result, she did not testify even though she sat through the multi-day trial. (Vol. IV, pg. 665)

Other than his mother, Gontarek explored some of the other leads provided by his client. He sent an investigator to speak with his employer to gather background on his expertise in wastewater treatment plants. (Vol. V, pg. 854) However, she reported that his employer suspected he was stealing equipment, and Gontarek concluded they would not be helpful. (Vol. V, pg. 855) He also recalled speaking with his girlfriend, but she did not want to testify. (Vol. V, pg. 881) He also called Major Mathis, but after speaking with her he concluded that she did not know anything about Guardado and was not helpful. (Vol. V, pgs. 854-855, 857)

Gontarek was unsure if he had spoken with any other family members, and suggested, "I think his stepdad and maybe his uncle. I'm not positive about it." (Vol. V, pgs. 866-867) However, he did not think family members would be valuable due to the fact that Guardado spent a significant portion of his life in prison, and "felt like the family didn't really have any contact with him." (Vol. V, pg. 867)

He contacted Dr. James Larson and asked him to determine if any statutory or non-statutory mitigators applied, but did not give Larson a specific directive. (Vol. V, pgs. 877-878) He was uncertain if he sent Larson Guardado's DOC records. (Vol. V, pg. 855, 879)

Guardado never had a clear understanding of Larson's role for his defense and he blamed Gontarek for failing to provide an adequate explanation. (Vol. IV, pg. 707) Furthermore, he became frustrated with Larson during their interviews because he wanted to explain his actions, but thought Larson did not want to hear it. (Vol. IV, pgs. 708, 709, 741)

Larson provided his report to Gontarek and together they prepared Larson's trial testimony. (Vol. V, pg. 878) Gontarek found Larson effective in previous cases and believed he was beneficial to Guardado because he supported the claims that Guardado was remorseful and that the crime was committed "as a result of his severe addiction to cocaine." (Vol. V, pgs. 860-861) Furthermore, Gontarek

claimed that he was unable to obtain another doctor and suggested that his court-appointed status limited his ability to do so. (Vol. V, pg. 861, 862) He also relied on Larson's opinion that no other experts were needed, particularly a neuropsychologist. (Vol. V, pgs. 861-862)

Just before trial, he planned to present only non-statutory mitigators: remorse, drug addiction, cooperation with law enforcement, good behavior at jail, family support, and an expert opinion that he was not a psychopath. (Vol. V, pgs. 873-874)

At some point[2], Jason Andrew Cobb offered to assist Gontarek so that he could "gain the experience." (Vol. IV, pg. 752) Gontarek required Cobb to be a direct contact with Guardado and "to be that voice between the defendant and Mr. Gontarek so that Mr. Gontarek could prepare for the death penalty phase and not have to deal with the little issues of phone calls and visitation and things like that."[3] (Vol. IV, pg. 758, 761) He described himself as "a paralegal or a babysitter" to his client so that Gontarek could focus on his job. (Vol. IV, pgs. 773-774) Gontarek and Cobb explained Cobb's role to their client:

> [W]e explained to him that Mr. Gontarek couldn't continuously be, for a better word, bombarded or called about visitation, phone calls, or complaints like that that were happening at the jail because [Gontarek]

[2] Cobb claimed that he assisted Gontarek before his official appointment on August 9, 2005. (R 183)

[3] On several occasions, Cobb described complaints from Guardado related to his incarceration. (Vol. IV, pgs. 754, 758, 760, 771, 774)

> needed to get ready for the death penalty phase. And that's – What I was going to try to help the defendant do is give him an ability to vent and voice concerns. And if any concerns rose to the level that applied to the trial, then, of course, I'd go speak to Mr. Gontarek about it." (Vol. IV, pgs. 761-62)

Cobb recalled that Guardado told him that he wanted the death penalty. (Vol. IV, pg. 771) When asked if he ever discussed mitigation with his client, he responded:

> Not really any substantive conversation. Because the meetings that we had with him that I remember, there wasn't a desire to do any of that; there wasn't a desire to present any type of mitigation and there wasn't a desire to try to avoid the death penalty. I remember in several conversations, he wanted to get the death penalty and wanted to go ahead and be sentenced to death and get on down the road, for better lack of -- of the wording. But there was never really any discussion about that with us when I was present. (Vol. IV, pgs. 759-760)

Gontarek never asked Cobb to help with the investigation by contacting family members, but he did speak with Guardado's mother, Umlauf. (Vol. IV, pg. 765, 778) Cobb claimed to have spoken with Porter, but recalled that she did not want to testify. (Vol. IV, pg. 765) Otherwise, Cobb never met any case investigator, nor did he ever speak with Larson. (Vol. IV, pg. 778)

Cobb understood their strategy included stressing the following mitigating factors: Larson's testimony and opinion; accepting accountability by plea; saving the state money; and saving the victim's family from pain of trial. (Vol. IV, pg. 762) He relied on Gontarek to make strategy decisions related to which

aggravators they wanted to attack and which mitigation they wanted to present. (Vol. IV, pg. 761)

Guardado testified, "Over the course of my life, pretty much any time that I was free I was using." (Vol. IV, pgs. 718-719) However, he did not recall speaking with his attorneys about the extent of his abuse:

> A: I started drinking when I was a teenager, you know. And then junior high school, I was smoking marijuana. Fifteen years old, I -- would have been fifteen at that time because I remember for my sixteenth birthday, I wanted a car, but my mom wouldn't give me a car. She bought me a ten speed because I was on dope. And at the time, I was using cocaine intravenously for my sixteenth birthday, because I crashed my bike.
>
> Q: You were shooting cocaine?
>
> A: Yes, sir.
>
> Q: And over the course of your adult life, when you've been out of prison, have you been using drugs on a regular basis?
>
> A: Yeah. I would always slide back into it. I mean it's what I knew.
>
> Q: Did you explain that to your lawyers?
>
> A: Again, I don't know that the opportunity ever presented itself. (Vol. IV, pg. 719)

He was certain that he disclosed his substance abuse history with Dr. Larson, and that he told his lawyers he was on a binge leading up to the crime. (Vol. IV, pgs. 720, 727)

Guardado provided more details that contributed to his drug binge. Upon his release from prison, Guardado began drinking immediately and his alcohol consumption increased over time. (Vol. IV, pg. 723-724) He was promised support

from his new employer since he was ill-equipped to handle living alone in a new place, however he never received the support promised. (Vol. IV, pg. 724) He provided a few examples that led him to consume alcohol and drugs:

> I got called out to a wastewater treatment plant. They have one-ton cylinders of chlorine there. You know, I guess if you're not in the business, you don't understand that a one-ton cylinder of chlorine can do if it busts a leak. You know, I got a page, because I did wear pagers; I got a page to go to it. When I got there, the -- you know, it's -- I could smell the chlorine leaking. And it's training that you have somebody else there with you, you know, during a chlorine leak in case something happens to you, they can drag you out or whatever. But I couldn't get nobody to come so I -- you know, I wrestled with that one-ton cylinder all night. You now, and that was just --
>
> And then when it come time for me to turn in my paycheck, my hours for my paycheck, those hours, you know, they were like 10, 21, 22 hours of overtime that they said, We're not going to pay you for these right now; we're just starting up and it's not in our budget; we'll make it up to you down the road. Well, you know, I'm putting in the hours; I'm not getting paid. And it just -- the more stressed I got, the more I ran back to what I knew. (Vol. IV, pgs. 724-725)

He experimented with crack cocaine for the first time in his life and it became a daily habit. (Vol. IV, pg. 726) "It became a total control; that was my main purpose was to find the next one." (Vol. IV, pg. 726) He lost his job after his D.U.I. arrest, and he continued to drink and abuse drugs as he struggled to find work. (Vol. IV, pg. 727)

Joanna Johnson, a substance abuse addiction expert, testified to the effects of Guardado's drug abuse. (Vol. IV, pgs. 785-786) Johnson disagreed with Dr. Larson's opinion concluding Guardado did not suffer from any mental illness or

emotional disorders. (Vol. V, pgs. 791-792, 797, 799) She opined that Guardado suffered from a substance abuse disorder and emotional dependency, which causes emotional stress. (Vol. V, pgs. 791-792)

Johnson testified that Guardado's drug and alcohol abuse, which began during adolescence, escalated through his teen years to the point that narcotics became his coping mechanism for dealing with stress. (Vol. V, pg. 792) Even if he were drug-free while he was in prison, upon his release he returned to drug use as a coping mechanism when he experienced stressful situations. (Vol. V, pg. 794) She opined that Guardado experienced "a full blown relapse." (Vol. V, pgs. 794-795)

At the time of the murder, Johnson described his mental state as "unable to control emotion, feeling, or even stop the run that he was on," which meant he couldn't stop the constant need for the drug. (Vol. V, pg. 796) She characterized his substance abuse at the time as a "drug delirium," and that "he was completely under the control of these drugs." (Vol. V, pg. 797) She concluded that he was suffering from compulsive obsessive behavior based on substance abuse, chronic dependency on cocaine and alcohol. (Vol. V, pg. 798) She supported this opinion with test results. (Vol. V, pgs. 798-799) She opined that Guardado's major mental illness was substance abuse dependency. (Vol. V, pg. 815)

Johnson opined that Guardado suffered from emotional disorders related to his substance abuse. (Vol. V, pg. 799) She described that he may have been

suffering from "cocaine psychosis," which she likened to a blackout. (Vol. V, pg. 800) She explained that did not necessarily mean a lack of memory because later events can be subsequently placed together forming a person's memory or recollection. (Vol. V, pgs. 800, 807-809) Guardado's confession "fit so many I've heard before when dealing with chronic blackouts, especially, and serious cocaine behaviors that have created serious situations that piece together one piece at a time." (Vol. V, pg. 801) She believed this would explain his delayed report of the murder weapon's location. (Vol. V, pgs. 801-802)

