*** CAPITAL CASE ***

No. _____

IN THE

Supreme Court of the United States

JESSE GUARDADO,

Petitioner,

v.

RICKY D. DIXON, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

SEAN GUNN
Counsel of Record
MICHELLE WARD
MARY HARRINGTON
Capital Habeas Unit
Federal Public Defender
Northern District of Florida
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
sean_gunn@fd.org

Counsel for Petitioner

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Eleventh Circuit Opinion Below
(August 12, 2024)

[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-10957

JESSE GUARDADO,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:15-cv-00256-RH

Before WILLIAM PRYOR, Chief Judge, and JILL PRYOR and LUCK, Circuit Judges.

LUCK, Circuit Judge:

On September 21, 2004, Jesse Guardado confessed to the Walton County Sheriff's Office that, eight days earlier, he had robbed and brutally murdered seventy-five-year-old Jackie Malone in her home. After he pleaded guilty in the state trial court without the benefit of a plea agreement or the aid of counsel, counsel was appointed to represent Guardado for the penalty phase. A penalty phase jury unanimously recommended that Guardado receive the death penalty, and the state trial court sentenced him to death.

Guardado appeals the denial of his petition for a writ of habeas corpus under 28 U.S.C. section 2254. He argues that the Florida Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), in denying his claims that his trial counsel were constitutionally ineffective by: (1) failing to adequately investigate and present mitigating evidence for the penalty phase; and (2) failing to challenge for cause or peremptorily strike Jurors Pamela Pennington, Earl Hall, and William Cornelius. After careful review of the briefs and the record, and with the benefit of oral argument, we affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Murder

James Brown knelt in the supermarket aisle of a small-town Winn-Dixie. The evening was busy at the store, and Mr. Brown had been hard at work restocking groceries. Mr. Brown stooped to reach a shelf near the floor and suddenly felt the cold steel of a knife against his throat. "[G]ive [me your] wallet," demanded the man over Mr. Brown's shoulder. But Mr. Brown didn't comply. He hollered for help and grabbed for the knife. The man pulled the knife back, slicing two of Mr. Brown's fingers, and ran from the store before Mr. Brown got a good look at his face.

The knifeman was Guardado. After Mr. Brown hollered for help, Guardado rushed to the Winn-Dixie parking lot and fled the scene.

He'd been out of prison on conditional release for about a year and a half after spending most of his adult life behind bars. Convicted for armed robbery in 1984. Robbery with a deadly weapon in 1990. Robbery with a weapon again in 1991. And now, on September 13, 2004, he'd attempted to rob a Winn-Dixie employee—all because he needed a crack cocaine fix. And he needed it bad. His crack binge was two weeks strong and counting, but he had to have more money to keep it going.

As darkness fell in the late summer sky over DeFuniak Springs, Guardado's thoughts turned to Ms. Malone. Guardado had known Ms. Malone since meeting her the year before, shortly

after his release from prison, and she'd been good to him despite his past. She helped him find a place to stay and rented him one of her properties. She provided money and helped him find his current job at the wastewater treatment plant in Niceville. She had even told him where he could find the spare key to her home and let him crash there overnight between rentals.

But none of that mattered to Guardado now. What did matter was that Ms. Malone lived in a secluded area. That she trusted him enough to open her home to him if he showed up in the middle of the night. That she had money. And that he knew where to find it. To get the money, all he had to do was kill her.

With a plan in place, Guardado swung by his truck and got a kitchen knife. He left home around ten o'clock and drove toward Ms. Malone's house, armed with the kitchen knife and a breaker bar.

Ms. Malone was asleep in her bed when Guardado arrived. Guardado appeared at the front door with the weapons tucked in the small of his back, then knocked and knocked until Ms. Malone woke up and answered. He identified himself through the door, and Ms. Malone opened the door in her nightgown and greeted him. Guardado told her he needed to use her phone, so Ms. Malone turned away to allow him inside. Then Guardado hit Ms. Malone over the head with the breaker bar. When that didn't kill her, he struck her again and again and again. When that didn't kill her, he grabbed his knife and stabbed her through the chest. Five times. When that didn't kill her, he slashed her throat. Twice.

That killed her.

Guardado got up, went to Ms. Malone's bedroom, and rooted through her valuables. He took her jewelry box, briefcase, purse, checkbook, and cell phone, as well as eighty dollars in cash. With enough in hand to guarantee his next high, he left Ms. Malone's broken body on the floor behind her couch and drove off into the night.

B. Guardado's Confession and Guilty Plea

Two days later, Ms. Malone's brother found her dead body and called the police. The Walton County Sheriff's Office opened an investigation and quickly homed in on Guardado as a suspect.

On September 21, the Niceville Police Department notified investigators in the Walton County Sheriff's Office that Guardado wanted to speak with them. A meeting was arranged between Guardado and the Walton County investigators near Guardado's broken-down truck in a Walmart parking lot. Once inside the investigators' car, Guardado blurted out that "that lady" didn't deserve what he'd done to her. The investigators suggested that he pipe down until he had a lawyer.

After meeting with an attorney who advised Guardado against talking to the investigators, Guardado still wanted to speak with them. He sat down with three of them—one of whom advised Guardado of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966)—and confessed to his crimes.

Guardado told the investigators that after he had killed Ms. Malone, he burned his clothes, Ms. Malone's jewelry box and purse, and the knife he used in the murder. He discarded the breaker bar, the charred knife, the checkbook, the briefcase, and the jewelry—which he thought would be worthless to sell. Then he headed for his shift at the plant, where he worked for a little while before going to a local convenience store, cashing four of Ms. Malone's checks, and buying some cigarettes. He contacted his drug dealers in DeFuniak Springs to buy more crack cocaine and continued binging crack before returning to work.

Law enforcement later recovered the items Guardado discarded and the charred remains of the ones he burned, including the knife, the briefcase, and the breaker bar. On October 19, 2004, having waived his right to counsel, Guardado pleaded guilty to murder without the benefit of a plea bargain.[1] Guardado planned to represent himself for the rest of the proceedings but eventually took the advice of his mother, Patsy Umlauf, to accept counsel for the penalty phase. The state trial court appointed two attorneys to represent Guardado during the penalty phase: John Gontarek and Jason Cobb.

[1] Guardado also pleaded guilty to the attempted robbery with a deadly weapon at the Winn-Dixie—for which he was sentenced to forty years' imprisonment—and robbery with a weapon at Ms. Malone's home.

C. Penalty Phase

The state trial court set the penalty phase trial to begin on September 13, 2005.

1. Penalty Phase Investigation

Mr. Gontarek, a twenty-five-year lawyer from Fort Walton Beach who'd handled between forty and fifty capital litigation cases as a defense attorney, served as lead trial counsel. Mr. Gontarek first met with Guardado at the jail within a couple of weeks of his appointment. He was impressed that Guardado had taken responsibility for his crimes and thought that saving the county and Ms. Malone's family from the ordeal of the trial "would go a long way in mitigation." He planned to make Guardado's confession and cooperation the cornerstone of his mitigation strategy.

Guardado was uncooperative with Mr. Gontarek. Even so, after informing Guardado that he had a duty to try to save Guardado's life, Mr. Gontarek had Dr. James Larson, a Pensacola-based forensic psychologist he had worked with in the past (and whose testimony had been used in several successful capital defenses), appointed to the case; interviewed any family members or friends who were willing to talk; and talked with any co-workers or others who could provide information about Guardado's skills in wastewater treatment.

Mr. Cobb, a newer lawyer from DeFuniak Springs, joined the defense team after approaching Mr. Gontarek about assisting because he wanted experience working on a capital case. Mr. Cobb had served as a state prosecutor for three years before beginning

his own private criminal defense practice about three years before the murder. As a prosecutor, Mr. Cobb helped prepare a capital case for prosecution, though he didn't participate in the trial itself. After his appointment as co-counsel, Mr. Cobb met with Mr. Gontarek for a briefing on the case and reviewed the discovery packet. Once Mr. Cobb was up to speed, he and Mr. Gontarek met with Guardado at the jail to introduce Mr. Cobb to Guardado and discuss the penalty phase process. Mr. Cobb deferred to Mr. Gontarek as lead counsel in forming a strategy for mitigation and deciding whom should be contacted as potential witnesses.

Throughout counsel's penalty phase investigation, Guardado remained uncooperative and insisted that he wanted to go back to prison, skip straight to sentencing, and even be put to death. He didn't suggest the names of any family members who Mr. Gontarek and Mr. Cobb should contact. But Mr. Gontarek started the investigation by collecting as much information as he could on Guardado and communicating regularly with Dr. Larson. Despite Guardado's reluctance, Mr. Gontarek compiled information about his mother, his stepfather, his uncle, and his employer. Mr. Gontarek dug into Guardado's jail records, which he preferred to use as mitigating evidence over prison records because prison records might open up prior violent felonies or other unfavorable evidence that the state could use.

After Mr. Gontarek gathered information about Guardado's family, he spoke with Mrs. Umlauf on numerous occasions. Most of their conversations centered on how to get Guardado to be

engaged in the process of saving his own life—a goal the two of them shared. Mr. Gontarek repeatedly asked Mrs. Umlauf to testify, but she refused; he did get her to write a letter instead.

Mr. Gontarek sent an investigator to talk to Guardado's employer at the Niceville wastewater treatment plant to get some background information on his water expertise. That effort proved unhelpful because the plant managers suspected Guardado of stealing equipment. Mr. Gontarek personally reached out to Major Rhodene Mathis, a now-retired warden of the Florida Department of Corrections, to discuss Guardado's behavior during his previous stints in prison. Although Mr. Gontarek determined that Major Mathis didn't remember anything about Guardado and thus wouldn't be helpful as a witness, Mr. Gontarek collected records from Major Mathis to share with Dr. Larson.

Mr. Gontarek also had Mr. Cobb reach out to Donna Porter, Guardado's ex-girlfriend, who didn't want to appear as a witness. Mr. Gontarek and Mr. Cobb chose not to subpoena Ms. Porter because they believed that she wouldn't be helpful in providing mitigating evidence.

And Mr. Gontarek reached out to Guardado's other family members, including Guardado's brother and stepfather, on numerous occasions by letter and telephone, especially during the first two months of his investigation. But the problem Mr. Gontarek kept running into was that Guardado had been in prison for so long that his family didn't have any contact with him. Ultimately, Mr. Gontarek chose not to call any of them as witnesses.

After Dr. Larson was appointed as a mental health expert, he met with Guardado four times to identify possible mitigating circumstances. Dr. Larson conducted two kinds of tests to evaluate Guardado: intelligence tests and personality tests. To evaluate Guardado's intelligence, Dr. Larson tested Guardado's IQ with the Wechsler Adult Intelligence Test, which Dr. Larson considered the "gold standard." Guardado's score on the test placed him in the sixty-third percentile, meaning he scored as well as or better than sixty-three percent of males in his age group—as Dr. Larson put it, that's "in the upper part of the average range." Dr. Larson also had Guardado take an "academic achievement test," which he described as "a simple screening test for academic ability" to measure Guardado's "reading, writing, and arithmetic" capabilities. Guardado scored "in the average range."

Next, to evaluate Guardado's personality, Dr. Larson administered the Minnesota Multi Phase Personality Inventory-2—"the most used personality test in the world." Guardado's results showed "no indications of mental illnesses," but they did indicate a "slight elevation in [the] depression" scale, a small elevation of the "paranoia scale," and elevated worry and anxiety. The MMPI-2 also analyzed "various items relating to substance abuse and attitudes toward substance abuse"—like "addiction to substances, [and] attitudes, beliefs, and values that support substance abuse"—which were also elevated.

Finally, Dr. Larson administered the Hare Psychopathy Checklist to Guardado. Guardado's score was "[q]uite good" and

indicated that he was not a psychopath. After evaluating Guardado, Dr. Larson prepared a report that summarized his findings and identified several factors Dr. Larson thought a jury would find mitigating.

2. Voir Dire

Guardado's penalty phase trial began with jury selection. The state trial court broke up voir dire into two phases—general voir dire and individual voir dire. During general voir dire, the state trial court and the attorneys gave instructions and asked questions to all prospective jurors in the courtroom. Then, during individual voir dire, the state trial court examined prospective jurors who indicated they might have a potential bias—three at a time—in chambers.

The general voir dire started with the prosecutor, who asked the prospective jurors if any of them knew the victim. Juror Pennington was among ten prospective jurors who said they did. Then, the prosecutor probed into whether the prospective jurors knew any of the witnesses that might be called to testify. Juror Hall said he recognized three law enforcement witnesses: Investigator Rome Garrett, Investigator James Lorenz, and Captain Stan Sunday. Later, the prosecutor asked the prospective jurors whether they, or anyone they were very close with, had been the victim of a violent crime. Juror Cornelius was among twenty who answered yes because he had family members—a great aunt and a great uncle—who had been murdered.

Then Mr. Gontarek had his turn during the general voir dire. He asked the prospective jurors to "promise . . . [they would] listen to the evidence and not make any decision about" their sentencing recommendation until they'd seen all the evidence and heard from the defense. In response to Mr. Gontarek's request, all prospective jurors—including Jurors Pennington, Hall, and Cornelius—indicated they'd keep an open mind. The prospective jurors agreed they would "weigh the aggravating factors and mitigating factors according to the law," the evidence, and the state trial court's instructions. And before he ended his general voir dire, Mr. Gontarek confirmed that the prospective jurors would agree to hear all the evidence and make a recommendation based on it by following the state trial court's instructions.

The state trial court then moved to individual voir dire by taking Guardado, Mr. Gontarek, Mr. Cobb, and the prosecutor into chambers to examine three prospective jurors at a time. First, Juror Cornelius had his individual voir dire. Juror Cornelius said that he was "somewhat" in favor of the death penalty, but he emphasized—four times—that "it should be based on the incident itself" and the specific "circumstances." Explaining his response during general voir dire that he had family members who had been the victims of violent crimes, Juror Cornelius recounted that his great aunt and great uncle were killed in a robbery twenty-five years earlier, "a long time ago." He didn't know many details about it—they were killed when he was "small," and the bits and pieces he knew were passed on to him by his family. The prosecutor then asked if what Juror Cornelius did know would affect his ability to consider

Guardado's case. Juror Cornelius assured the prosecutor: "No. That doesn't have anything to do with that."

During Mr. Gontarek's questioning, Juror Cornelius agreed there may be circumstances where a life sentence "might be a harsher penalty than the death penalty." Juror Cornelius had worked construction on three federal prisons and thought prison service at one he'd seen could be "a very severe punishment." But Juror Cornelius again emphasized that he wasn't jumping to conclusions about the case, that his recommendation would depend on what he "hear[d] in the courtroom," and that, "at th[at] point," he was "totally neutral on whether or not [he] should recommend death or life" at that time.