She also believed his "drug delirium" prevented his ability to distinguish between right and wrong at the time of the crime. (Vol. V, pg. 802) She explained her opinion:

> What he felt at the time, under -- Well, I shouldn't say him. What any -- our data shows, from the thousands of assessments that I've done, is that what feels or is normal under the duress or use of extensive narcotics is the -- is the norm at that moment. But that doesn't mean that it is the norm. (Vol. V, pg. 802)

Johnson agreed with many of Larson's opinions, but thought that his failure to conclude that Guardado was a chronic addict was significant. (Vol. V, pg. 816)

Dr. Gregory Prichard, a forensic psychologist, testified that he reviewed reports of Dr. Larson and spent considerable time with the defendant looking for statutory and non-statutory mitigators. (Vol. V, pg. 820) Dr. Prichard noted that

Dr. Larson had not outlined any statutory mitigators in his report, but may have suggested some non-statutory issues. (Vol. V, pg. 821)

Dr. Prichard determined that two statutory mitigators applied to Guardado. (Vol. V, pg. 822) The first, under §921.141(6)(f), Fla. Stat. (2003), he found that Guardado's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (Vol. V, pgs. 822, 838) He explained his findings to the court:

> A: My emphasis would be on the capacity of Mr. Guardado to conform his behavior to the requirements of the law.
>
> Part of what I was looking at to make that determination was -- Ms. Johnson was talking about the addictive behavior. And that's a very relevant issue for me in determining whether mitigation is present. Mr. Guardado was very much in full-blown relapse and full-blown addiction in at least the two weeks preceding the crime, which -- which means that he was -- he was using on a daily basis. It wasn't an every weekend thing or a once a month thing; he was using crack cocaine on a daily basis, so he was actually having a binge on crack cocaine.
>
> I spent about four years working with the addictive population. And one of the things that we see with addicts is -- especially individuals who are using cocaine, especially crack cocaine -- when somebody uses crack cocaine, the effect on the body, once the cocaine is smoked is -- is almost immediate and it's very intense. So it's an extremely intense high that's immediate and that the -- a person comes down from that high very rapidly as well. So it isn't something that is sustained.
>
> So what crack cocaine addicts do who are binging is they will smoke the cocaine and it will get them high and they'll enjoy the high and immediately, they're wanting another hit to -- to maintain that high or to get back to where their previous high was. So that's kind of the dynamic that was in play. And -- And when an individual gets in -- in that -- involved in that

> dynamic, where they're trying to pursue the drug that gets them high, they become very single minded in that pursuit. And it is an obsessive compulsive issue. Basically, the person obsesses about getting more cocaine and there's a strong compulsion to get the chemical of their choice. And -- And often it is by any means necessary.
>
> Q: Including violence?
>
> A: Definitely including violence.
>
> So the -- the issue becomes when they're under the influence of the chemical to that degree that they're no longer -- that they are no longer rational, they're no longer reasonable, they no longer think things through in -- in a logical way, they're not really attending to the consequences of their actions. They're attending to the fact that they want the chemical and they're going to get the chemical at -- at any cost. (Vol. V, pgs. 822-824)

In his opinion, Guardado's admission that he went to the victim's house to kill her for drug money was consistent with his finding. (Vol. V, pgs. 824-825) In fact, the remorse he felt later strengthened this finding because it showed his appreciation for his criminality only after he wasn't on a drug binge:

> Post offense behavior was, oh, my gosh; what have I done? And, this is horrible. And, I want to confess. And, I want to be sentenced to death. And all those things he was saying after the offense. So obviously, when he wasn't high anymore, it wasn't reasonable and rational to him at all. It was a terrible mistake that he showed great remorse for. But in the context of being high, he -- he's not able to apply those -- those same moral brakes and those same, you know, cognitive and emotional processes whereby we weigh the consequence of our actions and understand that -- that -- that there could be great consequences and the effect on themselves and everybody else around them. They -- They just lose the ability to reason and be rational. (Vol. V, pg. 825)

Dr. Pritchard believed Guardado's exemplary record while incarcerated supported his finding as well. (Vol. V, pgs. 825-826) Furthermore, he found that Guardado's behavior was consistent with reports from families of addicts, who report that the addict is a great person when sober, but becomes a very different person when using drugs. (Vol. V, pg. 826)

Dr. Pritchard found a second statutory mitigator that the jury should have considered – that he was under the influence of an extreme mental or emotional disturbance at the time of the crime. See §921.141(6)(b), Fla. Stat. (2003)(Vol. V, pgs. 822, 826) Several catalysts led to the emotional disturbance for Guardado: job loss, relationship trouble, and financial trouble. (Vol. V, pg. 827) He explained how these issues affected Guardado:

> So he sought the drug within a couple of weeks of -- of the murder. And, you know, the issue was that at that point, there was a lot of depression present, a lot of anxiety, a lot of -- of self doubt, feelings of failure, feelings of letting people down, etc. Those are the emotional things that play into the -- the need for the drug. (Vol. V, pg. 827)

Dr. Prichard took issue with Larson's conclusion Guardado did not suffer from mental illness or an emotional disorder based upon everything that was happening in his life at the time. (Vol. V, pg. 829) He stated that Guardado's troubles were "what people seek mental health and psychiatric counseling and medications for all the time and, in conjunction with that, receive a diagnoses of depressive disorder, anxiety disorder." (Vol. V, pg. 829) He thought there could

be a good argument that mental illness was present, but he did not think it would be as severe as bipolar disorder or schizophrenia. (Vol. V, pg. 829) Those factors, coupled with his addiction, led him to the conclusion that Guardado had an emotional disorder. (Vol. V, pgs. 829-830)

Dr. Prichard also disagreed with Larson's conclusions concerning Appellant's capacity to appreciate the wrongness and the criminality of the murder. (Vol. V, pg. 831) Dr. Prichard was concerned that, while he knew he was doing wrong, his impairments prevented him from conforming his conduct to act on what he knew was right, and stop himself from doing what he knew was wrong. (Vol. V, pgs. 831, 838)

In conclusion, Dr. Pritchard summarized the effects of the crack on the defendant on the night of the murder:

> It was driving him. He -- He still wasn't able to reconcile the reasons he did it. I mean it was obvious right after his arrest that he wasn't able to reconcile it. But the, he's still not able to reconcile it. And that -- that's kind of the insanity of drug addiction, when somebody's using. In the addictive population, we describe it as insanity. It's not clinically insane. But the insanity is that they will do things that, ordinarily, they wouldn't even think of doing. They will do things -- They will use their substance knowing that there is going to be a bad outcome. So the -- all these things are very present with him. He hasn't reconciled that he engaged in behavior that -- that ordinarily, he wouldn't have even thought about, had he not been under the influence. And you know, those are -- those are the things that come along with being a severe addict. (Vol. V, pg. 832)

Dr. Pritchard diagnosed Guardado with poly-substance dependence and agreed with Larson's conclusion that he did not suffer from any "major mental illness." (Vol. V, pgs.836-837)

On cross-examination, Dr. Pritchard clarified that the job loss he referred to in his opinion was the job at the wastewater facility that prompted his move to the panhandle and away from his family in Lakeland. (Vol. V, pgs.840-843) Dr. Pritchard was aware that Guardado had a new "girlfriend," but it was his previous relationship that added to his stress. (Vol. V, pg. 844) He also conceded that Guardado's financial troubles were tied to his drug use and could be considered "self inflicted financial problems." (Vol. V, pg. 844)

However, he emphasized that the problems Guardado faced cannot be considered without the proper context:

> But the idea is that he's a man who's been in prison for most of his adult life; he gets out; he's trying to do well and, in fact, is doing pretty well; things start falling apart for him again and he doesn't handle that well. He doesn't handle it the way -- the same way you or I would handle it. And he has less of a capacity to do it to begin with. So I would perhaps be a little less emotionally distressed by those things, although I'd be very emotionally distressed. But for him, it's probably worse. (Vol. V, pg. 844)

When the prosecutor suggested Guardado was merely facing common problems that any average person encounters in life, Dr. Pritchard explained:

> Well again, I would just point to a variety of losses, a variety of things that were not going well for him in the context of initially doing things pretty well. So he was failing. He's an addict; that -- that's

> going to play into it. Feeling like he doesn't -- he's a failure; he can't do anything right. He can't sustain; he can't maintain relationships. He can't be responsible. All the things that have been true for him in the past and -- and now are playing out one more time in his life. So again, it's a variety of things, not just a single thing, which is why I would characterize it as more extreme, rather than something of normal or moderate severity. (Vol. V, pg. 845)

Guardado did not think he discussed his case sufficiently with his attorneys. (Vol. IV, pg. 710) He complained that the total amount of time he spent with them before trial amounted to no more than one hour. (Vol. IV, pgs. 703, 728-729) He summed up their contact as:

> Well, it -- the times that we met were very few and far between. And when we did get together, it was just for a matter of minutes; you know, it was really never anything -- you know, I believe I said before that all total, I think I may have seen him six times for a total of an hour. (Vol. IV, pg. 703)

He made several attempts to call Gontarek, but was always told Gontarek was not in the office. (Vol. IV, pg. 711) He became frustrated to the point that he told Gontarek's secretary, "If he's not going to call, then you can just tell him he doesn't need to even be here anymore." (Vol. IV, pg. 711) He also recalled very little contact with Cobb before the trial. (Vol. IV, pg. 710)