Next, Juror Pennington moved into the judge's chambers for her individual voir dire. Juror Pennington said that she was "somewhat" in favor of the death penalty and that she didn't think it should be abolished. When asked about her answer during general voir dire that she knew Ms. Malone, Juror Pennington explained that the two crossed paths a few years before the murder when Ms. Malone brokered a real estate transaction for Juror Pennington's son. In the process of finalizing the deal, the two had either met or spoken on the phone several times over several months. While Juror Pennington liked Ms. Malone and thought Ms. Malone was "a very nice lady," she hadn't spoken to Ms. Malone since wrapping up the deal. Juror Pennington assured everyone that she "could be fair" when questioned about whether this encounter with Ms. Malone would affect her ability to fairly evaluate the case.

And when asked a second time whether she could be fair, Juror Pennington said she could. But the prosecutor wanted a final assurance, asking Juror Pennington if she could promise Guardado "that [she] could be fair and make a fair and legal decision based on whether or not the [s]tate proved that aggravating circumstances exist[ed] which outweigh[ed] the mitigating circumstances." Her response: "Yes."

Mr. Gontarek picked up the questioning to see if Juror Pennington would agree that if she "felt that . . . one mitigating factor outweighed [a number of] aggravating" factors, she "[w]ould . . . vote[] for life." She did. Going back to Juror Pennington's relationship with Ms. Malone, Mr. Gontarek asked if she could "set aside" her feelings and make a decision "based on the law and the evidence and not . . . any conversations" she had with Ms. Malone. She offered an unequivocal "[y]es, sir," and insisted "[i]t was just a business knowing" Ms. Malone. Before the state trial court dismissed her from chambers, Juror Pennington agreed—again—that any feelings she had about Ms. Malone wouldn't affect her ability to be fair and impartial.

Finally, Juror Hall had his individual voir dire. He agreed that if selected to serve on the jury he had to "hold the [s]tate to its burden" before voting to impose the death penalty and that he "[m]ost definitely" would consider if "any mitigating circumstances weigh[ed] against" imposing it. Addressing his statement during general voir dire that he knew three law enforcement officers involved in the investigation, Juror Hall explained that

Investigator Garrett was a "close friend," Investigator Lorenz was a former insurance client, and Captain Sunday was the son of a friend who went to school with Juror Hall's wife. Despite his relationships, Juror Hall maintained that he could fairly weigh any testimony given by the three law enforcement officers.

Like with Juror Pennington, Mr. Gontarek asked if Juror Hall was aware that "if there's one mitigating circumstance [he felt] outweigh[ed] any number of aggravating circumstances, it would be [his] duty to impose life," and he asked if Juror Hall would "follow that duty." Juror Hall agreed he would. Returning to Juror Hall's relationship with Investigator Garrett, Mr. Gontarek pressed him on whether he'd weigh the officer's testimony more just because the two were friends. But Juror Hall made clear he would take his friend's testimony "strictly on its value."

Jurors Pennington, Hall, and Cornelius were ultimately seated on the jury for the penalty phase. By the end of the voir dire, Mr. Gontarek exhausted all but one peremptory challenge. He had also successfully challenged four jurors for cause.

3. Penalty Phase Trial

The state called nine witnesses to testify at the penalty phase trial, including Mr. Brown (the Winn-Dixie employee Guardado tried to rob), Ms. Malone's family, law enforcement officers, and the chief medical examiner, and introduced more than a dozen exhibits, including the murder weapons and photographs. The defense called two witnesses (Dr. Larson and Guardado) and introduced two letters as exhibits (one from the records clerk of the

Walton County Sheriff's Office and one from Guardado's mother, Mrs. Umlauf).

a. Dr. Larson's Testimony

Dr. Larson testified about his psychological evaluation of Guardado, including that they met four times, and that Dr. Larson reviewed the arrest reports, depositions, family background, and criminal history associated with Guardado's case. He began by discussing Guardado's training in wastewater treatment from his stint in prison, which Dr. Larson explained reflected on Guardado's intelligence and was used by Guardado both inside and outside prison.

Then, Dr. Larson delved further into Guardado's mental state and capabilities. Guardado, Dr. Larson explained to the jury, showed no signs of hallucinations, psychotic behavior, mental illness, delusions, thought disorder, or major mood swings. In fact, Dr. Larson found Guardado's thought processes "well organized, logical, [and] goal oriented"—though Guardado did show signs of depression and remorse. Focusing on evaluating Guardado through the lens of his test scores, Dr. Larson told the jury about Guardado's sixty-third percentile score on the IQ test and his average range score on the academic achievement test. Comparing Guardado's IQ with his own observations of Guardado, Dr. Larson found Guardado's results "consistent with [his] conversations and . . . views" about Guardado—Dr. Larson, in fact, suspected Guardado might place even higher on the IQ test. Turning to Guardado's MMPI-2 test, Dr. Larson explained that the results

showed Guardado was not mentally ill. He did note Guardado's elevated depression, paranoia, worry, and anxiety, but those were expected given Guardado had just committed murder, was on trial, and was facing at least a life sentence. And while Guardado's test results showed "elevated" scores relating to substance abuse, those were also expected "given [Guardado's] history" of "abus[ing] substances since adolescence" and his prior crimes.

Next, Dr. Larson described the Hare Psychopathy Checklist. Before discussing Guardado's score, Dr. Larson took a moment to describe psychopaths to the jury. A psychopath, he explained, is someone with a "criminal personality"—"[t]hey are basically people that don't have a conscience; they are parasitic; mooch off of people; they can frequently move; [and they] tend to have unstable jobs." Also, "they lack empathy and caring for other people," "they lack a conscience," "[t]hey don't care about stealing or robbing from others," and they have "no respect for other people's property or lives."

Guardado, in Dr. Larson's view, wasn't a psychopath. To the contrary, he explained that Guardado's score on the psychopathy test was "[q]uite good"—about the expected score of an average prison inmate, but "not what you would expect from the average inmate on death row or a psychopath." He explained that Guardado's test indicated he had empathy, caring, a conscience, and remorse; that "he d[id] not fit the category of the worst of the worst"; and that Guardado was "not the psychopathic type." Dr. Larson emphasized Guardado "absolutely would not be

considered a psychopath" and "d[id] not suffer any of the traditional mental illnesses, such as bipolar disorder, schizophrenia, major depressive disorders, [or] major brain damage type of disorders." Based on Guardado's testing and history of incarceration, Dr. Larson expected Guardado "to make a good adjustment to prison," "make a contribution," and be "at low risk" of being a danger if sentenced to life in prison.

Evaluating Guardado's mental state at the time of the murder, Dr. Larson opined that Guardado "was under emotional duress in this time frame" owing to "economic problems" and "problems adjusting to society." These problems caused Guardado to "turn[] to his old habits of using cocaine," adding that his substance abuse habit dated "back to teenage years or early adult years." And Guardado's "relapse[]" turned into a "crack cocaine binge for approximately two weeks" before the murder. But despite Guardado's repeated drug use, Dr. Larson clarified that he did not "consider [Guardado] a drug addict" and that his crack cocaine binge occurred while he was under "considerable stress prior to the" murder. As to Guardado's mental state following the murder, Dr. Larson described how Guardado expressed "genuine" remorse over Ms. Malone's murder and called her a "very sweet lady" who "didn't deserve to die."

Overall, in Dr. Larson's view, Ms. Malone's murder was a "drug related incident" motivated solely by his need for crack, making Guardado a "low risk" for violent behavior generally. Dr. Larson also made clear that he evaluated Guardado for two statutory

mitigating circumstances—(1) whether he acted under extreme emotional distress and (2) whether his ability to appreciate the criminality of his conduct or to conform it to the law was substantially impaired—but it was his opinion that neither applied.

b. Guardado's Testimony

Guardado's testimony began with questions about his family background. He was born in Detroit to the "[b]est" mother, his father died when he was young, and his mother married his "wonderful" stepfather, who "did a very fine job of raising four boys." All three of his brothers turned out well and had respectable careers. He shifted to his own career, describing the process of becoming certified in wastewater treatment during his incarceration. Once out of prison, he was able to use his expertise and certification to get a job as the lead wastewater treatment operator at the city of DeFuniak Springs's water treatment plant. He described how he'd be able to use his skills to assist with wastewater treatment and teach other inmates how to get their wastewater management licenses.

After talking about his good behavior in prison that earned him conditional release, Guardado pivoted to the challenge of readjusting to society following his release. When asked about his return to drugs, Guardado began with how he was hired at the plant. He had been working eighteen-to-twenty-hour days for several months when, late one Friday night when he thought he had some downtime and had consumed several beers, he was called into work. Because he was the only wastewater treatment

operator in town and was on call around the clock, he headed to work. On his way home, he was pulled over and arrested for DUI. This cost him his job and three months in jail. But he maintained his conditional release because of his demonstrated work ethic and references of support from others—including from the victim, Ms. Malone. He got a job with a construction company that ended badly. He started using crack cocaine around that time. Ms. Malone helped him land his job in Niceville at a wastewater treatment plant, but his crack dependency got worse and his girlfriend moved out.

Guardado answered a few questions about his cooperation with the police and expressed remorse over his actions. He testified that the only reason he was in the courtroom that day was because his mother begged him to accept legal counsel, but that he wished they could have "continue[d] without this" and gone straight to sentencing.

On cross-examination, Guardado went into greater detail about the period when his crack dependency started controlling his life. He testified that in the two weeks prior to the murder, it was in "every awake [sic] moment that [his] mind was geared to finding and getting crack." Guardado described what it's like to come off a high and that one becomes "crazy with need" for more of the drug. Driven by that need, Guardado chose Ms. Malone to rob because she lived in a remote area where his crime "may go undetected," and he went there determined to get the money for drugs—"whatever it took."

c. Other Evidence

Guardado also presented two letters to the jury. In the first letter, the Walton County Sheriff's Office confirmed Guardado's record of good behavior while awaiting trial at the Walton County Jail. In the second letter, Guardado's mother, Mrs. Umlauf, wrote about Guardado's descent into drugs as a young man because he "chose the wrong friends" and noted how his incarceration "changed him and played a major role in the person he is today." She described his optimism for his new life once he got out of prison—he "came out with the best of intentions"—and his responsibility in securing and performing a new job in wastewater treatment. She added that Guardado "handl[ed] his job well." But despite his optimism, Guardado faced problems reintegrating into society and turned to drugs as a way to cope. This led to Guardado's downward spiral as the drugs "took over his life," and he reached out to his mom and stepfather for love and support. "My life is going down a bad road and I can't stop," Guardado told Mrs. Umlauf. Mrs. Umlauf thought Guardado's crimes were "crimes of desperation by an addict" and that "[t]he need [for drugs took] over all [his] senses." "This crime," she asserted, "would never have happened without drug involvement." She described Guardado as a "victim here"—of the drug trade, the stresses of life, and the Florida penal system.

The jury disagreed that Guardado was the victim here. It returned a unanimous recommendation that Guardado receive the death penalty because the aggravating factors had been proven

beyond a reasonable doubt and outweighed the mitigating circumstances.

4. *Spencer* Hearing

After the jury's death penalty recommendation, the state trial court held a presentence hearing under *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), to determine whether either party had further aggravating or mitigating evidence to present outside the presence of the jury. Guardado began by trying to waive the *Spencer* hearing and, through Mr. Gontarek, made clear he "want[ed] to be sentenced" that day. The state trial court then asked if Guardado wanted a *Spencer* hearing and if he had any further mitigation to present. In response, Guardado emphasized that he had "no knowledge of any further mitigation that [he could] present." Again, the state trial court asked if Guardado knew of any other mitigation evidence. This time, Guardado answered that he wanted to speak with the court "outside of the public." The state trial court told Guardado it couldn't do that. With his request denied, Guardado had "nothing further to say." The state trial court explained further it couldn't have the requested conversation alone with Guardado. Guardado then wanted "to make it known that" he did not want a *Spencer* hearing and "wish[ed] for sentencing to be imposed" that day. "[F]rom day one," he added, he "wanted this to be over with as expediently as possible," but "at every turn" it had "been delayed, delayed, and delayed." While he understood it was "of grave concern," it was "time to put it to an end."

At that point, the prosecutor told the state trial court that he had no further aggravating evidence to put on, but he did submit a letter from Ms. Malone's sister. So the state trial court turned back to Guardado, asking a third time if there was any further mitigation he wanted presented. Guardado then, for the first time, complained that he was unhappy with trial counsel's performance. The state trial court asked what evidence that Guardado "wished [trial counsel] would present on [his] behalf." But Guardado responded that there were "things" he couldn't "discuss in a public environment." Pressing on, the state trial court tried again to confirm what evidence Guardado wished his counsel had presented, but he continued to identify no new evidence while adding that he could not speak about "these things . . . in a public situation . . . until [the] sentence [was] imposed." Undeterred, the state trial court again asked Guardado what evidence he had wanted his counsel to present. Rather than answering that question, Guardado said that he was "not of a legal mind" and that his counsel's "knowledge in that area [was] greater than" his. He listed several objections he wanted his counsel to make during trial, complained about his attorneys' "great indifference," and reiterated that he was "going to ask, once again, that the [s]tate impose [the] sentence" at that time.

Finally, the state trial court turned back to Mr. Gontarek and asked what further mitigation evidence he would like to present. Mr. Gontarek presented Dr. Larson's written report to supplement his trial testimony. Dr. Larson's report described Guardado's upbringing, noting that Guardado "considered his mother to always be a loving, thoughtful[,] and concerned mother," and that "[h]e

later came to respect his stepfather and realized, in retrospect, that the stepfather had good intentions." The report also explained that: (1) Guardado disclaimed prior mental health treatment but had to attend classes for sexual offenders in the mid-1980s; (2) he entered substance abuse treatment as an early teen at juvenile facilities in Pensacola, Marianna, and Orlando; (3) he started using marijuana, alcohol, and Quaaludes in his early teen years but graduated to cocaine; (4) he suffered two major traumas as a child (the crib death of a sibling and being sexually molested by a neighbor); (5) his biological father passed away before Guardado had developed any lasting memories of him; and (6) his preteen years were happy, but his teen years became unhappy with increasing family discord (much of which was over his substance abuse).

Dr. Larson's report noted that Guardado's psychosocial history was significantly affected by having spent about twenty-three years of his adult life behind bars. As of the time Dr. Larson prepared his report, Guardado didn't want to go into the details of Ms. Malone's murder with him. But Guardado told Dr. Larson that he'd been sleep-deprived and using cocaine constantly in the days before the murder—as Dr. Larson put it, Guardado "basically described himself as on a two-week cocaine binge" before the murder. Guardado "took full responsibility" for his crime and expressed to Dr. Larson that he was remorseful. Much like his testimony, Dr. Larson concluded that the murder "appear[ed] to be situational, driven by chemical addiction."

Turning to the possible mitigating circumstances, a jury, Dr. Larson wrote, might "find it mitigating" to know about Guardado's efforts to work as a plumber and become certified in waste and water treatment while previously incarcerated. As he told the jury during his penalty phase testimony, Dr. Larson also opined that the jury "may also find it mitigating" that Guardado was "under emotional duress during the time frame of" the murder because, for example, he was "having difficulty adjusting to a computerized society," had lost his job, and was in the midst of "a two-week crack cocaine binge." Finally, a jury might find it mitigating that Guardado did "not suffer a mental illness or major emotional disorder" and "expressed extreme remorse" for the murder.

Before adjourning the hearing, the state trial court asked Guardado if he had anything else he would like to say. Guardado answered that he would "like to be sentenced" and "have the matter resolved" because it had been "continued and carried forth too long."

5. Sentencing

Based on the evidence presented at the penalty phase and the *Spencer* hearing, the state trial court found that five aggravating factors were proven beyond a reasonable doubt: (1) Guardado was under conditional release when he committed the murder, FLA. STAT. § 921.141(5)(a) (2005); (2) he had been convicted of another capital felony or a felony involving the use or threat of violence—that is, armed robbery, robbery with a deadly weapon, robbery, robbery with a weapon, and attempted robbery with a deadly

weapon, *id.* § 921.141(5)(b); (3) he committed the murder while engaged in the commission of a robbery with a weapon, *id.* § 921.141(5)(d); (4) the murder was especially heinous, atrocious, or cruel, *id.* § 921.141(5)(h); and (5) he committed the murder in a cold, calculated, and premeditated manner, with no pretense of moral or legal justification, *id.* § 921.141(5)(i).

The state trial court also found, as non-statutory mitigating circumstances, that Guardado: (1) had entered a plea of guilty without asking to bargain or for a favor (to which the state trial court gave great weight); (2) had fully accepted responsibility (great weight); (3) wasn't a psychopath and wouldn't be a danger in prison if given a life sentence (moderate weight); (4) could contribute to the prison population as a plumber or an expert in wastewater treatment if given a life sentence (little weight); (5) had fully cooperated with law enforcement (great weight); (6) had a good jail record awaiting trial with no disciplinary reports (little weight); (7) had consistently shown remorse (great weight); (8) had suffered throughout his adult life with addiction to crack cocaine, which was the basis for his crimes (some weight); (9) had a good family and support that could help him contribute in prison (moderate weight); (10) would try to counsel other inmates if given life in prison (moderate weight); (11) had suffered major trauma as a child due to the crib death of a sibling (moderate weight); (12) had suffered major trauma as a child by being sexually molested by a

neighbor (moderate weight);[2] (13) had a lengthy history of substance abuse starting in his early teens, graduating to alcohol and cocaine, with substance abuse treatment beginning at about age fourteen or fifteen (little weight); (14) had suffered the death of his biological father before developing lasting memories of him (little weight); (15) was raised by his loving, thoughtful, and concerned mother and stepfather and recognized that discord with his family during his teen years mostly concerned his substance abuse (little weight); (16) was under emotional duress during the timeframe of the crime (little weight); (17) didn't suffer a mental illness or major emotional disorder (little weight); (18) had offered to release his personal property and truck to his girlfriend (little weight); and (19) had previously contributed to state prison facilities as a plumber and in wastewater treatment (little weight). The trial court found no statutory mitigating circumstances.

Lastly, the state trial court gave the jury's advisory sentence great weight. Considering that recommendation and "the aggravating and mitigating circumstances found to exist . . . , being ever mindful that a human life [wa]s at stake," the state trial court found, "as did the jury, that the aggravating circumstances outweigh[ed] the mitigating circumstances." Accordingly, it sentenced Guardado to death.

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[2] When the state trial court reached this factor at sentencing, Guardado interrupted: "Objection; objection. Your Honor, I'm not—I'm not going to deal with that." Guardado then asked to be excused from the courtroom, but the state trial court denied that request.

Guardado directly appealed his sentence to the Florida Supreme Court, which affirmed. *See Guardado v. State*, 965 So. 2d 108 (Fla. 2007). The United States Supreme Court denied certiorari. *See Guardado v. Florida*, 552 U.S. 1197 (2008).

D. Rule 3.851 Motion for Postconviction Relief

Guardado moved for postconviction relief under Florida Rule of Criminal Procedure 3.851. In his motion, Guardado asserted his trial counsel were constitutionally ineffective under *Strickland* by failing to: (1) investigate and present mitigating evidence for the penalty phase; and (2) challenge for cause or peremptorily strike Jurors Pennington, Hall, and Cornelius.

As to the first claim, Guardado identified lay witnesses he alleged trial counsel knew or should have known about but failed to present at the penalty phase: Major Mathis, the retired warden who "had first hand [sic] knowledge that Guardado was a model inmate who worked very hard and contributed positively to the prison environment for many years"; Tommy Lancaster, Mark Mestrovich, and John Harris, "civilian employees who operated vocational programs at Sumter [Correctional Institution]" and "could testify that Guardado was an outstanding inmate and never a disciplinary problem"; the custodian of records at his former employer, who would've testified that Guardado, while working for the company, contributed to public safety; and Linda Warren (Guardado's stepsister), Bennie Guardado (his brother), Elizabeth Padgett (his friend), and Ms. Porter, Guardado's "family members or close friends" who "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." Guardado also alleged that trial counsel failed to present expert testimony about his mental health that would have established two statutory mitigating circumstances: (1) he "was under the influence of extreme mental or emotional disturbance," and (2) "his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." *See* FLA. STAT. § 921.141(6)(b), (f) (2005).

For his second claim, Guardado alleged that his trial counsel were deficient in not trying to remove—either for cause or through a peremptory strike—Jurors Pennington, Hall, and Cornelius from the jury. Guardado asserted that he suffered prejudice from the three jurors being seated on the jury because, if they weren't seated, "there [was] a distinct likelihood and reasonable probability that a majority of the jurors would have voted for life in prison."

1. The Evidentiary Hearing

The state habeas court held an evidentiary hearing on Guardado's Rule 3.851 motion for postconviction relief. Guardado called two of the lay witnesses he identified in his motion (Major Mathis and Ms. Padgett), his mother, himself, and two mental health professionals: Joanna Johnson and Dr. Greg Prichard. The state called Mr. Cobb and Mr. Gontarek, Guardado's trial counsel.

a. Major Mathis

Major Mathis testified that she worked at Sumter Correctional Institution, where Guardado had previously been

incarcerated, until 2006. While in prison at Sumter Correctional, Guardado worked in the forestry camp, a minimum-security opportunity available to well-behaved prisoners. Major Mathis couldn't remember anything specific about Guardado other than his name, that he worked in wastewater treatment, and that he was at the forestry camp. To her knowledge, he was a good worker. As to whether anyone asked her to testify during the penalty phase, she thought she remembered hearing from someone about testifying but didn't recall who'd reached out to her or how she'd been contacted. Major Mathis didn't remember reviewing any disciplinary reports about Guardado during his time at Sumter Correctional, and she would've had access to his file to answer any questions put to her at the time of the penalty phase, so long as her legal department authorized her to do so. But she acknowledged that if the state trial court already knew Guardado was incarcerated at Sumter Correctional and worked in wastewater treatment, there wasn't much she could add.

b. Mrs. Umlauf

Guardado's mother testified that Mr. Gontarek had called her about testifying during the penalty phase but said he'd felt it would upset Guardado for her to take the stand and thus told her that he thought she shouldn't testify. She had written the letter in support of her son, which had been introduced as an exhibit, at Mr. Gontarek's request. Had she been asked, Mrs. Umlauf would've been willing to testify about the trouble Guardado faced while growing up, including the death of his father and brother, his

time served at a juvenile facility (in which she didn't recall any bad experiences), his lifelong drug problem, his difficulty reentering society from prison, and his plea for help. On cross-examination, she repeated that in addition to what she included in the letter, she would've testified to Guardado's experience of losing his father and brother.

c. Ms. Padgett

Ms. Padgett, who struck up a friendship with Guardado after his release from prison, testified that she'd known Guardado in social settings to be pleasant and fun to be around. She would often go out at night with Guardado and Guardado's ex-girlfriend, Ms. Porter, where Guardado would act as their protector. But over time she saw a change in Guardado as he developed relationship problems with Ms. Porter (eventually leading to their breakup), drank more heavily, and became angrier. Ms. Padgett thought Guardado started using methamphetamine and cocaine, looked haggard, lost weight, and generally was on a downhill slide. She said that no one from the defense contacted her about testifying during the penalty phase. Throughout her testimony, Ms. Padgett had significant trouble remembering details about Guardado's case, including the dates certain events occurred and when they happened in relation to other events. On cross-examination, she also acknowledged that she lacked a grasp of many facts and that she based her opinions on what she "believe[d]."

d. Guardado

Guardado testified that Mr. Gontarek spent little time with him preparing for the penalty phase—about an hour total. Mr. Gontarek told him that, if he cooperated with Dr. Larson, then "everything else would be all right." Guardado claimed he'd given Mr. Gontarek a few people to contact—his associates and people who worked at Sumter Correctional—but when asked if he'd requested Mr. Gontarek contact his former employers, he explained "it's hard for [him] to answer because it'[d] been . . . seven years." As to his meetings with Dr. Larson, Guardado said that their purpose wasn't explained to him; he was told only to meet with Dr. Larson and cooperate fully. And in the lead up to the penalty phase, he tried unsuccessfully to reach out to Mr. Gontarek and Mr. Cobb multiple times and only ever saw Mr. Cobb in court. Discussing what he hoped his counsel had presented at the penalty phase, Guardado remembered wanting witnesses to testify about mitigating factors. But due to the limited time he and Mr. Gontarek spent together, he didn't get to discuss with his attorneys how he wanted them to approach the case.

Guardado recalled being present for jury selection but couldn't remember the extent to which he was included in the process. He didn't remember being specifically asked his opinion about Jurors Pennington, Hall, or Cornelius, although he did seem to recall that trial counsel told him they thought it would be good to have a juror who was familiar with law enforcement because the juror would be unemotional. To wrap up his testimony, Guardado

shared details about his drug history and life after prison, as he did with his lawyers.

e. Ms. Johnson and Dr. Prichard

Guardado's final two witnesses were the mental health professionals. Ms. Johnson, a social worker specializing in addiction, went first and talked about her evaluation of Guardado using tests like the Addiction Severity Index, which is "the same as a psychological evaluation except that it is specific to substance abuse." She focused on how Guardado's combination of cocaine use, alcohol use, and sleep deprivation may have affected his ability to make decisions and act. Based on her evaluation, Ms. Johnson thought there was a "real possibility" that he was under such a deep influence that he "might" have suffered from a "psychosis" akin to "amnesia" that triggered a "runaway train" of actions. She characterized Guardado's state of mind as "the extreme emotional disturbance within the use of those kind[s] of substances, other than an overdose." In this state, Ms. Johnson explained, Guardado wouldn't have been able to conform his behavior to societal norms and would've been "[u]nable to control emotion, feeling, or even stop the run that he was on." "[H]e was," she thought, "completely under the control of the[] drugs."

Addressing Dr. Larson's opinions from the penalty phase, Ms. Johnson disagreed with his assessment that Guardado wasn't under an extreme emotional disturbance. Guardado's rapid escalation of drug use as a young man—from marijuana to intravenous cocaine—pointed to some "extreme emotional things." Guardado

also went into a "full blown relapse" to cope with emotional problems in rejoining society after prison life, she explained, including how he faced job difficulties and relationship problems. She agreed with Dr. Larson that Guardado wasn't insane but disagreed that he suffered from no mental illness or emotional disorder. As for what mental illness or emotional disorder Guardado might have, Ms. Johnson opined that Guardado suffered from "[c]ompulsive obsessive behavior based on substance abuse[] [and] chronic dependency on cocaine and alcohol" and had "many" emotional disorders including his substance abuse. All of this, she summed up, spoke to Guardado's "constant need for the drug."

When asked, Ms. Johnson declined to opine on the correctness of Dr. Larson's finding that Guardado had no brain damage. She "sort of disagree[d]" that Guardado had no psychosis, because chronic cocaine use mixed with alcohol can create a form of psychosis akin to a "blackout." Finally, Ms. Johnson disagreed with Dr. Larson's assessment that Guardado had the capacity to appreciate the wrongness and criminality of murdering Ms. Malone because "what feels or is normal under the duress or use of extensive narcotics is the . . . norm at that moment." She concluded Guardado's decision to murder was driven solely by his desire to obtain more crack.

On cross-examination, Ms. Johnson admitted that she couldn't state with certainty that she reviewed Guardado's mental state through the lens of the complete record; she hadn't been given the audio of Guardado's confession and wasn't sure if she

had the complete penalty phase transcript. The prosecutor asked Ms. Johnson to square her testimony that Guardado had been completely under the control of drugs and alcohol and was unable to appreciate the criminality of his conduct—that "he was going to obtain more drugs," come hell or high water—with the overwhelming evidence that Guardado deliberately planned to murder and rob Ms. Malone because she was old, alone, and secluded. Ms. Johnson didn't know and couldn't answer why Guardado wouldn't have just murdered and robbed the first person he met on the street instead, but whatever Guardado's actions were, she remained sure they were driven solely by his goal to get more drugs. Ultimately, the difference between her and Dr. Larson's opinions, she thought, boiled down to whether Guardado was an addict and thus suffered from a mental health disorder.

Dr. Greg Prichard, a forensic psychologist, testified next. Tasked with looking at potential statutory mitigation, Dr. Prichard reviewed investigative reports on Ms. Malone's murder, Dr. Larson's report, the Florida Supreme Court opinion from Guardado's direct appeal, other historical information on Guardado, and testimony at the penalty phase. Dr. Prichard also interviewed Guardado at the prison for two and a half to three hours to get anything else he had to offer.

Based on his investigation, Dr. Prichard concluded that two statutory mitigating circumstances could or should have applied at the penalty phase: (1) that Guardado was under the influence of extreme mental or emotional disturbance at the time of the

murder, and (2) that Guardado's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. As support for the first statutory mitigating circumstance, Dr. Prichard cited Guardado's employment, relationship, and money troubles as "things [that] were kind of spinning out of control." "[T]he emotional disturbance associated with the[se] things that were going on in [Guardado's] life at the time," plus "a lot of depression [that was] present," was the "catalyst" of Guardado's "need for the drug."

Turning to his potential disagreements with Dr. Larson, Dr. Prichard agreed with Dr. Larson's finding that Guardado wasn't insane, but he thought the question of mental illness was "a little more debatable." Guardado did not have "the severe mental illness like schizophrenia or bipolar disorder," but there "could be a good argument for [Guardado] having a depressive illness or anxiety illness" in Dr. Prichard's view. Dr. Prichard squarely disagreed with Dr. Larson's opinion that Guardado had no emotional disorders, saying that "addiction is an emotional issue" with "roots in childhood development." And Guardado's tendency to "medicate" his emotions with drugs since "an early age . . . of fourteen or fifteen," "an indication of severe addiction," was "unusual" and "suggest[ed] very extreme emotional pain, emotional alienation, and an inability to deal with the emotional aspects" of his environment.

As to the second statutory mitigating circumstance, Dr. Prichard echoed Ms. Johnson's testimony and said that Guardado "was very much in full-blown relapse and full-blown

addiction." Dr. Prichard described how Guardado "was using crack cocaine on a daily basis" for two weeks before the murder, "so he was actually having a binge on crack cocaine." Guardado's binge, in Dr. Prichard's view, created an obsessive-compulsive motivation to attain his next high by any means necessary, causing him to lack the "moral brakes" he otherwise would've had to understand or appreciate the consequences of his actions until after he got off the high. Dr. Prichard identified a common "dichotomy" in addicts whereby they're "great people" when they're not using and "often violent and aggressive" when they are, which "seem[ed] to be present with Mr. Guardado."