During cross-examination, Guardado acknowledged that he was capable of expressing himself to his lawyers. (Vol. IV, pgs. 729-730) He also clarified that his mother persuaded him to keep Gontarek on the case after he became dissatisfied with his services. (Vol. IV, pgs. 731-732) He claimed that he wanted

to present additional mitigation to the judge at the hearing and at trial, but did not want to do so in a public forum. (Vol. IV, pgs. 735, 737, 739)

Guardado explained why he didn't express his dissatisfaction with his attorneys to the judge:

> A: Mr. Elmore, I deferred to counsel on his advice on all matters of legality. I was -- From the very first time that I met Mr. Gontarek and Mr. Gontarek told me, "Don't worry about this; I got it. I know Mr. Wells; I know him socially. I got this. I know Mr. Elmore. I'm sure that we're going to come out of this fine; I'm sure we're going to come out of this all right. Don't worry about it," that's what I did. And as I kept seeing it mount and mount and mount, my frustrations grew and grew and grew.
>
> Q: You're saying that he essentially assured you that you were going to get a life sentence? Is that what you're saying?
>
> A: I am saying that he led me to believe that with the -- the manner of his talking. Did he come right out and tell me, "You're only going to get a life sentence; don't worry about it?" No, he did not tell me that. But he did lead me to believe that he had an inside track into getting this done. That was my impression of it. That's why I didn't scream and holler in the beginning. And as I seen it starting to go farther and farther away from me and I could see the writing on the wall getting clearer and clearer, that's when I became more and more upset, confused, and frustrated. (Vol. IV, pgs. 741-742)

Ultimately, by the time of the Spencer[4] hearing, Guardado was totally dissatisfied with his lawyers. (Vol. IV, pg. 749)

Cobb claimed that he met with Guardado at the jail "at a minimum, two different occasions to talk with him about stuff," and that his first meeting was "at

[4] Spencer v. State, 691 So. 2d 1062 (Fla. 1996)

least an hour or possibly more." (Vol. IV, pg. 757) Later, he claimed that he met with Gontarek and his client at least twice and twice himself without Gontarek. (Vol. IV, pg. 769)

Gontarek denied that he spent merely an hour with Guardado before the trial. (Vol. V, pg. 850) When asked how often he met with the client in person, he responded, "Numerous times." (Vol. V, pg. 850) He agreed with Cobb's testimony that they both met with Guardado twice, and stated, "It might have been two or even more." (Vol. V, pg. 850)

However, during cross-examination, he admitted that he only visited Guardado four times at the jail. (Vol. V, pg. 870) Once within weeks of his appointment to the case, a second time two months later, and then twice after Cobb was appointed. (Vol. V, pg. 870) Furthermore, Gontarek's billing records indicate that he spent 3 hours, 3.5 hours twice, and 4 hours, which would include nearly 3 hours of driving time. (Vol. V, pgs. 868, 869-871)

Gontarek was unclear as to what records and documentation he reviewed before the trial. He apparently reviewed Guardado's jail records and learned that he was well behaved after his arrest. (Vol. V, pgs. 856-857) Cobb only recalled discussing Guardado's prison history "briefly." (Vol. IV, pg. 766) The only mitigation Cobb recalled from Guardado's life in prison was the fact that he acquired wastewater management skills and that he could continue to contribute to

the prison system in the same capacity. (Vol. IV, pgs. 766-767) Gontarek claimed to have encouraged Guardado to testify contrary to Guardado's testimony that he testified against his attorney's advice. (Vol. V, pg. 858)

Gontarek acknowledged it was important to have letters or testimony supporting a defendant in order to humanize the client for the jury. (Vol. V, pgs. 875-876) He agreed that live testimony or reading a family letter was far more effective than relying on the jury to read the same letter. (Vol. V, pg. 876) He also admitted that he does not know if the jury read Umlauf's letter that he submitted as evidence. (Vol. V, pg. 877)

Patsy Umlauf, Guardado's mother, testified for her son. (Vol. IV, pg. 663) She was living in Ohio at the time of the crime; she came to the trial, but only watched. (Vol. IV, pg. 663) She swore that she was ready and willing to testify, but Gontarek told her that he did not want her to testify, as it would upset him. (Vol. IV, pgs. 665, 674) She denied that Gontarek told her that her son didn't want her to testify. (Vol. IV, pg. 675) As a result, she did not testify even though she sat through the multi-day trial. (Vol. IV, pg. 665)

Had Umlauf testified at trial, she could have told the jury about the deaths of Guardado's father and brother when he was young. (Vol. IV, pg. 668) She told the judge that her son began using drugs when he was young and that he was sent to a juvenile facility for one or two years. (Vol. IV, pg. 668) Guardado was abusing

drugs during his early teen years and continued to use them for most of his life "except for when he was he [sic] locked up." (Vol. IV, pg. 669)

She picked him up from prison when he was released and took him to Mary Esther so that he could be near his aunt and get away from his old acquaintances. (Vol. IV, pg. 669) He was clean, had a job at a wastewater plant, and "it was going well" while she lived with him in Mary Esther. (Vol. IV, pg. 670) Then, she described how his boss offered him a job in DeFuniak Springs and "promised that Jesse would have all the backup he needed; that he would move up quickly in this company." (Vol. IV, pgs. 670-671) She helped him move to DeFuniak Springs and then she returned to Ohio where she kept in touch with him by phone and email. (Vol. IV, pg. 671)

She was aware of some of the frustrations her son experienced at work and described his downward spiral leading to the murder:

> Q: Did there – did there come a time, when you were back in Ohio, that you noticed a change with your son?
>
> A: Well, he took his job very seriously. But soon occasions would arise where he needed backup, but he could get no answer by phone or help physically. I remember one night where he had stayed up all night having to start the well by hand every few minutes just to keep the town's well water clean. And he continued to tell me instances where he was completely on his own, which upset him highly because he wanted everything to be done correctly. He earned awards for certain things, but it became increasingly hard for him to endure without the proper cooperation of others.
>
> Q: And are you talking about others with the company?

A: This is a man that's been behind bars for years and he wasn't up currently with the times. He never had a bank account or used charged cards or cell phones; computers had come into being and -- and it was all new to him. And life on the outside is quite different from prison life. He was uneasy dealing with people personally. And then if you add girlfriends to his already stressed life, he began to have trouble coping.

Q: Did he talk to you about these problems, ma'am? (Pause) Did he talk to you about these problems?

A: Yes, quite often.

Q: Did there come a time, shortly before the murder in this case, that you heard from your son, Jesse Guardado?

A: He -- shortly before. I received an e-mail one day just days before and he said *he was going down a bad road and he couldn't stop*. And it very much upset me. He'd already had a D.U.I. and I felt this was drugs. And I called and he managed to make me believe that things were under control; that the girl he was with was handling his money. But things were not okay. Why Probation did not see the signs; the loss of his job, the loss of weight. I don't know why they did not pick up on it. (Vol. IV, pgs. 672-673)(*Emphasis* added.)

Elizabeth Darby Padgett testified that she met Guardado through her friend, Donna Porter, who was Guardado's girlfriend at the time. (Vol. IV, pgs. 682-683) As soon as she met him, she became concerned about his criminal history. (Vol. IV, pgs. 684, 699-700) She thought that she knew him for six to nine months (and "maybe even longer") before his arrest. (Vol. IV, pg. 695) They socialized frequently during the time Guardado was working for the water treatment plant. (Vol. IV, pg. 684) She was asked to describe his demeanor and personality:

> He was very pleasant; he was fun to be around. He -- when we would go out, he was, you know, kind of like our protector; we didn't have to worry about anything. He was a gentleman; opened doors for us.

> Just he was great to be around. He would give someone the shirt of your back -- his back, if they needed it. (Vol. IV, pg. 685)

However, there came a time that she noticed a change in his behavior when his relationship with Porter ended and he was arrested for a D.U.I. (Vol. IV, pgs. 685-686) "He began drinking more and more. And I would see him out and he was not the same person, you know. You could see the anger in his face." (Vol. IV, pg. 686) She suspected that he was abusing crack cocaine and methamphetamines. (Vol. IV, pg. 686)

After his release from jail for the D.U.I., Guardado moved in with her, Porter, and Porter's new boyfriend, where he slept on the couch. (Vol. IV, pg. 687) During that period of time, she noticed even more changes in his behavior. (Vol. IV, pg. 688) He appeared tired and haggard; he lost weight, and eventually moved out as he continued his downward slide. (Vol. IV, pg. 689)

She reported that no one attempted to contact her while his case was pending. (Vol. IV, pg. 690) However, she recalled sending a letter of support, but could not recall if it was before or after his trial.[5] (Vol. IV, pg. 693) In her letter, she expressed, "it was not Jesse who killed Jackie, but the drugs did." (Vol. IV, pg. 698)

[5] The letter was later submitted as evidence and the date reflects that it was written after the trial. (Vol. IV, pgs. 696-697)

Rhodene Mathis, a retired prison warden from the Department of Corrections testified that she worked at Sumter Work Camp when Guardado was an inmate and was aware of his daily activities. (Vol. IV, pgs. 652-653) She testified that only special inmates that meeting a specific criteria (including custody classification, prison behavior, criminal history, and length of sentence) are permitted to work outside the gates of the camp. (Vol. IV, pgs. 653-654) Guardado was one of those special inmates and he worked at the forestry camp. (Vol. IV, pg. 653)