Then, finding common ground with Dr. Larson, Dr. Prichard agreed that Guardado had no discernible, obvious brain damage and "suffered from no psychosis." He equivocated on whether Guardado had the capacity to appreciate the wrongness and criminality of the murder. One could argue that Guardado appreciated it, Dr. Prichard thought, but the question was how much he could appreciate it and whether he had the capacity to conform his conduct to the law. "It was going to be a bad night for Mr. Guardado and whoever got in his way," as Dr. Prichard put it. The addiction "was driving [Guardado]," and he murdered solely to obtain more crack.

On cross-examination, when pressed about the extent of his disagreement with Dr. Larson, Dr. Prichard agreed they reached the same "bottom line": Guardado was driven to obtain more cocaine as a result of his addiction. But Dr. Prichard believed

Dr. Larson didn't articulate why he felt the statutory mitigating circumstance related to the inability to conform one's conduct to the law would not apply. Dr. Prichard clarified that Guardado was dealing with more of an emotional rather than mental disturbance. Things had been going "very well" for Guardado when he got out of prison—even though "he was drinking and using some [drugs]"—and his cocaine binge only happened after "things started going really badly" when he was arrested for DUI, lost a job he enjoyed, lost a girlfriend, and lacked a steady place to stay. "[T]he idea," Dr. Prichard said, "is that—that it bec[a]me[] extreme" not because of any one thing but because of "a variety of losses, a variety of things that were not going well for him in the context of initially doing things pretty well." Dr. Prichard acknowledged that Guardado had both a new job when he murdered Ms. Malone and that he'd had multiple past girlfriends, but he indicated that Guardado was still feeling the losses associated with his previous employment and a past relationship.

f. Mr. Cobb

The state also put on its witnesses. Mr. Cobb testified about how he became involved in the case, his early meetings with Mr. Gontarek, his introduction to Guardado, and his role in the case. From the outset, he got the sense that Guardado didn't want to go forward with the penalty phase and just wanted to "plead to death." He recalled attending an initial meeting at the jail with Mr. Gontarek and Guardado, at which Mr. Gontarek explained that if Guardado wanted to skip to the death penalty, a *Spencer* hearing

would still be required. But nothing substantive was discussed at this visit, and during Mr. Cobb's meetings with Guardado "there was never really any discussion about" mitigation evidence; Guardado just wanted to get the death penalty over with.

Guardado never suggested any mitigating evidence Mr. Gontarek or Mr. Cobb might present. But, in spite of Guardado's desire to get things over with, Mr. Cobb reached out to Mrs. Umlauf and Ms. Porter to see if they had mitigating evidence to offer. And the defense briefly discussed whether to present evidence about Guardado's skills in wastewater treatment, which was ultimately discussed by Guardado himself at the penalty phase.

As to what he remembered about jury selection, Mr. Cobb recalled that Guardado raised an issue about a prospective juror "glaring" at him. This prospective juror was ultimately challenged either for cause or peremptorily and was not seated. Before the defense agreed to seat Jurors Pennington, Hall, and Cornelius, the "perceived problems" and "perceived positives" of having them on the jury were discussed. All considerations were weighed in Guardado's presence, continued Mr. Cobb, so that everyone would understand the "pros and . . . cons" of having any particular individual on the jury. Ultimately, Mr. Gontarek made the final choices, and Guardado agreed with them. Recalling Juror Cornelius specifically, Mr. Cobb remembered discussing his opinion that a life sentence may be harsher than the death penalty as a positive. And for Juror Hall, his familiarity with law enforcement officers wasn't considered a problem because Mr. Gontarek's penalty phase strategy

wasn't to call the officers' credibility into question. Instead, Mr. Gontarek planned to emphasize Guardado's cooperation with the police.

g. Mr. Gontarek

Mr. Gontarek described his mitigation strategy and the investigation he and Mr. Cobb undertook during the penalty phase. Recounting his first meeting with Guardado, Mr. Gontarek remembered being "impressed" that Guardado had "taken responsibility," which Mr. Gontarek thought "would go a long way in mitigation." His plan was "to bring in Dr. Larson, who [was] a well[-]known and respected forensic psychologist," and "to talk to the defendant's family who would talk to [him]—[Guardado's] mother, . . . [Ms. Porter and other] family members or friends, [and] any employers." He testified that Guardado's testimony about only meeting with him for an hour, total, wasn't accurate; they had met "[n]umerous times." Mr. Gontarek's billing records were introduced to confirm the time he'd spent on the case.

Mr. Gontarek testified that Ms. Umlauf declined to appear as a witness, which is why he ultimately asked her to write the letter he presented at the penalty phase. As to Dr. Larson's opinions on Guardado, Mr. Gontarek explained that since the state trial court had appointed Dr. Larson to the case, Mr. Gontarek couldn't simply seek a more favorable opinion from a different expert once Dr. Larson determined no statutory mitigating circumstances were present.

Moving to voir dire, Mr. Gontarek testified that he would've moved to strike Jurors Pennington, Hall, and Cornelius if he thought they were actually biased against Guardado. He remembered Guardado playing an active role in jury selection but that Guardado never requested that any of the three jurors be removed. If Guardado had, Mr. Gontarek first would've attempted a for-cause challenge, then he would've used his one remaining peremptory strike, and finally he would've requested more peremptory strikes from the state trial court if needed.

Next, Mr. Gontarek explained his reasons for seating the three jurors. A person who "was only somewhat in favor of the death penalty"—like Juror Pennington—was the kind of person "[he]'d want to keep." As to Juror Hall's ties to law enforcement, Mr. Gontarek explained his strategy was to highlight Guardado's full cooperation, which he "thought was significant mitigation." He thought that someone who knew the officers might have been impressed with their testimony confirming Guardado cooperated with them. And Juror Cornelius thought a life sentence could be harsher than the death penalty, which was "a reason that [Mr. Gontarek] may have desired that he remain on the" penalty phase jury. Later, when asked about his decision to seat Juror Cornelius, Mr. Gontarek clarified that any number of factors might've been considered when deciding to seat him, including his body language, tone of voice, the dynamics of the other prospective jurors, his interactions with counsel and Guardado, Mr. Gontarek's conversation with Guardado, and other things he said—like that he was only somewhat in favor of the death penalty. The result of the jury

selection process, Mr. Gontarek confirmed, was a jury that Guardado agreed to seat.

On cross-examination, Mr. Gontarek couldn't recall why he entered Mrs. Umlauf's letter into evidence without reading it to the jury, which he admitted could've been more effective. Going back to Dr. Larson, Mr. Gontarek explained that he provided Dr. Larson with information about the case so that Dr. Larson could determine whether any statutory mitigating circumstances applied to Guardado. Mr. Gontarek described how in cases where Dr. Larson determines no statutory mitigating circumstances apply, Mr. Gontarek would ask him to identify any non-statutory mitigating circumstances they could present to a jury instead. And before the penalty phase, Mr. Gontarek prepared Dr. Larson to testify and reviewed his report with him.

h. Other Evidence

At the end of the evidentiary hearing, the state habeas court admitted into evidence four letters—received long after the penalty phase—by Ms. Warren, Bennie Guardado, Ms. Porter, and Ms. Padgett. Ms. Warren wrote that Guardado had been doing well when he first left prison, but then the pressures of adjusting to society combined with his lack of family support in DeFuniak Springs caused him to spiral out of control. Bennie Guardado added how they lost their father and another brother, how a boy in a nearby apartment complex provided Guardado with alcohol and marijuana, how another introduced Guardado to harder drugs like Quaaludes and he stole to cover the cost, how Guardado descended

into addiction and crime, and how he spent time in a juvenile facility. Ms. Porter wrote about how she'd first met Guardado after his release from prison and what she'd witnessed as he coped with life on the outside. And Ms. Padgett wrote about Guardado's relationship problems and the drug-related changes she'd witnessed in him.

The letters maintained that Guardado could be a model prisoner because, when he's not high or exposed to crack and alcohol, he's a good worker and a person who's remorseful for his crimes. None of the letters, though, said that the author was willing and available to testify about these facts during the penalty phase.

2. The State Habeas Court Denied Guardado's Rule 3.851 Motion

The state habeas court denied Guardado's Rule 3.851 motion, concluding that he wasn't entitled to relief on either of his two *Strickland* claims. As for Guardado's claim that trial counsel were ineffective for failing to investigate and present mitigation evidence during the penalty phase, the state habeas court divided its *Strickland* analysis into two parts. First, it addressed the ten lay witnesses, whom Guardado maintained trial counsel could have used to show his background and good behavior while not using drugs. The state habeas court found that their testimony and letters from the Rule 3.851 hearing "only contain[ed] background information" and would've been "cumulative" or "largely cumulative" of the evidence that came in about Guardado's background and behavior during the penalty phase. Because the lay witness testimony and letters about Guardado's background would've been cumulative or

largely cumulative, the state habeas court concluded that Guardado failed to establish *Strickland* prejudice because there was no reasonable probability of a different result if the evidence came in during the penalty phase.

The state habeas court next addressed the mental health testimony—offered by Ms. Johnson and Dr. Prichard—which Guardado asserted trial counsel could've presented to show his mental state at the time of the murder. The state habeas court found that Ms. Johnson and Dr. Prichard testified to "the same information" as Dr. Larson because all three witnesses described how Guardado "murdered the victim because of his addiction to cocaine." So, the state habeas court concluded, Guardado failed to satisfy *Strickland*'s prejudice standard for this part of his first claim, too.

As for Guardado's second claim that trial counsel were ineffective for failing to challenge for cause or peremptorily strike Jurors Pennington, Hall, and Cornelius, the state habeas court found that Guardado failed to demonstrate the jurors were unfair or biased; instead, during voir dire, each juror promised to be fair. Thus, the state habeas court determined Guardado was not prejudiced by trial counsel's failure to challenge or strike them.

3. The Florida Supreme Court Affirmed the State Habeas Court's Denial of Guardado's Rule 3.851 Motion

The Florida Supreme Court affirmed the denial of Guardado's Rule 3.851 motion because it "agree[d]" with the state habeas court that he failed to show *Strickland* prejudice for each of

his two claims. *Guardado v. State*, 176 So. 3d 886, 893–96, 899 (Fla. 2015).

Starting with Guardado's first claim that trial counsel failed to adequately investigate or present mitigation evidence, the Florida Supreme Court—like the state habeas court—began with the lay witness testimony and letters from the Rule 3.851 hearing. *See id.* at 893–95. Based on its "review of the record," the Florida Supreme Court determined "that there was no . . . prejudice as to counsel's failure to contact" or present these lay witnesses during the penalty phase. *Id.* at 894. The lay witness testimony and letters "contain[ed] mostly background information" and would have "substantively track[ed]" or been "cumulative" of evidence already presented at the penalty phase. *See id.* at 893–96.

Turning to the mental health testimony, the Florida Supreme Court explained that "there was no need" for Ms. Johnson's and Dr. Prichard's additional testimony because Dr. Larson had testified to Guardado's mental state at the time of the murder during the penalty phase. *Id.* at 895–96 (agreeing with the state habeas court's conclusion that the new experts' testimony "mirrored" Dr. Larson's). The Florida Supreme Court acknowledged that Ms. Johnson and Dr. Prichard disagreed with Dr. Larson on how to label Guardado's emotional stress and drug addiction. *Id.* But "although [Dr. Larson] was not as favorable as the defense would have liked," "[s]imply presenting the testimony of experts . . . that [we]re inconsistent with the mental health opinion of an expert retained by trial counsel d[id] not rise to the level of prejudice

necessary to warrant relief." *Id.* at 896 (quoting *Dufour v. State*, 905 So. 2d 42, 58 (Fla. 2005)) ("This was not a scenario where an expert who could provide mitigating testimony about the defendant was not called and counsel instead relied on one witness who did not provide specific details regarding mitigating information.").

Second, turning to Guardado's claim that trial counsel were ineffective for failing to challenge for cause or peremptorily strike Jurors Pennington, Hall, and Cornelius, the Florida Supreme Court applied its own gloss on *Strickland* prejudice from *Carratelli v. State*, 961 So. 2d 312 (Fla. 2007). The Florida Supreme Court explained that, under its *Carratelli* test, a petitioner raising an ineffective assistance of counsel claim that his trial counsel failed to challenge a juror for cause or use a peremptory strike "must demonstrate that [the] juror was actually biased." *Guardado*, 176 So. 3d at 899 (quoting *Carratelli*, 961 So. 2d at 324). "[A]ctual bias," as *Carratelli* defined it, "mean[t] bias-in-fact that would prevent service as an impartial juror." *Id.* (quoting *Carratelli*, 961 So. 2d at 324). Applying the *Carratelli* test, the Florida Supreme Court determined Guardado wasn't prejudiced by trial counsel's failure to challenge or strike Jurors Pennington, Hall, and Cornelius because he failed to satisfy *Carratelli*'s actual bias test. *Id.*

E. Section 2254 Petition

After the Florida Supreme Court affirmed the denial of Guardado's Rule 3.851 motion, Guardado petitioned the district court for a writ of habeas corpus under 28 U.S.C. section 2254. He asserted that the Florida Supreme Court unreasonably applied

Strickland in denying his claims that (1) his trial counsel were ineffective for failing to investigate and present mitigation evidence, and (2) his trial counsel were ineffective for failing to challenge for cause or peremptorily strike Jurors Pennington, Hall, and Cornelius.

The district court denied Guardado's petition. As to Guardado's first claim, the district court concluded the Florida Supreme Court did not unreasonably determine that Guardado failed to show prejudice. The district court "compar[ed] the evidence presented during the trial and *Spencer* hearing, on the one hand, to the evidence presented at the [Rule 3.851] hearing, on the other hand." Comparing the evidence, the district court explained, showed that "the mitigation case presented at trial was fundamentally the same as" the one Guardado presented at the Rule 3.851 hearing. Because the mitigation cases were fundamentally the same, the Florida Supreme Court's determination that the new evidence was unlikely to have made any difference wasn't unreasonable.

Second, turning to Guardado's claim that trial counsel were ineffective in failing to challenge or peremptorily strike Jurors Pennington, Hall, and Cornelius, the district court concluded the Florida Supreme Court didn't unreasonably determine that Guardado failed to show prejudice because there was no evidence of "juror bias."

F. Certificate of Appealability

The district court denied Guardado a certificate of appealability, but we granted one on two issues:

1. Whether the Florida Supreme Court unreasonably applied *Strickland* on Guardado's claim that his trial counsel was ineffective by failing to investigate and present mitigating evidence adequately, but only to the extent the particular legal theory and the specific factual foundation on which the mitigating evidence claim rests were raised and exhausted in the state courts.
2. Whether the Florida Supreme Court unreasonably applied *Strickland* on Guardado's claim that his trial counsel was ineffective by failing to challenge for cause or peremptorily strike Jurors Pennington, Hall, and Cornelius.