Her memory of Guardado was limited, but she recalled he was a good worker. (Vol. IV, pg. 655) She believed someone tried to contact her about testifying for Guardado before she retired, but she could not be certain. (Vol. IV, pgs. 655, 656) Had someone contacted her before she retired, she would have been able to answer any questions about him by reviewing his file. (Vol. IV, pgs. 656-657)

During cross-examination, Mathis was asked to clarify her memory of Guardado and she stated:

> Well, the only thing I remember is that he was an inmate that was assigned to the wastewater treatment plant and he -- worked at the wastewater treatment plant. He went outside the gate and came back inside the gate and he lived at the forestry camp. And that's basically it. (Vol. IV, pg. 659)

Regarding jury selection, Guardado recalled being present during voir dire and admitted he could hear each of the juror's responses. (Vol. IV, pgs. 713-714) He did not recall if his attorneys sought his input for each potential juror. (Vol. IV, pg. 718) He deferred to Gontarek's judgment and did not voice any specific objections to any particular juror. (Vol. IV, pgs. 714, 715) He recalled that his attorneys told him that a law enforcement officer would be beneficial on the jury because they would not view the evidence emotionally. (Vol. IV, pgs. 716-717) He stated, "They convinced me that it would be helpful to have somebody to have that kind of background on the jury." (Vol. IV, pg. 717)

Cobb recalled that Guardado was involved in the jury selection process and provided input. (Vol. IV, pgs. 764-765) Cobb recalled that there was a general feeling Cornelius thought that a life sentence was a harsher punishment. (Vol. IV, pg. 779) He recalled that Hall's relationship with law enforcement was discussed with his client. (Vol. IV, pg. 780)

Gontarek testified that he would have stricken any juror perceived to be biased, and stricken any of the three alleged to be biased had Guardado demanded it. (Vol. V, pgs. 863-864) He wanted to keep Pennington because she stated she was "only somewhat" in favor of the death penalty. (Vol. V, pg. 864) He claimed that he wanted to keep Hall because he might be impressed with Guardado's confession because he had relationships with law enforcement officers. (Vol. V,

pg. 865) He agreed that he may have desired Cornelius because he thought a life sentence could be harsher than a death sentence. (Vol. V, pgs. 865-866)

Summary of Order Denying Relief

The order denied all of the claims. In ruling on the jury selection issues, the court found that Tucker's beliefs substantially impaired his ability to follow the law and that "he would likely not be able to follow the law based upon his beliefs." (Vol. VI, pg. 1076) Likewise, the court found that Hebert "could not assure the trial court that he would be able to set aside his religious faith and follow the law," and stated that he "indicated that his personal religious faith, which he always tried to follow, would weigh in his decision, so much that he might not be able to follow the law." (Vol. VI, pgs. 1078-1079) And finally, since Clark was not stricken for cause, the court found no deficiency since there was no basis to object to the State's use of a peremptory challenge. (Vol. VI, pgs. 1080-1081)

With regard to the jurors alleged to be biased, the court found that none of the jurors were shown to be unfair or partial. (Vol. VI, pgs. 1083, 1085, 1088) The court also concluded that each juror was kept for a sound strategic reason: Pennington based upon her "lukewarm sentiment regarding the death penalty"; Hall because he would be impressed by law enforcement testimony describing Guardado's cooperation; and Cornelius because he believed a life sentence could be worse than a death sentence. (Vol. VI, pgs. 1083, 1085-1086, 1088)

The court also denied both claims that additional mitigation evidence should have been presented. In denying this claim, the court concluded that Mathis' testimony at the evidentiary hearing was not mitigating and was also cumulative. (Vol. VI, pg. 1090) Since none of the civilian employees from Sumter Correctional or his place of employment testified, the court denied this portion of the claim for lack of evidence. (Vol. VI, pgs. 1090-1091, 1097-1098) Likewise, the court denied the portion of the claim that relied on letters from witnesses that did not testify at the evidentiary hearing because none of the letters demonstrated that they were available and willing to testify. (Vol. VI, pg. 1091)

With regard to Darby Rentz Padgett, first the court concluded that Guardado's claim that he told his lawyers about her lacked credibility in light of his resistance to counsel in the first place and his failure to alert the court that he had additional mitigation to present. (Vol. VI, pg. 1095) In addition, her characterization of Guardado lacked credibility because Guardado had a live-in girlfriend at the time of the murder and he wanted her to receive his possessions after his arrest. (Vol. VI, pg. 1096) The court claimed that Guardado's own confession contradicted her claim that he could not recall the murder. (Vol. VI, pgs. 1096-1097) And finally, the court found her testimony cumulative. (Vol. VI, pg. 1097)

The court rejected Umlauf's testimony and determined that she refused to testify based upon Gontarek's "credible" testimony. (Vol. VI, pg. 1102) In so finding, the court found Gontarek could not have been found ineffective for failing to force an unwilling family member to testify. (Vol. VI, pg. 1102) In addition, the court found that her testimony was "largely cumulative." (Vol. VI, pg. 1103)

Finally, the court denied the claim alleging that expert testimony should have been presented to establish additional mitigation. Despite the extensive testimony of Johnson and Pritchard describing Guardado's diminished mental state due to situational factors and his drug delirium, the court was satisfied that "defense counsel did present Defendant's chronic alcohol and drug abuse as non-statutory mitigation." (Vol. VI, pg. 1112) The court found the label of the mitigation (statutory or non-statutory) insignificant and stated, "Even though Dr. Larson did not categorize Defendant's drug addiction as a statutory mitigator, the same information as testified by Johnson and Dr. Pritchard at the evidentiary hearing was presented to the jury through Dr. Larson's testimony: Defendant murdered the victim because of his addiction to cocaine." (Vol. VI, pg. 1112) Therefore, the court did not find either defective performance or prejudice resulted. (Vol. VI, pg. 1113)

Guardado filed a motion for rehearing and it was denied. (Vol. VIII, pgs. 1488-1491) A timely notice of appeal was filed and this brief follows. (Vol. VIII, pg. 1496-1497)

SUMMARY OF ARGUMENT

Guardado was denied his constitutional right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I §16(a) of the Florida Constitution.

Guardado's attorneys failed to conduct a reasonable investigation despite having ample resources and dire need to discover mitigation. They made minimal efforts to contact friends and family for background information and failed to review his prison records. Any efforts were not specifically tailored to Guardado and his attorneys were merely going through the motions. They hired an expert that was unqualified to address his substance abuse issues and they did not provide him with sufficient information or directions to determine whether Guardado qualified for any statutory mitigation.

Armed with an unhelpful expert, counsel did not expand the investigation to make up for their expert's shortcomings. They did not seek additional experts to prove that Guardado was suffering from the debilitating effects of the drug-induced delirium when he committed the crime. Nor did they call non-expert witnesses to describe his downward spiral that led to more drug abuse and ultimately to murder. As a result, they essentially abandoned the argument that crack-cocaine controlled him on the night of the murder.

Counsel was well aware of the fact that five aggravators applied to Guardado and they were virtually unchallengeable. Knowing this, it was his duty to expand his investigation beyond relying on what his expert provided after his initial evaluation. Specifically, counsel should have explored the extent of Guardado's crack binge and the effects it had on his ability to conform his conduct within the confines of the law. In addition, counsel should have developed additional facts to show that Guardado was under extreme mental or emotional duress at the time of the murder.

In addition, counsel was ineffective during jury selection when counsel failed to object to the State's exclusion of competent jurors who expressed opposition toward the death penalty. Counsel failed to object to the State's exclusion of a juror who would not dismiss his religious beliefs, but still promised to follow the law. And another juror was excluded because of due process concerns. Neither should have been excluded because they did not demonstrate a substantial inability to follow the law.

Finally, counsel was ineffective for failing to strike several jurors that were actually biased. One was a friend of the victim, another was a very close friend with law enforcement that investigated the crime, and another juror's relatives were victims of a similar crime. The failure to strike these jurors was inexcusable and prejudice resulted.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Penalty phase counsel rendered ineffective assistance for failing to conduct a reasonable investigation and failing to present other available mitigation.

Standard of Review

The standard of review for an order denying a motion for post-conviction relief is two-pronged: (1) this Court must defer to the circuit court's factual findings so long as competent, substantial evidence supports them; but (2) must review *de novo* the circuit court's legal conclusions. Walker v. State, 88 So. 3d 128, 134 (Fla. 2012) (citing Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

Deficient Investigation

Strickland v. Washington, 466 U.S. 668 (U.S. 1984), requires that to prevail on an ineffective assistance of counsel claim, the defendant must demonstrate that counsel's performance was deficient and that prejudice resulted from the deficient performance. In the context of preparation for the penalty phase in a capital case, counsel's duties are the same as they would be for an ordinary trial. *Id*. at 687.

"An attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." State v. Reichmann, 777 So. 2d 342, 350 (Fla. 2000). This Court has held that "investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be

introduced by the prosecutor." Blackwood v. State, 946 So. 2d 960, 974 (Fla. 2006)(quoting Wiggins v. Smith, 539 U.S. 510, 524 (2003)). "Among the topics that counsel should consider presenting in mitigation are the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Parker v. State, 3 So. 3d 974, 985 (Fla. 2009).

The investigation should seek to uncover the unique qualities and characteristics of the defendant. In Armstrong v. Dugger, 833 F.2d 1430, (11th Cir. 1987), the court stated, "[t]he major requirement of the penalty phase of a trial is that the sentence be *individualized by focusing on the particularized characteristics of the individual*." *Id.* at 1433. (*Emphasis* added.) The court found that the attorney's investigation, which consisted of interviewing the defendant, his parole officer, and his mother, was "negligible." *Id*. As a result, only the parole officer testified, and the court concluded that defense counsel "failed to provide the jury with the information needed to properly focus on the particularized characteristics of this petitioner." *Id*.

The investigation by Guardado's lawyers was also negligible, especially considering that his defense "team" had significant resources to meet the great need to discover detailed mitigation. His lawyer's were required to carry a fraction of the burden normally borne by death penalty counsel. Guardado pleaded guilty

before they were appointed. (Vol. I, pgs. 10-11) As a result, they did not have to prepare for the guilt phase of trial. This created the advantageous opportunity for them to focus solely on mitigation. Common sense would suggest that their investigation should be twice as thorough and extensive as the typical investigation.

With the enormous task to defend against guilt dispensed, Gontarek still obtained help from Jason Cobb, who was appointed as co-counsel. (Vol. IV, pg. 751) Generally, courts appoint co-counsel in capital cases and those attorneys will commonly divide labor between the two phases. See A.B.A. Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 4.1.A.1(Rev. 2003)(calling for "no fewer than two *qualified* attorneys, an investigator, and a mitigation specialist, one of whom should be qualified to screen for the presence of mental or psychological disorders or impairments).

But in this case there was no guilt phase! Together, they had twice the manpower and half the work. Blessed with two lawyers, Guardado should have benefited and received a detailed, thorough investigation. Instead, Cobb played the role of "babysitter" and did not even discuss mitigation with Guardado. (Vol. IV, pgs. 759-760) In effect, the second lawyer (normally an additional defense weapon) became a shield between the client and lead counsel, undermining the rationale for co-counsel in the first place.

Even with the procedural and personnel windfall, their task was arduous. The State was prepared to argue five (5) statutory aggravators that were virtually unchallengeable. (Vol. V, pgs. 872, 873) Counsel facing such a scenario is duty-bound to seek out and find as many statutory and non-statutory mitigators as possible. See Blackwood, 946 So. 2d at 974; and Wiggins, 538 U.S. at 524. While these facts do not modify the attorney's duty to conduct a reasonable investigation, they do provide the proper context to evaluate what counsel should have done in this case.

Counsel decided to follow a boilerplate investigation plan that lacked any specificity to Guardado's case and did not focus his "particularized characteristics." Gontarek planned to retain a forensic psychologist and talk with Guardado's friends, family, and employers. (Vol. V, pg. 854) He secured co-counsel[6] and a private investigator, which should be the standard operating procedure to *begin* an investigation. And finally, Gontarek expressed a limited interest in his client's history of incarceration. (Vol. V, pgs. 856-57, 879)

When it came to implementing the plan, however, Gontarek's actions did not scratch the surface of reasonableness. Clearly, he spoke with Guardado's mother and Major Mathis (despite her lack of recollection), and nothing in the record contradicts his claim that he spoke with Guardado's girlfriend. (Vol. V, pgs. 854-

[6] Although nothing in the record demonstrates that co-counsel Cobb was qualified under the ABA Guidelines or Florida Statutes.

55, 858, 880, 881) However, his own testimony suggests that he failed to interview all of his family members. (Vol. V, pgs. 866-67)

Gontarek could not recall which family members he interviewed. He thinks he may have spoken with his step-dad and uncle. (Vol. V, pg. 867) If he had, it is safe to assume that they did not prove beneficial in Gontarek's mind, otherwise, he would have remembered their conversations, called them to testify, or had them write a letter. But letters *were* written by Guardado's family; only they were written *after* the trial in support of his post-conviction motion. (Vol. I, pgs. 127-130) Linda Snide-Warren, his stepsister, and Bennie Guardado, his brother, wrote letters that stated their unwavering support for their brother. (Vol. I, pgs. 127-130) The letters do not specify if they were contacted, but the only logical conclusion is that they were never contacted by anyone from the defense team because otherwise Gontarek would have submitted them to the jury, just as he did with Umlauf's letter.

Gontarek's spotty memory and apparent lack of effort was explained by his testimony at the evidentiary hearing when he stated, "[he] felt like the family didn't really have any contact with him." (Vol. V, pg. 867) In other words, he had very little motivation to reach them because Guardado lived most of his life in prison. And thus, no one in his family knew or cared for him. Seeing no value in

the family's input, any attempts made were minimal and insignificant, falling well short of his duty to conduct a reasonable investigation.

Gontarek also failed to adequately investigate Guardado's social history by interviewing his friends and associates. Aside from speaking with his girlfriend, he did not speak to Padgett or Porter. (Vol. IV, pg. 690; Vol. V, pg. 881) He did not learn that both believed that he turned into a different person when he was abusing drugs. Both submitted letters of support after the trial and Padgett reiterated her sentiment at the evidentiary hearing. (Vol. I, pgs. 131-132; Vol. IV, pgs. 682-698)

Counsel's failure to develop evidence from Guardado's time in prison was inexcusable as well. Guardado suggested that Gontarek contact Mark Mestrovich, and John Harris, since they spent every day with him in prison and could provide valuable insight to his character. (Vol. IV, pg. 706) While the record suggests Gontarek contacted Mathis, it does not reflect that he attempted to contact Mestrovich and Harris. (Vol. V, pgs. 854-855) The reason he never contacted them is strikingly similar to his rationale dismissing the importance of his family. Gontarek claimed that he preferred to look at county jail records over prison records because he feared they could open the door to his prior violent history. (Vol. V, pgs. 856-57, 879) His explanation implied that he never investigated his prison records or attempted to contact Mestrovich and Harris.

The sum total of both lawyers' testimony demonstrates that they conducted an obligatory investigation that ignored the obvious – the drug delirium that drove a man to bite the hand that fed him. Cobb, by his own admission, was nothing more than a "babysitter" and did not contribute to the investigation. (Vol. IV, pgs. 758, 759-60) He understood that Guardado did not want to present any mitigation and he probably assumed that relieved him from his obligation. (Vol. IV, pgs. 759-60, 771) Furthermore, he made it perfectly clear that Gontarek was responsible for the investigation and that he was following Gontarek's orders, which simply required that he listen to Guardado's complaints. (Vol. IV, pgs. 754, 758, 760-61, 771, 774)

Gontarek's testimony revealed a disinterested attorney who was merely going through the motions without putting forth any real effort to discover favorable mitigation. He only visited his client four times at the jail. (Vol. V, pg. 870) He secured a second attorney, Cobb, to serve as the primary contact for the client, effectively insulating himself from his client. (Vol. IV, pgs. 758, 761-62) He never asked Cobb to assist the investigation by contacting family members. (Vol. IV, pg. 778) He could not recall any specific details of his investigation efforts, yet was quick to remember that one of the most important witnesses, the client's mother, refused to testify. (Vol. V, pgs. 859, 880) He could not confirm or deny any attempts to contact any other family members, and he could not be

certain that he supplied Dr. Larson with his client's prison records. (Vol. V, pgs. 855, 856-57, 879) And most importantly, he dropped the ball when it came to fleshing out his client's troubling drug problem.

Deficient Failure to Expand the Investigation

In Cooper v. Sec'y, Dep't of Corrs., 646 F.3d 1328 (11th Cir. 2011), the court reversed a death sentence due to defense counsel's inadequate investigation, which consisted of talking with the defendant, his mother, and a clinical psychologist. *Id*. at 1351. Cooper's lawyers could not recall with certainty whether they gathered and reviewed their client's background records, they made a few phone calls to people (resulting in dead ends), had difficulty finding potential witnesses, and relied exclusively on the defendant and his mother for background information. *Id*. at 1346-47.

As a result, the Cooper lawyers did not find out about their client's horrific childhood until their own expert disclosed it during a deposition. *Id*. at 1347. Then counsel made a strategic decision to not call the expert during penalty phase and "essentially abandoned that issue by not putting [their expert] on the stand before the jury," and "did not expand their background investigation after they decided not to call [their expert] before the jury." *Id*. Counsel's failure to investigate further constituted defective performance according to the court. *Id*. at 1351.

Guardado's attorneys made the same mistake when they failed to expand the investigation after reviewing Larson's report, which did not address his drug problem. Larson administered only one test related to substance abuse and it evaluated "attitudes toward substance abuse" and the "likelihood that someone would become a substance abuser." (Vol. VII, pgs. 1340) This test did not shed any light on how his drug use contributed to the murder, but instead stated the plainly obvious: Guardado had a drug problem and was likely to abuse drugs. His trial testimony contained one limited reference to drug abuse, which was otherwise buried within testimony riddled psychological jargon. The only comment the jury heard was that Guardado had "elevated scores" on his substance abuse test. (Vol. VII, pg. 1341)

Furthermore, Larson brushed aside Guardado's elevated depression score, indications of paranoia and anxiety because he believed that was typical for an incarcerated person. (Vol. VII, pg. 1340) In other words, Larson believed the murder and his subsequent arrest *caused* Guardado's mental health problems despite Guardado's assertion that he was in a downward spiral due to stress and drug abuse. In the end, Larson could provide little more than: an assurance that he was not a psychopath; a vague assertion that he was under stress due to drugs at time of the crime; an obvious restatement that he was remorseful; and an opinion that he would make a fine prisoner. (Vol. VII, pgs. 1341-46)

Larson grossly understated the severity of Guardado's mental problems and overlooked the significance of the crack cocaine's influence on his behavior. He never suggested why the jury should consider his crack binge a mitigating circumstance. He did not explain the crippling effects of crack cocaine and the control it had over Guardado. To the contrary, the State used Larson to emphasize that Guardado had *complete control* over his actions, chose to abuse drugs, and deliberately decided to murder in order to get them. (Vol. VII, pgs. 1348-49) If anything, Larson hurt Guardado and helped the State by specifically refuting any assertion that statutory mitigation applied.