This appeal followed.

II. STANDARD OF REVIEW

We review de novo a district court's denial of a federal habeas petition. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010).

III. DISCUSSION

For habeas claims resolved in state court, like Guardado's, "we review the last state-court adjudication on the merits." *Sears v. Warden GDCP*, 73 F.4th 1269, 1280 (11th Cir. 2023) (internal quotation marks and citation omitted). The Antiterrorism and Effective

Death Penalty Act of 1996's (AEDPA) "highly deferential framework" generally "demands that [the] state-court decision[] be given the benefit of the doubt." *Id.* at 1279 (citations omitted). Under this framework, AEDPA precludes federal habeas relief "unless the state court's 'adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States.'" *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1034 (11th Cir. 2022) (en banc) (quoting 28 U.S.C. § 2254(d)(1)). If the state court unreasonably applied clearly established federal law, we do not defer to its denial of relief and, instead, review de novo the petitioner's claim. *Calhoun v. Warden, Baldwin State Prison*, 92 F.4th 1338, 1346 (11th Cir. 2024).

"To meet the 'unreasonable application' standard, 'a prisoner must show far more than that the state court's decision was merely wrong or even clear error.'" *Pye*, 50 F.4th at 1034 (quoting *Shinn v. Kayer*, 592 U.S. 111, 118 (2020)). Instead, he has to show the state court's decision was "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Id.* That means "so long as fairminded jurists could disagree on the correctness of the state court's decision," the state court did not unreasonably apply clearly established federal law. *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). "If this standard is difficult to meet, that is because it was meant to be." *Harrington*, 562 U.S. at 102–03 ("Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems,

not a substitute for ordinary error correction through appeal." (internal quotation marks and citation omitted)).

But AEDPA isn't the only "difficult to meet" standard at play here. *Strickland* "itself places a demanding burden on a [petitioner] to show that he was prejudiced by his counsel's deficient performance," *Pye*, 50 F.4th at 1041, and it "strongly presume[s counsel] to have rendered adequate assistance," *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Strickland*, 466 U.S. at 690). Plus, the failure to establish either deficient performance or prejudice is "fatal" to an ineffective assistance claim. *Tuomi v. Sec'y, Fla. Dep't of Corr.*, 980 F.3d 787, 795 (11th Cir. 2020).

For a petitioner to establish prejudice, he must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cullen*, 563 U.S. at 189 (quoting *Strickland*, 466 U.S. at 694). In the capital sentencing context, that requires showing "a reasonable probability that, absent [counsel's] errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Thornell v. Jones*, 144 S. Ct. 1302, 1310 (2024) (alteration in original) (quoting *Strickland*, 466 U.S. at 695). A reasonable probability is one that's "sufficient to undermine confidence in the outcome," which requires "a substantial, not just conceivable, likelihood of a different result." *Id.* (quoting *Cullen*, 563 U.S. at 189); *see Strickland*, 466 U.S. at 687 (noting "that counsel's errors [must have been] so serious as to deprive the defendant of a fair trial").

Combining the two standards by "[a]pplying AEDPA to *Strickland*'s prejudice standard," the question for the federal habeas court is "whether the state court's conclusion that [counsel]'s performance at the sentencing phase of [the petitioner]'s trial didn't prejudice him—that there was no 'substantial likelihood' of a different result—was 'so obviously wrong that its error lies beyond any possibility for fairminded disagreement.'" *Pye*, 50 F.4th at 1041–42 (quoting *Shinn*, 592 U.S. at 118); *see also Johnson v. Sec'y, DOC*, 643 F.3d 907, 911 (11th Cir. 2011) ("[I]t will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding."); *Harrington*, 562 U.S. at 105 ("The *Strickland* standard is a general one, so the range of reasonable applications is substantial." (citation omitted)). Unless the answer is yes, "we lack the power to grant relief." *Pye*, 50 F.4th at 1042.

Guardado maintains that the answer here is yes. The Florida Supreme Court, he contends, unreasonably applied *Strickland*'s prejudice prong in denying relief on his two ineffective assistance of counsel claims. We address his arguments as to each claim in turn.

A. The Florida Supreme Court's Prejudice Determination on Guardado's Claim That Counsel Failed to Investigate and Present Mitigation

Guardado first argues that the Florida Supreme Court unreasonably applied *Strickland* in determining that trial counsel's performance in investigating and presenting mitigation evidence

did not prejudice the result of the penalty phase. In Guardado's view, the Florida Supreme Court unreasonably concluded the mitigation evidence that trial counsel should've investigated and presented was cumulative to the penalty phase evidence trial counsel actually presented. We disagree.

"[N]o prejudice can result from the exclusion of cumulative evidence." *Raheem v. GDCP Warden*, 995 F.3d 895, 925 (11th Cir. 2021) (alteration in original) (quoting *Dallas v. Warden*, 964 F.3d 1285, 1310 (11th Cir. 2020)). "[E]vidence presented in postconviction proceedings is 'cumulative' or 'largely cumulative' to . . . that presented at trial when it tells a more detailed version of the same story . . . [,] provides more or better examples[,] or amplifies the themes presented to the jury." *Holsey v. Warden*, 694 F.3d 1230, 1260–61 (11th Cir. 2012); *see also Raheem*, 995 F.3d at 925 ("The Supreme Court has found evidence cumulative where it 'substantiate[s],' 'support[s],' or 'explain[s]' more general testimony provided at trial." (alterations in original) (quoting *Cullen*, 563 U.S. at 200–01)). For example, in *Holsey*, we concluded that the state court didn't unreasonably find the petitioner's postconviction evidence about his "troubled, abusive childhood" was largely cumulative because "the jury at the sentencing had heard about his troubled, abusive upbringing too." 694 F.3d at 1264–67. And the state court didn't unreasonably find that expert testimony about the petitioner's "limited intelligence" was largely cumulative of lay testimony about the petitioner's academic struggles, which "concerned the same subject matter." *Id.* at 1262–64; *see also, e.g.*, *Thornell*, 144 S. Ct. at 1312 (finding no *Strickland* prejudice where the

postconviction evidence merely "corroborate[d]" the penalty phase evidence "about [the defendant's] head trauma and cognitive impairment," including how he was physically abused and had "three falls during childhood"); *id.* at 1313 (same, where the petitioner's postconviction evidence that his grandfather introduced him to drugs and alcohol as a nine-year-old was "essentially the same" as evidence showing his substance abuse began by at least age seventeen); *Robinson v. Moore*, 300 F.3d 1320, 1347–48 (11th Cir. 2002) (concluding a state court didn't unreasonably determine the petitioner failed to show prejudice from trial counsel's failure to investigate and present a "different example[]" of a "good deed" he performed because the sentencing court heard "evidence of other good deeds"); *Dallas*, 964 F.3d at 1308–10 (same, where the petitioner offered new affidavits from family about his teenage substance abuse but substance abuse was a "pillar[]" of his trial defense).

Applying these principles, the Florida Supreme Court determined Guardado failed to show *Strickland* prejudice because the lay witness testimony and letters from the Rule 3.851 hearing "containe[d] mostly background information" and "substantively track[ed]" or would've been "cumulative" of evidence already presented at the penalty phase. *See Guardado*, 176 So. 3d at 893–96. As for the mental health testimony, the Florida Supreme Court determined Guardado failed to show prejudice because "there was no need" to investigate and present Ms. Johnson's and Dr. Prichard's testimony in light of Dr. Larson's penalty phase testimony and report about Guardado's mental state during the murder. *Id.* at 895–

96 (agreeing with the state habeas court that the new mental health testimony "mirrored" Dr. Larson's). Guardado needed to do more, the Florida Supreme Court added, than "[s]imply present[] the testimony of experts . . . that [we]re inconsistent with the mental health opinion of an expert retained by trial counsel." *Id.* at 896 (citation omitted).

Considering the demanding burdens that AEDPA and *Strickland* place on Guardado, we cannot say the Florida Supreme Court's prejudice determinations were "so obviously wrong . . . beyond any possibility for fairminded disagreement." *See Pye*, 50 F.4th at 1041–42 (quoting *Shinn*, 592 U.S. at 118). To explain why, we do as the district court did by "compar[ing] the trial evidence" with the evidence that Guardado "presented during the state postconviction proceedings." *See Holsey*, 694 F.3d at 1260–61.

1. Lay Witness Testimony and Letters

The first bucket of mitigating evidence Guardado maintains his trial counsel should have investigated and presented was the testimony and letters of ten lay witnesses. The background information these witnesses would've provided during the penalty phase captured the circumstances that pushed Guardado to crack cocaine and how, in their view, he was a good person with a solid work ethic when not using drugs.

Specifically, Mrs. Umlauf testified and Bennie Guardado wrote about Guardado's troubled youth—how he lost his father and a brother, fell into a bad crowd who introduced him to alcohol and drugs during his teen years, and ended up in a juvenile

detention facility. They described how his troubled youth turned into an adult life spent mostly incarcerated.

As far as Major Mathis knew about Guardado's incarceration at Sumter Correctional, Guardado took advantage of a work opportunity available for well-behaved prisoners and was a good worker. Guardado's family and friends saw him work hard outside of prison, too. But Guardado's family and friends saw changes in him because of his problems adjusting to life outside prison. They pointed to how Guardado went through a breakup, and to how emotional stress pushed him to abuse alcohol (like when he had a DUI) and crack cocaine. Without these stressors or the exposure to crack, Guardado could be a productive, model prisoner.

The lay witness testimony and letters from the Rule 3.851 hearing echoed the penalty phase evidence. Guardado's trial counsel had obtained and presented Mrs. Umlauf's letter, Dr. Larson's testimony and report, and Guardado's own testimony. That evidence spoke to Guardado's troubled youth—how he lost his brother in a crib death and his father, was sexually molested, "chose the wrong friends," began using alcohol and drugs as a teenager, and ended up in a juvenile facility. Mrs. Umlauf wrote about how this troubled youth turned into an adult life spent mostly behind bars.

As to Guardado's earlier stints in jail or prison, the Walton County Sheriff's Office letter confirmed that Guardado had no disciplinary incidents while at its jail, on top of Dr. Larson's testimony about Guardado's prison record and how he enjoyed working in

wastewater treatment. And Mrs. Umlauf wrote that Guardado "came out [of prison] with the best of intentions" and "handl[ed] his job well," at least until emotional stress and crack "took over his life." Finally, Guardado, Mrs. Umlauf, and Dr. Larson emphasized during the penalty phase that, when Guardado's not high, he would be a model prisoner again given his previous good behavior and his remorse for murdering Ms. Malone.

Based on the penalty phase evidence, the state trial court found the same mitigating circumstances that a court could've found had it heard the lay witness testimony and letters from the Rule 3.851 hearing. The state trial court considered mitigating circumstances relating to Guardado's upbringing (like how he suffered major trauma as a child due to the crib death of a sibling and losing his dad, was sexually molested, and began abusing alcohol and crack at fourteen or fifteen). It considered as mitigating circumstances how Guardado's childhood troubles continued into adulthood (like how he's had a crack addiction throughout his adult life). And it considered mitigating circumstances accounting for Guardado's potential to be a model prisoner (including how he had a good jail record awaiting trial with no disciplinary reports, could contribute given his wastewater treatment experience, and had good family support that could help him contribute), plus his remorse.

In other words, the lay witness testimony and letters from the Rule 3.851 hearing and the penalty phase evidence *both* chronicled Guardado's background in essentially the same way: he lost

his father and brother as a child, used alcohol and drugs as a teen, was held in a juvenile facility, spent much of his adult life in prison, worked in wastewater treatment both in and out of prison, couldn't adjust to life outside prison, relapsed, and is remorseful for murdering Ms. Malone. The testimony and letters from the lay witnesses would've merely "amplifie[d] the themes" of Guardado's penalty phase defense, even if the lay witnesses gave "more detail[s]" or "better examples." *Holsey*, 694 F.3d at 1260–61; *see also Thornell*, 144 S. Ct. at 1312–13 (finding no *Strickland* prejudice where the postconviction evidence merely "corroborate[d]" and was "essentially the same" as the penalty phase evidence); *Robinson*, 300 F.3d at 1347–48 (concluding it wasn't unreasonable to determine that the petitioner failed to show prejudice where most of his new evidence merely offered "different examples"); *Dallas*, 964 F.3d at 1309–10 (same, where the theme of the petitioner's postconviction evidence was a "pillar[]" of his trial defense). As in *Holsey*, a fairminded jurist could agree with the Florida Supreme Court that Guardado failed to show prejudice because the lay witness testimony and letters "contain[ed] mostly background information" and "substantively track[ed]" or would've been "cumulative" of the penalty phase evidence. *Guardado*, 176 So. 3d at 893–96; *see Holsey*, 694 F.3d at 1262–67.

2. Mental Health Testimony

The second bucket of mitigating evidence Guardado maintains his trial counsel should have investigated and presented was mental health testimony showing how substance abuse impacted

his mental state at the time of the murder. At the Rule 3.851 hearing, Guardado offered Ms. Johnson's and Dr. Prichard's testimony.

Ms. Johnson testified that Guardado was "completely under the control of . . . drugs," akin to an "amnesia," which triggered a "runaway train" of actions before Ms. Malone's murder. Ms. Johnson based her opinion on how Guardado went into a "full blown relapse" of crack use for two weeks before the murder as a way to cope with his stressors in rejoining society; at the time of the murder, he experienced a "constant need for the drug." Guardado's constant need for crack, Ms. Johnson testified, was the sole reason he murdered Ms. Malone.

Dr. Prichard also testified that Guardado experienced "emotional disturbance associated with the things that were going on . . . in his life at the time"—"things were kind of spinning out of control" with Guardado's employment, love life, and finances—and that there was "a lot of depression present." These stressors were the "catalyst" of Guardado's "need for the drug," because that's what Guardado used to "medicate" his emotions. Guardado had done so, according to Dr. Prichard, since "an early age . . . of fourteen or fifteen." And Dr. Prichard specifically cited how Guardado "was using crack cocaine on a daily basis" just before the murder, "so he was actually having a binge on crack cocaine." He opined that this crack binge "was driving [Guardado]" on the night of the murder and "[i]t was going to be a bad night for Mr. Guardado and whoever got in his way" of getting more crack. That's why, in

Dr. Prichard's view, Guardado's need for crack was the sole reason he murdered Ms. Malone.

Like the lay witness testimony and letters, the mental health testimony presented at the Rule 3.851 hearing echoed the evidence that trial counsel actually presented during the penalty phase. That's because Dr. Larson explained during his penalty phase testimony that Guardado had used crack dating "back to teenage years or early adult years." Dr. Larson described how Guardado was "under emotional duress" and "considerable stress" while adjusting to adult life outside prison—specifically citing his "economic problems," his DUI, and that he couldn't hold down a job. Amidst this considerable emotional stress, Dr. Larson explained, Guardado "relapsed and went on a crack cocaine binge for approximately two weeks" before the murder. Dr. Larson then testified—like Ms. Johnson and Dr. Prichard—that this binge made Guardado's murder of Ms. Malone a "drug related incident" because Guardado was motivated solely by his need for crack. Or, as Dr. Larson put it in his report, the murder was "situational" and "driven by [Guardado's] chemical addition."