Upon reviewing Larson's report, counsel should have inquired as to why there was a dearth of information regarding his substance abuse issues. Since his initial confession, Guardado explained his behavior was driven by his need for more crack cocaine. (Vol. VII, pgs. 1251, 1252, 1272) He explained that his drug problem was heightened due to his inability to cope with the stressors in his life. (Vol. VII, pg. 1258) None of this was a surprise to Gontarek. Both of these issues were (and still are) the best mitigation to explain why a man, described as a pleasant gentleman who would give you the shirt of his back, would murder one of the few persons that supported him.

Larson's oversight is almost understandable given that he was ill equipped to fully assess the significance of Guardado's drug binge. Somehow, even though

they met on several occasions, Larson was never aware that Guardado was abusing drugs every time he committed a crime. (Vol. VII pgs. 1353) This might have been due to the fact that he never reviewed any prison records because he never received them from Gontarek.[7] He was also never given any special instructions to explore the severity of his drug problem. (Vol. V, pgs. 877-878)

Counsel should have suspected that Larson overlooked these issues or sought an explanation for why they were minimized in his report. Guardado supported this contention when he complained about Larson's interview techniques. (Vol. IV, pgs. 708, 709, 741) He should have instructed Larson to delve deeper into Guardado's addiction and mental health issues. Counsel should have produced his prison records, arrest reports, and letters from family for Larson to consider. Counsel should have commanded Larson to conduct a more detailed interview regarding these issues. And if Larson's opinion still didn't help, then counsel should have sought a more specialized expert in substance abuse addiction since Larson devoted little to this area in his regular practice. Gontarek's "one-size-fits-all" mentality toward securing an expert was inadequate.

[7] At the evidentiary hearing, Gontarek testified, "I think I got his [DOC] records, though, and gave them to Dr. Larson." (Vol. V, pg. 855) Later, he testified he was not sure if did and would not be surprised to learn Larson's file did not contain any DOC records. (Vol. V, pg. 879) Furthermore, Larson's report does not specify that he reviewed any of Guardado's prison records. (R 303-309)

At the evidentiary hearing, Gontarek tried to justify his reliance on Larson and claimed that his opinion was still "helpful" because it addressed Guardado's remorse and explained his addiction. (Vol. V, pg. 861) This claim is meritless. First, the State *repeatedly* used Larson's testimony to argue for death at the trial. (Vol. VII, pgs. 1348-49; TT 327-328, 333, 334-35, 338) During cross-examination and closing argument, the prosecutor highlighted Larson's opinion concluding that Guardado: was not insane or psychotic, did not suffer from any mental illness, emotional disorder, or brain damage, and he knew right from wrong, and had the capacity to appreciate the wrongfulness of the murder, and committed the murder solely to obtain more crack cocaine. (Vol. VII, pg. 1354; TT pgs. 333, 334-35) During closing arguments, he used Larson's testimony to support that the crime was committed in a cold, calculated, and premeditated manner. (TT pgs. 327-328)

Second, Larson's testimony was not necessary or helpful to demonstrate that Guardado was remorseful, nor did it support it. Larson did not conduct any psychological testing that indicated remorse, and thus his testimony was simply opinion based upon his observations. The jury had ample opportunity to consider the genuineness of Guardado's remorse by listening and watching his confession, judging his testimony before them, and considering Lorenz's testimony suggesting he was remorseful. Simply put, Larson did not assist the jury to determine if Guardado was remorseful.

Gontarek's closing argument shows exactly what he thought of Larson's opinion. He merely argued that Larson proved Guardado was not a psychopath and would not be a danger to anyone in prison. (TT pgs. 346-347) If Gontarek truly believed Larson helped to show remorse, then he would have made that argument to the jury.

Third, Larson's testimony did nothing to show how Guardado's drug abuse should be a mitigating factor. In fact, his testimony was used to rebut any claim that his drug use mitigated the crime. The State emphasized Larson's testimony that Guardado possessed the mental capacity to make a choice when he committed the murder. (TT pgs. 338) Furthermore, Gontarek did not argue that Larson's opinion suggested the drug use was a mitigating factor. (TT pgs. 341-349)

Deficient Mitigation Presentation

Assuming arguendo that counsel's investigation was reasonable, counsel was still deficient due to his meager presentation to the jury. First, there was absolutely no reason to put Larson on the stand because the mitigation he offered was available from Guardado. The only benefit that could be squeezed from Larson's opinion was that he opined Guardado was not a psychopath. (Vol. VII, pg. 1343) This benefit paled in comparison to his prejudicial opinions refuting that drugs or mental duress mitigated his behavior.

Furthermore, in reaching his conclusion, Larson told the jury that four characteristics were common to psychopaths: they are parasitic (mooch off of people), they move frequently, they find it difficult to keep a job, and they lack a conscience. (Vol. VII, pgs. 1341) Larson's conclusion aside, three of those characteristics fit Guardado in the months before the murder. The jury heard he had lost his job and was looking for work. They knew he was sleeping on a couch at his ex-girlfriend's house, had rented from Ms. Malone on several occasions, and borrowed money from time to time. The jury must have been scratching their heads to square Larson's opinion with his description of the typical psychopath. In short, any benefit gleaned from Larson was outweighed by the damage inflicted by his testimony.

Second, considering the State's five virtually unchallengeable aggravators, engaging the battle with Larson as the only weapon amounted to a suicide mission. And counsel's decision to rely exclusively on Larson's testimony during his mitigation argument to the jury demonstrates that he gave up before the trial ever began. He did not highlight Guardado's testimony that the drugs controlled him. Nor did he otherwise argue any version of "the drugs killed Ms. Malone, not Jesse" despite hearing that explanation from those that knew him personally.

Furthermore, other witnesses were available to offer mitigation to the jury. Major Mathis could have testified that Guardado was permitted to live and work at

the forestry camp while he was serving his previous prison sentence and that he was a good worker. (Vol. IV, pgs. 653-54) Her testimony would have supported the argument that he could make a positive contribution to the prison community and that he was a different person when he was not engulfed in a drug delirium. Elizabeth Darby Padgett (Rentz) could have told the jury that he was a good boyfriend to her girlfriend and that she observed his downhill slide into drug and alcohol abuse. (Vol. IV, pgs. 685-86) She would have been yet another witness to Guardado's "Jekyll and Hyde" split personality.

Third, and most indicative of deficient performance, was counsel's decision to give the jury a piece of paper with words from a condemned man's mother without publishing it to the jury. (TT pg. 221) Guardado's mother was in the courtroom! (Vol. IV, pg. 663) Counsel could have read the letter and the jury could have witnessed her reaction as it was read. They could have seen Guardado's reaction as well. Or even better, she could have read the letter herself! Counsel could not provide an explanation for this mistake. (Vol. V, pg. 876) His failure to explain his logic is understandable because there is no explanation.

At the evidentiary hearing, Umlauf testified that she was ready and willing to testify for her son. However, she testified that Gontarek did not want her to testify and she acquiesced to his instruction. (Vol. IV, pgs. 665, 674) Gontarek disputes this point and the trial court concluded that she was unwilling to testify.

(Vol. VI, pg. 1102) Gontarek's claim and the court's conclusion are puzzling. First, there is no question she was present throughout the trial and subsequent proceedings. (Vol. IV, pg. 663, 665) Second, the record is clear that it was Umlauf who insisted Guardado obtain representation and begged for him to accept a court-appointed attorney. (Vol. IV, pg. 731-732; Vol. V, pg. 858) This begs the question: why would she refuse Gontarek's request to testify when she was responsible for securing Gontarek in the first place? And why would she refuse to testify yet make herself available by sitting through the trial?

The only logical explanation is that Gontarek told her she should not testify, but there is no logical explanation why he would instruct her to do so. He did not deny that he believed that her testimony would be upsetting to Guardado. However, he never explained why upsetting Guardado was a reason for why Umlauf should not testify.

Umlauf was a valuable mitigation witness for several reasons. First, she was Guardado's mother and she could have humanized him for the jury. Second, she could have provided an extensive background history of her son. (Vol. IV, pgs. 668-69) She would have told the trial jury about losing his father and a brother when he was a young. (Vol. IV, pg. 668) She could describe his troubled history in the juvenile system and confirmed his early drug abuse history. (Vol. IV, pg.

669) Nothing could be more powerful than a live witness pleading for her son's life.

Third, she could have confirmed his struggle after he moved away, took a new job, and became overwhelmed by the lack of support from his new employer. (Vol. IV, pgs. 669-71) She was aware of his downward spiral in the weeks leading up to the killing. (Vol. IV, pgs. 672-73) This would have been powerful testimony for the jury, but Gontarek rejected it in the face of a looming death sentence for his client.

Even more baffling was counsel's decision to read a letter from the county jail regarding his discipline record instead of reading Umlauf's letter. (TT pgs. 220-221) The jurors undoubtedly detected that the defense lawyer found her letter unimportant and paid little attention, if any, to its contents. Reading the letter slowly and with emphasis to the jury, and then sending it back with them would have sent a completely different message. At the very least his lawyers could have made 12 copies to provide a copy for each juror. As Guardado sits on death row, there is no assurance that anyone on that jury ever read the contents of her letter.

Almost as disturbing is the fact that the defense team apparently felt there were a number of non-statutory mitigators that they presented to the court in a sentencing memorandum and at the Spencer hearing, but were never argued to the jury. What is even more disturbing is the State suggested two (2) additional

mitigators that were apparently never thought of, or overlooked by, the defense team. Simply arguing for the nineteen (19) non-statutory mitigators ultimately found would have made a significant difference and impact with the jury.

Counsel could not explain why he chose to present some mitigation at the Spencer hearing, but not to the jury. During Gontarek's closing argument, he argued Guardado had shown remorse, accepted responsibility for his actions, was not a psychopath, was suitable for life in prison, and wanted to spare the family from the anguish of a trial. Facing five significant aggravators, this feeble effort of defense, without calling more witnesses fell short of competent representation. The additional witnesses not called would have bolstered and corroborated the testimony of Guardado, as his credibility was questioned by the State.

Resulting Prejudice

A defendant must show that but for counsel's deficiency, there is a reasonable probability the sentence would have been different, to satisfy the prejudice prong under Strickland. Walker, 88 So. 3d at 138. To assess that probability, this Court must consider the totality of all the available mitigation evidence (presented at trial and during the evidentiary hearing) and reweigh it against the aggravating evidence. *Id*. (citing Porter v. McCollum, 558 U.S. 30 (2009) and Williams v. Taylor, 529 U.S. 362 (2000). "A reasonable probability is

a 'probability sufficient to undermine confidence in the outcome.'" Henry v. State, 948 So. 2d 609, 617 (quoting Strickland, 466 U.S. at 694.)

The most obvious source of prejudice stems from the jury's failure to hear mitigation related to Guardado's drug delirium. In summary, the jury should have learned that his state of intoxication, made worse by his fragile emotional state, was so serious that his ability to conform his conduct to the requirements of law was substantially impaired within the context of §921.141(6)(f), Fla. Stat. (2003) Consequently, the jury would have been able to consider at least one statutory mitigator.

Unfortunately, the jury never heard about the debilitating effects of the crack on Guardado. As testified to by Joanna Johnson, Guardado's drug and alcohol abuse became his coping mechanism for dealing with stress. (Vol. V, pg. 792) At the time of the murder, he was "unable to control emotion, feeling, or even stop the run that he was on," in a "drug delirium," and "completely under the control of these drugs." (Vol. V, pg. 796-97) She believed his "drug delirium" prevented his ability to distinguish between right and wrong at the time of the crime, a significant factor that Larson specifically contradicted. (Vol. V, pg. 802)

Dr. Pritchard took it one step further and concluded that his drug use qualified for statutory mitigation under §921.141(f) Fla. Stat. (2003) (Vol. V, pgs. 822, 838) Pritchard concluded that Guardado's ability to conform his conduct was

substantially impaired as a result of his body's need for crack cocaine. (Vol. V, pgs. 822, 838) He described Guardado's thought processes as a "single minded pursuit" for the drug and likened it to obsessive-compulsive behavior. (Vol. V, pg. 823) The power of the drug took over his mind to the point that he was no longer rational, reasonable, or had the ability to think things through in a logical way. (Vol. V, pg. 824) He was not controlled by his consideration for the consequences. (Vol. V, pg. 824) *He was controlled by the chemical*, and he would pursue the chemical at any cost even if it required violence.

Dr. Pritchard added clinical and psychological significance to the remorse expressed by Guardado. He opined that Guardado's remorse showed his appreciation for his criminality returned after the drugs left his system. (Vol. V, pgs. 825) His rationality returned and he was trying to fix what his irrational mind compelled him to do on the night of the crime. (Vol. V, pg. 825) As Dr. Pritchard put it, his "moral brakes" were inoperable while the drugs flowed through his system. (Vol. V, pg. 825) He explained that his impairments prevented him from conforming his conduct to act on what he knew was right, and stop himself from doing what he knew was wrong. (Vol. V, pgs. 831, 838)

Furthermore, Dr. Pritchard found that Guardado's behavior was consistent with reports from families of addicts, who report that addicts are great people when sober, but become very different when using drugs. (Vol. V, pg. 826) He likened

the "Jekyll and Hyde" personalities they exhibit to insanity. (Vol. V, pg. 832) He did not believe Guardado was clinically insane, "But the insanity is that they will do things that, ordinarily, they wouldn't even think of doing." (Vol. V, pg. 832)

Had counsel diligently pursued family members and friends, they would have been able to present additional statutory mental health mitigation to the jury. Specifically, that at the time of the homicide, the defendant was under the influence of extreme mental or emotional disturbance. His mental illness was the result of years of chronic drug and alcohol abuse, neglect of his health, and failure to get treatment for his mental illness.

The jury never heard that Guardado suffered from a mental illness. Johnson opined that he suffered from substance abuse dependency. (Vol. V, pg. 815) And Dr. Pritchard opined that §921.141(b), Fla. Stat. (2003), applied because Guardado was under the influence of extreme mental or emotional disturbance. (Vol. V, pgs. 822, 826) Several catalysts supported his opinion: his job loss, relationship trouble, and financial troubles. (Vol. V, pg. 827) He explained that they created a sense of anxiety, self doubt, feelings of failure, and feelings of letting people down. (Vol. V, pg. 827)

Unlike Larson, Dr. Prichard stated that Guardado's troubles were "what people seek mental health and psychiatric counseling and medications for all the time and, in conjunction with that, receive a diagnoses of depressive disorder,

anxiety disorder." (Vol. V, pg. 829) He diagnosed Guardado with poly-substance dependence, but agreed that he did not suffer from any "major mental illness." (Vol. V, pgs. 836-37)

Linda Warren, Bennie Guardado, Donna Porter, and Darby Rentz are all family members or his close friends. They could all have attested that, when not abusing drugs, he was a good friend and relative who cared about his family and often did good things for others without any expectation of reward.

Considering the evidence presented at the post-conviction hearing in addition to the evidence presented at the trial and Spencer hearing undermines the confidence in the outcome of the jury recommendation and the lower court's death sentence. The persuasive expert testimony effectively nullified the impact of the State's aggravators because they put the facts in the proper context. They explained his behavior as an anomaly that would never recur if he spent the rest of his life in prison. His family and friends (in addition to the experts,) captured the individual characteristics that pertained to Guardado and Guardado only. Their testimony would have humanized him to the jury.

As a result of counsel's actions, Guardado was deprived of his right to effective assistance of counsel under the Sixth and Fourteenth Amendments of the U.S. Constitution and Article I, Section 16 of the Florida Constitution.

II. Penalty phase counsel rendered ineffective assistance during voir dire for failing to object to the exclusion of several qualified jurors and for failing to strike several biased jurors.

Standard of Review

The standard of review for an order denying a motion for post-conviction relief is two-pronged: (1) this Court must defer to the circuit court's factual findings so long as competent, substantial evidence supports them; but (2) must review *de novo* the circuit court's legal conclusions. Walker v. State, 88 So. 3d 128, 134 (Fla. 2012) (citing Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

Stricken Jurors Who's Views Toward the Death Penalty DID NOT Substantially Impair Their Ability to Follow the Law

Two prospective jurors, James Tucker and David Hebert, were improperly stricken for cause without a proper objection from defense counsel.[8] Neither of these prospective jurors expressed anti-death penalty views sufficient to disqualify them from jury service.

In a capital proceeding, some people are unqualified to serve on the jury if their personal views express an unyielding conviction and rigidity toward the death penalty. See Barnhill v. State, 834 So. 2d 836, 844 (Fla. 2002) (citing Farina v. State, 680 So. 2d 392 (Fla. 1996)). For those that question capital punishment, it is

[8] Both the original and amended 3.851 motions alleged three jurors were improperly stricken for cause. However, after reviewing the record it is clear that the State used a peremptory strike to remove prospective juror Theresa Clark, and not a challenge for cause.

proper to exclude them if they "state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. . . . (or) who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them." Miller v. State, 42 So. 3d 204, 213-214 (Fla. 2010) (quoting Witt v. State, 342 So. 2d 497, 499 (Fla. 1977)).

However, even if a prospective juror has expressed strong feelings toward the death penalty, they may still serve "if they indicate an ability to abide by the trial court's instructions." Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995) (citing Penn v. State, 574 So. 2d 1079 (Fla. 1991)) In other words, if they can follow the law they can serve.

In Farina v. State, 680, So. 2d 392 (Fla. 1996), this Court vacated a death sentence when it found that a juror who disfavored the death penalty yet could still follow the law was improperly stricken. The Farina juror stated that she had "mixed feelings" regarding the death penalty. *Id*. at 396. She claimed that she would consider imposing the death penalty and repeated that she would try to "give [the State] a fair shake." *Id*. at 396-397.

The Farina Court analyzed all of her responses and determined that while she "may have equivocated about her support for the death penalty, her views on the death penalty did not prevent or substantially impair her from performing her

duties as a juror in accordance with her instructions and oath." *Id*. at 398. In addition to her responses, this Court was persuaded by the fact that the State did not explain why she was not qualified and because the trial court indicated it was granting the challenge because it had just granted a defense challenge. *Id*.

Farina and the Florida cases followed the rule of law set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968), in which the Supreme Court held "that a sentence of death cannot be carried out if the jury 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." Witherspoon, 391 U.S. at 522. The Court relied on the principal that a juror opposed to the death penalty may nevertheless be fully capable of following the law, the oath of a juror, and the judge's instructions. *Id*. at 519.[9]

The Supreme Court reaffirmed that core principal in Adams v. Texas, 448 U.S. 38 (1980). Adams held that a state cannot exclude jurors that are unable to swear that the possibility of a death sentence would not affect their deliberations.