True, as Guardado points out, Ms. Johnson and Dr. Prichard disagreed with Dr. Larson on how to label Guardado's emotional duress and need for crack. But labels aside, the circumstances Ms. Johnson, Dr. Prichard, and Dr. Larson described were largely the same—Guardado decided to murder while suffering from emotional stress and under the influence of crack cocaine. Indeed, relying on Dr. Larson's testimony and report, the state trial court

found mitigating circumstances essentially mirroring those Ms. Johnson and Dr. Prichard described. Specifically, the state trial court weighed as mitigating circumstances how Guardado was under emotional duress during the murder and how his crack addiction caused him to murder.

Because Ms. Johnson's and Dr. Prichard's testimony at the Rule 3.851 hearing hit similar notes to Dr. Larson's penalty phase testimony and report, our conclusion regarding the mental health testimony is the same one we reached as to the lay witness testimony and letters. A fairminded jurist could agree with the Florida Supreme Court that Guardado failed to show prejudice from any failure by trial counsel to investigate and present mental health testimony from Ms. Johnson and Dr. Prichard because "there was no need" for their testimony on top of Dr. Larson's. *Guardado*, 176 So. 3d at 895–96; *see Raheem*, 995 F.3d at 925–26.

3. Guardado's Arguments

Guardado disagrees with our conclusion for two reasons. First, under his view of Florida law, statutory mitigating circumstances are inherently weightier than non-statutory ones. He argues that the mental health testimony from the Rule 3.851 hearing would've established two statutory mitigating circumstances if investigated and presented during the penalty phase: (1) he murdered Ms. Malone under the influence of extreme mental or emotional distress, and (2) his capacity to appreciate the criminality of his conduct or conform it to the law was substantially impaired. *See* FLA. STAT. § 921.141(6)(b), (f) (2005). Because the state trial court

found only non-statutory mitigating circumstances, the argument goes, there was a reasonable probability that the mental health testimony from the Rule 3.851 hearing—which established the inherently weightier statutory mitigating circumstances—would have tipped the balance in favor of a life sentence.

But Guardado's view of Florida law—that statutory mitigating circumstances are inherently weightier than non-statutory ones—is mistaken. The Florida Supreme Court has found that non-statutory mitigating circumstances can be weightier than statutory mitigating circumstances. In *Abdool v. State*, for example, the trial court assigned "little weight" to the same statutory mitigating circumstances that Guardado relies on here—(1) extreme mental or emotional distress and (2) a substantially impaired capacity to appreciate the criminality of conduct or conform it to the law—and gave nine non-statutory mitigating circumstances "moderate weight." 53 So. 3d 208, 223 (Fla. 2010). Rejecting the defendant's argument that the trial court erred in assigning weights to the mitigating circumstances, the Florida Supreme Court "h[e]ld that the trial court did not abuse its discretion when applying weight to the mitigating circumstances," *id.* at 223–24 (emphasizing that "the weight to be given to existing mitigating circumstances [is] within the discretion of the sentencing court" (citation omitted)).

Abdool isn't the only example of where the Florida Supreme Court agreed that non-statutory mitigating circumstances were weightier than statutory ones. *See, e.g.*, *Francis v. State*, 808 So. 2d 110, 140–41 (Fla. 2001) (rejecting the defendant's argument that the

statutory emotional-distress mitigator should've been given more than "some weight," emphasizing that the trial court "also found, as a nonstatutory mitigator, that the defendant was mentally ill or emotionally disturbed and accorded it 'considerable weight'"); *Covington v. State*, 228 So. 3d 49, 60–61, 66 (Fla. 2017) (rejecting "that the trial court abused its discretion in affording [the statutory emotional-distress mitigating] circumstance moderate weight" where "great" weight was assigned to a non-statutory mitigating circumstance); *Perez v. State*, 919 So. 2d 347, 358 & n.3, 372–74 (Fla. 2005) (concluding that the trial court didn't abuse its discretion in assigning "little weight" to the statutory emotional-distress mitigator although it had given five non-statutory mitigating circumstances "moderate" or "some weight," disagreeing with the defendant "that [the] trial court [wa]s required to assign any certain weight to the [statutory] mitigating circumstance in the abstract"). Because statutory mitigating circumstances are *not* inherently weightier under Florida law, Guardado has not shown a substantial likelihood that the result of his penalty phase would have been different if the statutory mitigating circumstances relating to his mental health were subbed in for the comparable non-statutory ones that the state trial court found and considered at sentencing.

Second, Guardado compares his trial counsel's performance in investigating and presenting mitigation evidence to *Wiggins v. Smith*, 539 U.S. 510, 535–38 (2003), *Rompilla v. Beard*, 545 U.S. 374, 390–93 (2005), and *Porter v. McCollum*, 558 U.S. 30, 40–44 (2009), where the Supreme Court concluded that counsel's deficient performance in investigating and presenting mitigation evidence

prejudiced the result of the penalty phase. But in each of those cases, the Supreme Court found *Strickland* prejudice because "counsel introduced little, if any, mitigating evidence at the original sentencing." *Thornell*, 144 S. Ct. at 1314 (citing *Wiggins*, 539 U.S. at 515, 534–35; *Rompilla*, 545 U.S. at 378, 393; *Porter*, 558 U.S. at 41). "[Guardado], by contrast, started with much more mitigation." *See id.* For example, trial counsel presented evidence that shed light on Guardado's childhood traumas. There was evidence showing that those traumas pushed Guardado to teenage substance abuse and a life in prison. Trial counsel also presented evidence showing that, although Guardado can work and contribute when not using crack cocaine, he struggled when readjusting to life outside prison and relapsed. And the penalty phase jury heard evidence—including expert testimony—describing Guardado's substance abuse and how Guardado "was under considerable stress" before the murder.

Based on the mitigation evidence that trial counsel presented during the penalty phase, the state trial court found nineteen mitigating circumstances and gave nine of them at least great or moderate weight, including how Guardado was traumatized by losing his brother, was sexually molested, and accepted responsibility for the murder. So the mitigation case that Guardado's trial counsel investigated and presented for his penalty phase is a far cry from the barebones mitigation cases that counsel presented in *Wiggins*, *Rompilla*, and *Porter*. *See id.*

Rompilla and *Wiggins* are even further off the mark. In those cases, the Supreme Court "did not apply AEDPA deference to the

question of prejudice." *Gavin v. Comm'r, Ala. Dep't of Corr.*, 40 F.4th 1247, 1269 (11th Cir. 2022) (quoting *Cullen*, 563 U.S. at 202). "Thus, as the Supreme Court has cautioned, . . . they 'offer no guidance with respect to whether a state court has *unreasonably* determined that prejudice is lacking'—which is the question we must answer in this case." *Id.* (quoting *Cullen*, 563 U.S. at 202).

Here, the answer to that question, as to Guardado's claim that trial counsel failed to adequately investigate and present mitigation evidence during the penalty phase, is no. The Florida Supreme Court did not unreasonably determine there was no reasonable probability of a different penalty phase outcome had trial counsel investigated and presented the lay witness testimony and letters, or the mental health testimony. And because that determination was not unreasonable, the district court properly denied federal habeas relief under AEDPA. *See* 28 U.S.C. § 2254(d)(1); *Calhoun*, 92 F.4th at 1346; *Sears*, 73 F.4th at 1279–80.

B. The Florida Supreme Court's Prejudice Determination on Guardado's Claim That Counsel Failed to Challenge or Strike Three Biased Jurors

As for his claim that trial counsel were ineffective because they failed to challenge for cause or peremptorily strike Jurors Pennington, Hall, and Cornelius, Guardado raises two arguments. First, he contends that the Florida Supreme Court unreasonably applied *Strickland* by "substitut[ing]" *Carratelli*'s heightened "actual bias" test for *Strickland*'s prejudice standard, which only requires a reasonable probability sufficient to undermine confidence in the

outcome. Second, he continues, because the Florida Supreme Court unreasonably applied *Strickland*'s prejudice standard, we should review de novo the Florida Supreme Court's prejudice determination and find that the outcome of his penalty phase would've been different if Jurors Pennington, Hall, and Cornelius were challenged for cause or struck.

We agree with Guardado that the Florida Supreme Court unreasonably applied *Strickland*'s prejudice standard by substituting *Carratelli*'s heightened actual bias test for the reasonable probability test. But we also conclude, applying the *Strickland* prejudice standard de novo, Guardado has not shown that there was a substantial likelihood he'd receive a life sentence absent any error by trial counsel in failing to challenge for cause or peremptorily strike Jurors Pennington, Hall, and Cornelius.

1. The Florida Supreme Court's Unreasonable Application of *Strickland*'s Prejudice Standard

To be entitled to AEDPA deference, the Florida Supreme Court had to apply "[t]he correct standard for ineffective assistance of counsel [a]s set out in *Strickland*." *See Calhoun*, 92 F.4th at 1347. *Strickland*'s prejudice standard for "juror selection claims" based on counsel's "failure to challenge [a juror] either peremptorily or for cause" is the same as it would be for "any other *Strickland* claim." *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1243 (11th Cir. 2011). So a court must consider, just as it must for any other *Strickland* claim based on trial counsel's deficient performance during the penalty phase, whether the petitioner has shown "a reasonable

probability that, absent [counsel's] errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Thornell*, 144 S. Ct. at 1310 (alterations in original) (quoting *Strickland*, 466 U.S. at 695).

The Florida Supreme Court unreasonably applied this standard. To explain why, we examine the standard that the Florida Supreme Court did apply—*Carratelli*'s "actual bias" standard. *See Guardado*, 176 So. 3d at 899 (quoting *Carratelli*, 961 So. 2d at 324). In *Carratelli*, the Florida Supreme Court resolved a conflict among the state intermediate appellate courts about the application of *Strickland*'s prejudice prong to collateral claims of ineffective assistance of counsel during juror selection.[3] *Carratelli*, 961 So. 2d at 315. Before *Carratelli*, some Florida appellate courts required that the biased juror serve on the jury to establish prejudice. *Id.* Others applied a more lenient standard requiring the petitioner to show a reasonable doubt existed about the juror's impartiality. *Id.*

The *Carratelli* court began by observing that "the test for prejudice in conjunction with a collateral claim of ineffective assistance" is "much more strict" than the "test for prejudicial error in conjunction with a direct appeal." *Id.* at 317–18 (quotation omitted). On the one hand, "the standard for obtaining a reversal upon

[3] The specific claim in *Carratelli* was ineffective assistance in "failure to *preserve* a challenge to a potential juror." 961 So. 2d at 315 (emphasis added). But, in its holding, the Florida Supreme Court set out a unified prejudice standard for claims of ineffective assistance in "failing to preserve *or raise* a cause challenge before a jury is sworn." *Id.* at 327 (emphasis added).

the erroneous denial of a cause challenge is relatively lenient: a defendant need only show that an objectionable juror—whether or not actually biased—sat on the jury." *Id.* at 320; *see id.* at 318–20 ("Where the record demonstrates a reasonable doubt about a juror's ability to be impartial, the trial court abuse[s] its discretion in denying [a] cause challenge."). On the other hand, because "once a conviction has been affirmed on direct appeal a presumption of finality and legality attaches to the conviction and sentence," a court's "consideration of postconviction claims . . . is more restrictive." *Id.* at 320 (cleaned up). After citing this finality concern, the *Carratelli* court noted how *Strickland*'s prejudice standard requires "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694).

But instead of stopping at the "reasonable probability" standard, as *Strickland* required, *see* 466 U.S. at 694, the *Carratelli* court went further. The court "determined that the prejudice standard applicable to [a] postconviction claim" regarding counsel's failure to challenge a juror "is whether the juror [wa]s actually biased":

> In the context of the denial of challenges for cause, [*Strickland*] prejudice can be shown only where one who was actually biased against the defendant sat as a juror. We therefore hold that where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the

> defendant must demonstrate that a juror was actually biased.

Carratelli, 961 So. 2d at 324–25. "[A]ctual bias," as *Carratelli* defined it, "mean[t] bias-in-fact that would prevent service as an impartial juror." *Id.* at 324 (citation omitted). In Guardado's case, the Florida Supreme Court applied the *Carratelli* test to affirm the denial of his claim, concluding he was not prejudiced by counsel's failure to challenge for cause or strike Jurors Pennington, Hall, and Cornelius because he failed to show actual bias. *Guardado*, 176 So. 3d at 899.

The problem, as Guardado argues, is that *Carratelli*'s actual bias-in-fact standard requires more than "a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The reasonable probability standard only requires showing that counsel's deficient performance "undermine[s] confidence in the outcome." *Thornell*, 144 S. Ct. at 1310 (quoting *Cullen*, 563 U.S. at 189). And that more lenient standard is the one a petitioner must satisfy for a claim that counsel failed to challenge for cause or peremptorily strike a juror. *See Harvey*, 629 F.3d at 1243 ("We evaluate juror selection claims as we would any other *Strickland* claim."). Showing the juror was actually biased could be enough to establish prejudice, but *Strickland* doesn't require a showing of actual bias. *Cf., e.g.*, *Smith v. Gearinger*, 888 F.2d 1334, 1337–39 (11th Cir. 1989) (reasoning "it may be sufficient" for a petitioner to satisfy the reasonable probability standard by showing counsel failed to challenge for cause "jurors . . . expected to sympathize with the victim").

As we recently explained in *Calhoun*, "this type of error"—where "[t]he correct prejudice standard puts a lesser burden on the petitioner" but the state court holds the petitioner to a "stricter prejudice standard"—"ordinarily strips a state court decision of AEDPA deference." *Calhoun*, 92 F.4th at 1347–49 (concluding a state supreme court's application of *Strickland* wasn't due AEDPA deference because the court "used [a] preponderance of the evidence/'would have' standard instead of the reasonable probability/confidence-in-the-outcome standard that *Strickland* mandates"). Because the Florida Supreme Court's application of *Carratelli* held Guardado to a stricter prejudice standard than *Strickland*'s reasonable probability standard, the ordinary rule applies here just as it did in *Calhoun*.

The state disagrees. It primarily relies on ten cases that, in its view, require a stricter prejudice standard—actual bias—for ineffective assistance claims that counsel failed to challenge for cause or peremptorily strike a juror. Having carefully reviewed the ten cases, we are not persuaded.

First, the state argues that in two of our cases, *Teasley v. Warden, Macon State Prison*, 978 F.3d 1349 (11th Cir. 2020), and *Owen v. Florida Department of Corrections*, 686 F.3d 1181 (11th Cir. 2012), we read *Strickland*'s prejudice standard to require actual bias when the claim is that counsel failed to challenge for cause or peremptorily strike a juror. But we did not read *Strickland*'s prejudice standard to require actual bias in either case. Starting with *Teasley*, the petitioner raised two arguments on appeal: (a) the state habeas court

made an unreasonable factual determination that a juror wasn't actually biased; and (b) the state habeas court unreasonably applied *Strickland* in concluding the petitioner wasn't prejudiced by counsel's failure to raise the juror's alleged bias on direct appeal. 978 F.3d at 1355–56, 1358. In resolving the actual bias argument, we only addressed whether the state habeas court's *finding of fact* was "unreasonable . . . in light of the evidence." *See id.* at 1355–58 (quoting 28 U.S.C. § 2254(d)(2)). We did not hold that the petitioner had to prove actual bias to prevail on an ineffective assistance claim that counsel failed to challenge or strike a juror. *See id.*

In fact, in resolving the *Teasley* petitioner's second argument that the state habeas court unreasonably applied *Strickland*, we did not use any "actual bias" gloss on the prejudice standard. *See id.* at 1358–59. Instead, we assessed the state habeas court's no-prejudice determination against *Strickland*'s well-established reasonable probability test—concluding that, in light of the state habeas court's factual finding, "there [wa]s no reason to believe *that the result of the appeal would have been different* if appellate counsel had raised the issue." *Id.* (emphasis added). That's the *Strickland* reasonable probability standard. *See* 466 U.S. at 694. If anything, *Teasley* reaffirmed that the reasonable probability standard is the correct one for establishing prejudice when the claim is that counsel failed to challenge or strike a juror.

Owen is even less helpful to the state than *Teasley*. That's because in *Owen*—as the state concedes—we expressly did "not decide whether the *Carratelli* actual-bias test for prejudice impose[d]

a higher burden or contradict[ed] the governing *Strickland* prejudice standard." 686 F.3d at 1201. Instead, we assumed that "the *Carratelli* prejudice test . . . w[as] contrary to *Strickland*" because it was clear that, under de novo review, the petitioner couldn't prevail on his *Strickland* claim. *Id.*

Second, the state argues that, under *Weaver v. Massachusetts*, 582 U.S. 286 (2017), courts must apply a higher prejudice standard on postconviction review than on direct appeal. As the state sees it, without *Carratelli*'s heightened prejudice standard, habeas petitioners asserting a *Strickland* claim that counsel failed to challenge or strike a juror would have a lighter burden than if they raised the juror issue on direct appeal.

But the state's premise—that the *Strickland* standard would be more favorable than the direct appeal standard without *Carratelli*—is wrong. On direct appeal, Florida courts *presume* prejudice where a defendant claims that a biased prospective juror should've been removed. *See, e.g.*, *Busby v. State*, 894 So. 2d 88, 92, 96–97 (Fla. 2004) (holding that the defendant, who exhausted his peremptory challenges, identified a biased juror, was denied a challenge for cause, and was denied additional peremptory challenges, was prejudiced without analyzing the probability of a different outcome). By contrast, when asserting a postconviction *Strickland* claim, prejudice "cannot be presumed." *Teasley*, 978 F.3d at 1358; *see also Weaver*, 582 U.S. at 300–01 (holding that prejudice isn't presumed when a defendant raises a violation of right to a public trial on an ineffective-assistance claim). Instead, the petitioner must

satisfy a "highly demanding" burden of showing that, but for counsel's deficient performance, there was a reasonable probability of a different outcome. *Shinn*, 592 U.S. at 118 (citation omitted).

Third, the state directs us to four cases that were decided on direct appeal from civil or criminal trials: *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984); *United States v. Tsarnaev*, 595 U.S. 302 (2022); *Skilling v. United States*, 561 U.S. 358 (2010); and *United States v. Martinez-Salazar*, 528 U.S. 304 (2000). But because these four cases are not habeas cases, or even criminal cases, they are unhelpful in answering the question we have to answer—whether *Strickland*'s prejudice standard applies to a habeas claim that counsel failed to challenge for cause or strike a juror.[4] *Cf. Williams v. Singletary*, 114 F.3d 177, 180–81 (11th Cir. 1997) (rejecting a habeas petitioner's reliance on *Zafiro v. United States*, 506 U.S. 534 (1993), where it "was not a habeas case" and "[i]nstead, . . . involved a direct appeal of a federal criminal conviction"); *Pierre v. Vannoy*, 891 F.3d 224, 228 n.3 (5th Cir. 2018) (explaining that a habeas petitioner's reliance on similar case law was "unhelpful").

Finally, the state cites three cases from other circuits "for the proposition that a showing of actual bias . . . is the typical standard

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[4] *McDonough Power* is particularly unhelpful. That case followed a *civil* products liability trial, and the Supreme Court decided it nearly four months *before* adopting the two-part test for ineffective assistance claims in *Strickland*. *See McDonough Power*, 464 U.S. at 549; *Strickland*, 466 U.S. at 686–87. The earlier *McDonough Power* decision could not tell us much, if anything, about how to apply the *later Strickland* habeas standard.

for *Strickland* prejudice when the claim . . . involves a juror." But, like the other cases the state relies on, these three do not address the question we must decide: whether a state court unreasonably applies *Strickland*'s prejudice standard when it adopts a test *requiring* actual bias rather than a reasonable probability of a different outcome. *See Dickey v. Davis*, 69 F.4th 624, 634 & n.3, 645–46 (9th Cir. 2023) (addressing the state habeas court's "unexplained denial" of the petitioner's claim that he was prejudiced by counsel's strategy of selecting jurors predisposed to vote for death); *Haight v. Jordan*, 59 F.4th 817, 832–33 (6th Cir. 2023) (applying *Strickland*'s prejudice standard de novo because the state court "did not decide [that] issue on the merits"); *Virgil v. Dretke*, 446 F.3d 598, 611–14 (5th Cir. 2006) (applying *Strickland*'s "well-rehearsed" reasonable probability standard and concluding the petitioner satisfied it by showing "two persons, each expressly stating that they were unable to serve as fair and impartial jurors," were seated on his jury). As we've explained, the answer to that question is yes—the Florida Supreme Court unreasonably applied *Strickland*'s prejudice standard by substituting *Carratelli*'s heightened actual bias test for the reasonable probability test.

2. De Novo Review

Because the Florida Supreme Court unreasonably applied *Strickland*'s prejudice prong, we must "undertake a de novo review of the record" and determine for ourselves whether Guardado was prejudiced by counsel's failure to challenge for cause or peremptorily strike Jurors Pennington, Hall, and Cornelius. *See Debruce v.*

Comm'r, Ala. Dep't of Corr., 758 F.3d 1263, 1266 (11th Cir. 2014) (cleaned up). Based on our de novo review, we conclude that he was not.

The three jurors confirmed during individual voir dire that, despite their connections to the case, they would be fair if seated on the jury. Starting with Juror Pennington, which Guardado describes as his best case for prejudice, she was asked whether her business relationship with Ms. Malone would affect her ability to be fair. Juror Pennington testified that she "could be fair." She gave the same answer a second time. And when asked again if she could "assure Mr. Guardado that [she] could be fair and make a fair and legal decision," Juror Pennington said, "[y]es," she could. Before the end of Juror Pennington's individual voir dire, she was asked two more times whether her previous relationship with Ms. Malone would affect her ability to make a fair and impartial decision based on the law; she confirmed both times that she would make her decision based on the law. Her knowing Ms. Malone "was just . . . business."

Like Juror Pennington, Juror Hall assured the state trial court and the parties that he could be fair despite his connection to the case. During general voir dire, Juror Hall said that he knew three law enforcement officers involved in the investigation. Then, when asked during individual voir dire if he could "fairly weigh [their] testimony with that of other witnesses," Juror Hall testified that he could. Mr. Gontarek later pressed Juror Hall on whether he would weigh Investigator Garrett's testimony more than anyone

else's, and Juror Hall again answered that he would not. Instead, as Juror Hall said, he would take the testimony "strictly on its value."

Finally, Juror Cornelius was asked if having family members who were victims of violent crime would affect his ability to serve as a juror in this case. He answered: "No. That doesn't have anything to do with that." Juror Cornelius emphasized that he was "small," and he didn't know many details about the murders of his great aunt and great uncle; the murders had taken place twenty-five years earlier.

All three jurors, in other words, "insisted—repeatedly and unequivocally—that they could follow the law." *Owen*, 686 F.3d at 1201 (reviewing the petitioner's *Strickland* claim de novo and concluding he failed to show prejudice where three jurors similarly emphasized their impartiality). Guardado has not met his burden to show that Jurors Pennington, Hall, and Cornelius could not be fair or that trial counsel's acceptance of them as jurors otherwise prejudiced the result of the penalty phase trial. For that reason, Guardado has not satisfied *Strickland*'s "highly demanding" standard of showing a substantial likelihood that, absent any error by trial counsel in failing to challenge or strike the three jurors, he would've received a life sentence instead of death. *See Thornell*, 144 S. Ct. at 1310; *Shinn*, 592 U.S. at 118 (citation omitted). Guardado isn't entitled to habeas relief on his second claim.

IV. CONCLUSION

Guardado committed a heinous crime. After a full and fair penalty phase trial, he was sentenced to death. We conclude that the Florida Supreme Court didn't unreasonably apply *Strickland* to his claim that trial counsel were ineffective by failing to investigate and present mitigating evidence. And despite the Florida Supreme Court's unreasonable application of *Strickland* to his claim that trial counsel were ineffective by failing to challenge for cause or peremptorily strike three jurors, on de novo review, Guardado failed to show counsel's performance prejudiced the result of his penalty phase trial. The district court's denial of Guardado's petition under section 2254 is affirmed.

AFFIRMED.

Eleventh Circuit Order Denying Rehearing (October 9, 2024)

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-10957

JESSE GUARDADO,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 4:15-cv-00256-RH

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before WILLIAM PRYOR, Chief Judge, and JILL PRYOR and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

Eleventh Circuit Order Denying Motion to Expand COA (July 27, 2022)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-10957-P

JESSE GUARDADO,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Florida

Before: WILLIAM PRYOR, Chief Judge, JILL PRYOR, and LUCK, Circuit Judges.

BY THE COURT:

Appellant's "motion to expand and reconsider partial denial of certificate of appealability" is DENIED.

Petitioner's Motion to Expand COA
(June 28, 2022)

No. 22-10957

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JESSE GUARDADO,

Petitioner-Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

On Appeal from the United States District
Court for the Northern District of Florida

MOTION TO EXPAND AND RECONSIDER PARTIAL DENIAL OF CERTIFICATE OF APPEALABILITY

Sean Gunn
Mary Harrington
Amy Greer
Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818
sean_gunn@fd.org

Counsel for Petitioner-Appellant

Guardado v. Secretary, Florida Department of Corrections **No. 22-10957**

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Interested Persons:

Cobb, Jason (Trial Co-Counsel)

Dixon, Ricky (Respondent-Appellee)

Elmore, Robert (Trial Prosecutor)

Gontarek, John Jay (Trial Counsel)

Greer, Amy (Counsel for Petitioner-Appellant)

Guardado, Jesse (Petitioner-Appellant)

Gunn, Sean (Counsel for Petitioner-Appellant)

Harrington, Mary (Counsel for Petitioner-Appellant)

Hinkle, Robert (Federal District Judge)

Malone, Jackie (Victim)

McClain, W.C. (Direct Appeal Counsel)

Millsaps, Charmaine (Counsel for Respondent-Appellee)

Moody, Ashley (Florida Attorney General)

Murrell, Randolph (Federal Public Defender)

Taylor, Clyde Jr. (State Postconviction Counsel)

Wells, Kelvin (State Circuit Judge)

Corporate Disclosure: N/A

MOTION TO EXPAND AND RECONSIDER PARTIAL DENIAL OF CERTIFICATE OF APPEALABILITY

Petitioner-Appellant Jesse Guardado moves—pursuant to Federal Rules of Appellate Procedure 22(b) and 27(c), and Local Rules 22-1(c), 27-1(d), and 27-2—for expansion and panel reconsideration of this Court's June 7, 2022, order partially denying a certificate of appealability (COA).

I. The COA order

On June 7, 2022, the Court in a single-judge order granted Petitioner a COA on two issues arising from his claim that his penalty-phase counsel was ineffective:

> 1. Whether the Florida Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984) on Guardado's claim that his penalty-phase counsel was ineffective by failing to investigate and present mitigating evidence adequately, but only to the extent the particular legal theory and the specific factual foundation on which the mitigating evidence claim rests were raised and exhausted in the state courts.
>
> 2. Whether the Florida Supreme Court unreasonably applied *Strickland* on Guardado's claim that his penalty-phase counsel was ineffective by failing to challenge for cause or peremptorily strike jurors Pennington, Hall, and Cornelius.

The Court denied a COA as to the remainder of Petitioner's ineffective-assistance arguments, and as to the entirety of his four other claims.

Petitioner requests that the panel expand the COA to permit certain additional arguments in support of his trial-ineffectiveness claims, and to include one of his other claims, which arises under *Hurst v. Florida*, 577 U.S. 92 (2016), and *Caldwell*

v. Mississippi, 472 U.S. 320 (1985). Because the issues discussed below are sufficiently debatable, the panel should grant reconsideration and expand the COA.

II. The COA standard

Petitioner is entitled to a COA upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That standard is satisfied if reasonable jurists could debate the district court's rulings or, separately, if the issues are "adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

The COA inquiry is "threshold" and "not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). "[A] COA does not require a showing that the appeal will succeed." *Miller-El*, 537 U.S. at 337. COA analysis "does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.* at 336. "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Denying a COA based on "adjudication of the actual merits . . . is in essence deciding an appeal without jurisdiction." *Buck*, 137 S. Ct. at 773 (internal quotation omitted).

III. Special note on *Shinn v. Ramirez*

Because this motion involves ineffective-assistance-of-counsel claims and related issues under *Martinez v. Ryan*, 566 U.S. 1 (2012), a brief note about a recent

Supreme Court decision, *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), is appropriate at the outset. *Shinn* was decided after the parties' COA briefing in this case was complete but shortly before this Court's June 7 order partially denying a COA.

Shinn held that a provision of the federal habeas statute, 28 U.S.C. § 2254(e)(2), limits the evidence supporting a trial-ineffectiveness claim to the state-court record, even if *Martinez* provides cause to excuse the claim's procedural default. *Shinn*, 142 S. Ct. at 1734. But *Shinn* reaffirmed that *Martinez* still provides cause to excuse procedural default—*Shinn* simply limits evidentiary support for any *Martinez*-excused claims to the state-court record. *Id.* at 1737. In other cases, Respondent has described his view that *Shinn* basically "limit[s] *Martinez* claims to claims of ineffectiveness of trial counsel that are obvious on the face of the . . . state court record." *Brown v. Sec'y, Fla. Dep't of Corr.*, No. 3:16-cv-99, ECF No. 57 (N.D. Fla. June 2, 2022); *see also* Brief for the States of Texas et al. as Amici Curiae in Support of Petitioners, at 19, *Shinn v. Ramirez*, No. 20-1009 (conceding that state-court evidence developed for unrelated claims may still be considered).

As explained further below, the trial-ineffectiveness and *Martinez* issues addressed in this motion fall within the category of claims left fully intact by *Shinn*.

IV. The Court should reconsider the COA's restriction on Petitioner's mitigation-ineffectiveness arguments

The Court's June 7 order granted a COA on Petitioner's mitigation-ineffectiveness claim but "only to the extent the particular legal theory and the

specific factual foundation on which the mitigating evidence claim rests were raised and exhausted in the state courts." The Court implicitly denied a COA on the procedural-default arguments Petitioner made before *Shinn*. COA App. at 24-25.