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[9] In so ruling, the court implied that it was permissible to exclude two types of jurors that opposed capital punishment: (1) those who stated that they would **never** impose the death penalty under any circumstances; and (2) those whose ability to find guilt would be impaired. *Id*. at 522 (Footnote 21). The first type consists of jurors that refuse to follow the law at the penalty phase. The second type of jurors may try to follow the law, but their belief impairs their ability to remain impartial and indifferent when determining guilt.

Adams, 448 U.S. at 50. The Court reasserted that someone could oppose the death penalty, yet still follow the law, but described when jurors may be excused because of their beliefs:

> We repeat that the State may bar from jury service those whose beliefs about capital punishment would lead them to *ignore or violate* their oaths. *Id*. at 50-51. (*Emphasis* added)

In reaching the decision the Court stated, "This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id*. at 45. Subsequently, this standard was adopted in Wainwright v. Witt, 469 U.S. 412 (1985), in an attempt to clarify the Court's perception of conflicting standards used in Witherspoon and Adams. *Id*. at 421.

Both Adams and Witherspoon limited a state's ability to remove potential jurors who were reluctant to impose the death penalty, but otherwise willing to follow the law and abide by their oath as a juror. In Adams, the Supreme Court explained that admitting that a potential death sentence might *affect* deliberations did not suggest an inability to follow the law. *Id*. at 49. To the contrary, such an admission suggests that juror would view the deliberations "with greater seriousness and gravity." *Id*.

Prospective Juror Hebert was precisely the type of juror that Adams and Witherspoon protected. Immediately after voicing his religious scruples with the death penalty, he said that he would be "as fair as I can." (Vol. VI, pg. 1169) He could not promise the court that he would reject his religious beliefs and assure that his religion would not *affect* his decision. To the contrary, he stated, "I think it would affect my decision, yes." (Vol. VI, pg. 1170) This is no different from the jurors who admitted that the death penalty would *affect* their deliberations—a fact that Adams concluded was an insufficient basis for exclusion.

Hebert said that he would follow the law. (Vol. VI, pgs. 1173, 1174) The problem presumably was that he steadfastly asserted that his religion would have "some weight" in his deliberations. (Vol. VI, pgs. 1170, 1174) When pressed by the judge, he admitted that his religion might "impair [his decision] to a certain degree." (Vol. VI, pg. 1176) At other times, Hebert confessed that he was unsure what he would do. (Vol. VI, pg. 1169, 1178) Regardless, Hebert's responses indicate that he was willing to abide by the judge's instructions. At worst, Hebert indicated that his religious beliefs would force him to deliberate "with greater seriousness and gravity."

The court found Hebert should have been excluded because "Mr. Hebert could not assure the trial court that he would be able to set aside his religious faith and follow the law." (Vol. VI, pg. 1078) Further, the court claimed that Hebert's

religious beliefs would influence him "so much that he might not be able to follow the law." (Vol. VI, pg. 1079) To the contrary, Hebert never said that he "might not be able to follow the law" nor did his responses warrant this interpretation. Nor did he state that he could never recommend a death sentence.

The first time he was asked whether his faith would substantially impair his ability to be fair and impartial, Hebert responded, "To be perfectly honest, I would hear both sides and try to be as fair as I can. But the effect of my religion on me, I really don't know what I would do, to tell you the truth." (Vol. VI, pg. 1168) The second time he responded, "Yeah." (Vol. VI, pg. 1170) The third time he rephrased his first answer, "I would try to follow the instructions as best I can. But what I'm saying is my religion would have some weight in my decision." (Vol. VI, pgs. 1174-1175) The fourth time he responded, "I don't know how to answer." (Vol. VI, pg. 1175) The fifth time he said, "I think it would impair it to a certain degree." (Vol. VI, pg. 1176)

All of his responses should be considered to determine whether he was qualified, not a single response in isolation. His responses clearly demonstrate that his religion would *affect* his decision, but they do not suggest that his abilities were *substantially impaired*. As in Farina, Hebert's responses may have been equivocal, but they did not demonstrate a *substantial* impairment of his abilities to follow the law. If anything, his responses verified that would take his oath very seriously. He

could not assure the prosecutor, or the court, that his faith would be checked at the courtroom door, but the law doesn't require that jurors completely abandon their religious beliefs as part of the juror's oath.

Likewise, James Tucker should not have been stricken for similar reasons. Tucker, a lawyer, objected to Florida's death penalty statutes because of "due process issues." (Vol. VI, pgs. 1159, 1161) However, his concern for due process was not a valid basis to remove him for cause.

The court found that the record showed that Tucker's beliefs substantially impaired his ability to follow the law and that "he would likely not be able to follow the law based upon his beliefs." (Vol. VI, pg. 1076) Likewise, the court found that Hebert "could not assure the trial court that he would be able to set aside his religious faith and follow the law." (Vol. VI, pgs. 1078-1079) The court was partially correct, he could not assure that he would set aside his religious faith, but he never indicated that he could not follow the law.

Since Hebert was perfectly qualified to serve on the jury, counsel should have objected when the State moved to strike him for cause. His failure to object constituted defective performance under Strickland.

The erroneous exclusion of both Hebert and Tucker was fundamental error and inherently prejudicial. In Davis v. Georgia, 429 U.S. 122 (1976), the Supreme Court announced a *per se* rule that requires that a death sentence be vacated when a

qualified juror is excused for cause. As such, prejudice is inherent and Guardado's death sentence should be vacated accordingly.

Biased jurors that presided over the penalty phase

Pamela Pennington was permitted, without objection from the defense, to sit as a juror in the case despite her friendly relationship with the victim. Gontarek did not move to strike her for cause or use a peremptory challenge even though she admitted that she personally liked Ms. Malone. (Vol. VI, pgs. 1190, 1191) They met when Ms. Malone was serving as her son's realtor and they had frequent contact over a several month period during that time. (Vol. VI, pgs. 1183, 1184, 1191) Pennington claimed that she could be fair and impartial. (Vol. VI, pgs. 1184, 1191)

Despite her claim, Gontarek should have moved to strike her for cause because her relationship made it impossible to remain fair and impartial. Gontarek's rationalization for keeping her was based on her statement that she was "only somewhat" in favor of the death penalty. (Vol. V, pg. 864; Vol. VI, pgs. 1182-82) While she did make that statement, she also claimed that the death penalty should not be abolished. (Vol. VI, pg. 1183) Thus, any claim that it was a reasonable strategic decision to keep her is meritless.

Earl Hall knew three of the police officers that worked on this case including Captain Stan Sunday, Investigator Rome Garrett, and Investigator James Lorenz,

who testified at the trial. (Vol. VII, pgs. 1211-12) Lorenz was Hall's client when Hall was selling insurance. (Vol. VII, pg. 1211) Garrett was a close personal friend of Hall. (Vol. VII, pgs. 1211-12) Hall knew Sunday's father and his wife went to school with Sunday's father. (Vol. VII, pgs. 1211-12) Hall noted positive feeling about the victim who was a person his family members knew personally. (Vol. VII, pg. 1210)

All of these facts demonstrate Hall's bias. Gontarek attempted to rationalize keeping Hall because of his relationship with law enforcement. (Vol. V, pg. 865) Cobb recalled discussing Hall with Guardado. (Vol. IV, pg. 780) Guardado recalled that his attorneys advised him to keep Hall because of his relationship with law enforcement because they would not view evidence emotionally. (Vol. IV, pgs. 716-17) There is absolutely basis to support the contention that Hall would be a favorable juror.

Furthermore, it is equally likely that a juror without emotional attachment will be more likely to vote for death over life. And to no surprise of any criminal defense attorney, Hall stated that he was "strongly" in favor of the death penalty. (Vol. VII, pg. 1199) Gontarek's logic to keep Hall directly contradicts his logic to keep Pennington. There was no apparent benefit to Hall and keeping him was an unreasonable strategy decision because his bias was apparent from his responses.

William Cornelius' aunt and uncle were murdered under circumstances similar to Ms. Malone. (Vol. VII, pgs. 1147, 1152-53) This fact, by itself, was sufficient to remove them peremptorily if the court would not excuse them for cause. Once again, Gontarek suggested a rationale for keeping Cornelius that was unreasonable. He claimed that Cornelius thought a life sentence was harsher than a death sentence. (Vol. V, pgs. 865-866) The problem is that Cornelius did not say what Gontarek claimed to have heard.

Cornelius merely stated that he had worked at a prison construction site. (Vol. VI, pg. 1157) He only agreed that it was a "very severe punishment" for the inmates housed there. (Vol. VI, pg. 1157) And he seemed to qualify that it was severe "on that one," meaning *only* at the prison he worked on. Gontarek stretched to justify what was another oversight on his part during jury selection. Cornelius was understandably biased, as the allegations were too eerily similar to the tragedy his family experienced.

The court's order found that none of the jurors were shown to be unfair or partial. (Vol. VI, pgs. 1083, 1085, 1088) The court's conclusions were incorrect and counsel should have used peremptory challenges to remove each of these jurors. Had Pennington, Hall and Cornelius been challenged for cause or peremptorily, there is reasonable probability that a majority of the jurors would have voted for life in prison.

As such, Guardado was deprived of his right to a fair and impartial jury and the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 9 & 16 of the Florida Constitution.

CONCLUSION

Because Guardado did not receive effective assistance of counsel during the penalty phase in deprivation of his rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 9 & 16 of the Florida Constitution, he is entitled to a new penalty phase. As such, this case should be remanded with instructions that the trial court conduct a new penalty phase jury trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Office of the Attorney General
Criminal Appeals Division
PL-01, The Capitol
Tallahassee, FL 32399-1050

By U.S. mail delivery this ___ day of March 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of the Petitioner complies with the type-font limitation.

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