The panel should reconsider the clause in the COA order excising Petitioner's procedural-default arguments from his mitigation-ineffectiveness claim, at least with respect to two narrow categories of mitigation that are not impacted by *Shinn* because they are based entirely on the state-court record. They involve trial counsel Gontarek's failure to follow red flags regarding Petitioner's (1) incarceration at the Dozier school, and (2) history of childhood sexual abuse. It is reasonably debatable whether Petitioner can secure relief through *Martinez* as to these two defaulted components of his mitigation-ineffectiveness claim, which are not impacted by *Shinn*. The panel should expand the COA to include these issues.

A. Trial ineffectiveness

Gontarek knew long before the penalty phase about Petitioner's juvenile incarceration at the Dozier School for Boys in Marianna, Florida, which was notorious for its violence against children. In Petitioner's confession to police, a recording of which was played at the penalty phase, he stated that he was incarcerated as a child at the "Marianna Boys School," where he was made to work in the slaughterhouse. ECF No. 17-12 at 56-57. Dr. Larson, Gontarek's sole witness, also briefly noted Petitioner's Dozier incarceration in his seven-page psychological

evaluation of Petitioner, but Gontarek did not ask him about it during his testimony. Though Gontarek submitted the evaluation at the *Spencer* hearing, after the jury had recommended death, "just to supplement [Dr. Larson's] testimony," Gontarek never took any steps to investigate Dozier. *See* ECF Nos. 17-5 at 126 (Dr. Larson's report referencing substance-abuse treatment Petitioner underwent at "Marianna"); 17-16 at 41. Indeed, Gontarek sought no records and pursued no witnesses to fully flesh out the conditions at Dozier or how this incarceration had impacted Petitioner's life, despite clear indicators that the impact was both profound and lasting.

A second unexplored theme that loomed large throughout the penalty proceedings was the childhood sexual abuse Petitioner suffered. Dr. Larson's report listed "two major traumas in [Petitioner's] life," including that he "was sexually molested by a neighbor." ECF No. 17-5 at 126. But Gontarek never followed up on this reference in the report or elicited any testimony from Dr. Larson about this "major trauma." As a result, the jury never heard anything about it, and the judge read only the single sentence in Dr. Larson's report. Based on that single sentence, the sentencing court still gave this trauma moderate weight as a non-statutory mitigating factor, ECF No. 17-6 at 28, suggesting that if Gontarek had investigated further, the court may well have given it greater, perhaps decisive weight.

In addition to Dr. Larson's report, several other episodes occurred during the proceedings that hinted at more evidence of sexual abuse overlooked by Gontarek.

At the *Spencer* hearing, Petitioner requested to speak with the judge privately because he could not "in all good conscience, let [Gontarek] speak for me anymore." ECF No. 17-16 at 36. When the court asked for details about the mitigation Gontarek failed to present, Petitioner stated that "these are things that I can't discuss in a public environment." *Id.* at 37; *see also id.* at 37-38. At sentencing, as soon as the judge mentioned sexual molestation as a mitigating factor, Petitioner objected, saying he was "not going to deal with that" and asking to be excused from the courtroom. ECF No. 17-17 at 10-11. Petitioner's reaction would have made reasonable counsel aware that there may have been further mitigating value to sexual abuse that needed investigating, particularly its long-term impact on Petitioner.

Reasonable jurists could debate whether Gontarek's failure to spot the red flags of Dozier and sexual abuse constituted ineffectiveness under *Rompilla v. Beard*, 545 U.S. 374, 382 (2005) (holding trial counsel ineffective for overlooking red flags in the record that he "could fruitfully have followed in building a mitigation case"). This Court has echoed *Rompilla*'s holding. For example, in *Daniel v. Commissioner, Alabama Department of Corrections*, the Court remanded for an evidentiary hearing to determine trial counsel's ineffectiveness for failing to "take the simple step of getting [the petitioner's] school records" after hearing from family members about his learning problems. 822 F.3d 1248, 1267, 1282 (11th Cir. 2016).

This "red flag," the Court found, should have alerted counsel of the need to investigate further into intellectual disability. *Id.* at 1269.

Gontarek was aware of Petitioner's Dozier and sexual-molestation history, as both were mentioned in Dr. Larson's report. But rather than taking preliminary investigative steps such as gathering Petitioner's juvenile-detention records to evaluate the mitigating weight of these experiences, Gontarek left them as bare factual assertions in the record without further exploring their potential effect on Petitioner's life, especially in relation to his conduct and addiction. In their place, Gontarek presented a one-witness mitigation case consisting of Dr. Larson, whom Gontarek inadequately prepared to testify and who agreed with the State's faulty conclusion that Petitioner was, essentially, an ordinary person who "committed [the] murder solely to obtain more crack cocaine[.]" ECF No. 17-14 at 32.

Reasonable jurists could debate whether Gontarek's investigative failures constitute deficient performance. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (holding that the limited scope of counsel's mitigation investigation was unreasonable and noting that the ABA guidelines recommended obtaining records from "prior adult and juvenile correctional experience"). Just as in *Rompilla* and *Daniel*, the state-court record's red flags could have yielded powerful mitigation evidence that shifted the balance towards a life sentence, but Gontarek's ineffectiveness caused them to go undeveloped. *See id.* at 537.

B. Postconviction ineffectiveness

These defaulted mitigation-ineffectiveness claims are substantial under *Martinez* because they have "some merit," *Martinez*, 566 U.S. at 14, and "jurists of reason would find [them] debatable," *McKiver v. Sec'y, Fla. Dep't of Corr.*, 991 F.3d 1357, 1368 (11th Cir. 2021) (internal citations omitted).[1] Nonetheless, state-postconviction counsel Taylor failed to raise them and was thus ineffective under *Martinez*. It is at least reasonably debatable whether Petitioner satisfies *Martinez*'s cause-and-prejudice requirements to excuse these claims' procedural default.

Taylor had a straightforward task to exhaust these two mitigation-ineffectiveness claims. Indeed, it was the same path laid out in *Rompilla*: "identif[y] [the] likely avenues [Gontarek] could have followed in building a mitigation case." *Rompilla*, 545 U.S. at 382. The consequences of Gontarek's failure to follow the red flags about Dozier and sexual abuse were apparent on the face of the trial record, including Gontarek's unreasonable one-witness mitigation case consisting of a single expert whom he failed to properly prepare.

The threadbare nature of Gontarek's mitigation case and his failure to explore the major indicators of abuse and trauma present throughout the record relating to

[1] The Court's review of this issue is doubly deferential towards Petitioner and favors reconsidering the COA to include his *Martinez* arguments. That is because the inquiry is whether there is "some merit," under the COA standard of *Miller-El*, to the idea that Petitioner's claims have "some merit" under the *Martinez* standard.

Dozier and sexual abuse, should have resulted in Taylor raising a successful trial-ineffectiveness claim under *Rompilla*. Instead, Taylor's mitigation presentation shared many of the same flaws as Gontarek's. His lay witnesses, some of whom barely knew Petitioner, provided cumulative information, and his primary expert was so ill-prepared that the state court considered his testimony insufficient. *See Guardado v. State*, 176 So. 3d 886, 893-96 (Fla. 2015). Like Gontarek, Taylor overlooked red flags in the record of Petitioner's Dozier and sexual-abuse history.

Strikingly, Taylor was aware of Dozier's potential mitigating value. At a status conference, Taylor alerted the court that he was missing records from Petitioner's juvenile incarcerations, which was particularly concerning given "the recent publicity over the last three or four years of problems that went on for young people who were placed in certain facilities including the Dozier School for Boys." ECF No. 17-25 at 76-77. Even so, with the knowledge that Dozier was a promising source for mitigation, Taylor mirrored Gontarek by failing to request Petitioner's Dozier records, and Dozier evidence was not presented at the evidentiary hearing.

Taylor also failed to raise Gontarek's ineffectiveness in overlooking the red flag of Petitioner's sexual molestation to expand upon the extent and impact of that abuse. Dr. Larson's report called the molestation a "major trauma," but Gontarek did not ask him to develop it further and neglected to present it to the jury. Taylor's expert, Dr. Prichard, was hired to elaborate on Dr. Larson's testimony and to

determine "potential mitigation for sentencing purposes." ECF No. 17-29 at 51. Dr. Prichard reviewed Dr. Larson's seven-page report, *id*. at 52, but Taylor never asked him to discuss the report's reference to sexual abuse. Like Gontarek with Dr. Larson, Taylor failed to get Dr. Prichard to expand upon one of the report's critical findings: whether, and how, Petitioner's sexual molestation impacted his later life.

The trial record showed that Petitioner repeatedly attempted to alert the court to Gontarek's failure to present adequate mitigation on this issue, but the sentencing court shut down any further conversation on the topic after Petitioner said he did not want to discuss the specifics of the mitigation in a public hearing with Gontarek as his representative. *See* ECF No. 17-18 at 74-78, 82-83, 116-18. Yet Taylor never investigated the significance of these many red flags.

In attempting to litigate a trial-ineffectiveness claim, Taylor repeated many of Gontarek's mistakes. The trial record showed that Gontarek's mitigation case centered on Petitioner's remorse and guilty plea, and very little else, a fact Taylor highlighted at the evidentiary hearing. *See* ECF No. 17-29 at 82. Although Taylor recognized that Gontarek's mitigation presentation was ineffective, he overlooked the significance of the record's indications about Dozier and sexual abuse. These "should have been red flags to counsel, alerting [him] to the need for more investigation." *Daniel*, 822 F.3d at 1267. Yet Taylor, like Gontarek, neglected to take the initial step of obtaining the records that could have provided powerful

evidence to support the trial-ineffectiveness claims. *Cf. Rompilla*, 545 U.S. at 393 ("This [postconviction] evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury."). Because it is reasonably debatable whether Petitioner has satisfied *Martinez*, the panel should grant reconsideration and expand the COA to permit Petitioner to brief these issues.

V. The Court should expand the COA to include Petitioner's ineffectiveness argument regarding Jury Foreperson Johns

The Court's June 7 order granted a COA on Petitioner's trial-ineffectiveness arguments regarding Jurors Pennington, Hall, and Cornelius, but did not grant a COA on Petitioner's substantively identical argument regarding prospective Juror Johns, who ultimately became the jury foreperson and delivered the jury's death recommendation to the trial court. ECF No. 17-16 at 20-21. The sole difference between the arguments that were granted a COA and the one the single-judge order denied is that, as Petitioner acknowledged, state-postconviction counsel Taylor did not present the Juror Johns argument to the state courts. But the Johns argument still warrants inclusion in the COA because any procedural default is excusable under *Martinez*, and *Shinn* does not apply because the issue can be analyzed based solely on the state-court record. Indeed, a jury-selection-ineffectiveness claim such as this is a classic example of a *Martinez* issue that survives *Shinn*. The panel should grant reconsideration and expand the COA to include Petitioner's Juror Johns arguments.

The district court wrongly dismissed this claim because Petitioner "has not alleged cause and prejudice or a fundamental miscarriage of justice as required to assert an unexhausted claim." ECF No. 54 at 11. On the contrary, Petitioner stated in both his petition and memorandum of law that he could satisfy *Martinez*'s cause-and-prejudice showing and overcome any procedural-default defenses raised by Respondent. ECF Nos. 7 at 16; 42 at 15-16. Respondent's answer, however, never raised a procedural-default defense to Petitioner's Juror Johns arguments, or even mentioned that component of Petitioner's claim at all. The district court could have still reached the *Martinez* issue regarding the Johns claim sua sponte because the applicability of *Martinez* was clear. Johns's bias was at least equivalent to, if not greater than, that of the three jurors Taylor identified to support his trial-ineffectiveness claim and would have placed at issue trial counsel Gontarek's deficiencies with respect to a full third of the jury, including the foreperson.

Just as with Jurors Pennington, Hall, and Cornelius, Gontarek failed to meaningfully question Johns to find out her potential biases, despite clear red flags. As explained in Petitioner's prior filings, Gontarek went into jury selection knowing that it was proceeding in a small town of around 5,000 people, where many knew the victim, knew law enforcement, and had seen news coverage about the crime. *See, e.g.*, COA App. at 28. Despite these realities, Gontarek failed to request a change of venue, and then compounded that failure by conducting an ineffective voir dire that

did not involve any strategic justification. The Court should review the full measure of Gontarek's jury-selection failures, including those related to Juror Johns.

While being interviewed in a group of three and responding to counsels' largely generic questions about her knowledge of the case and ability to be impartial, Johns revealed that she worked as a self-employed private investigator and was "strongly" in favor of the death penalty. ECF No. 17-11 at 15, 17-18. She was formerly an Air Force criminal investigator and had worked with one of the State's investigators in Petitioner's case. *Id.* at 19. At the time of Petitioner's sentencing, she performed investigative work for, among others, the federal Departments of State and Defense, as well as the Okaloosa County Sheriff's Office. *Id.* at 17-18, 20. Additionally, Johns knew the prosecutor. *Id.* at 18. She had also done work for seven to ten law firms in the area. *Id*. at 20-21.

Johns noted that some of her Air Force duties included conducting undercover drug operations and investigating drug abuse. *Id*. at 19-20. While she claimed that none of her experiences would prevent her from being fair and impartial in sentencing Petitioner, at an earlier time in her career she would have been responsible for arresting someone like Petitioner. *Id.*

It was not Gontarek but the prosecutor who elicited this information from Johns. Gontarek's only follow-up was to ask whether Johns had ever conducted investigations on behalf of defendants. She said yes. He also asked her if her contract

with the Okaloosa County Sheriff's Department would impede her ability to listen to the evidence. She said no. *Id*. at 25-26.

Juror Johns's background presented a clear possibility of both explicit and implicit bias, as well as conflicts of interest. Nonetheless, Gontarek did not ask Johns the necessary follow-up questions to expose those and other potential biases. He did not ask her thoughts on drug addiction or how she felt about drug users—both of which were critical issues related to mitigation in this penalty-only trial. He asked no questions about her investigative, military, and law enforcement career even though she indicated she spent many years conducting undercover drug operations and arresting people for drug-related crimes. She had extensive dealings related to law enforcement and drug addiction, two prominent themes in Petitioner's case, but Gontarek failed to ask how her experiences would impact her ability to be impartial.

No reasonable attorney would fail to ask further questions when these red flags were present, particularly in a capital case when the client's life was on the line. Without more extensive voir dire, neither the trial court nor Petitioner could discover the extent of Johns's feelings about drugs, her possible bias against Petitioner due to her law-enforcement background, or any unconscious biases she may have because of her experiences. The consequence of Gontarek's ineffective voir dire was not only that Johns was seated on the jury; she became its foreperson.

Gontarek did not ask probing questions of the venire, and thus there was inadequate information available for him to effectively raise challenges for cause or to exercise his peremptory challenges in a reasonably strategic manner. There was no qualitative difference in bias between the jurors who were struck and those, like Johns, who were seated. Gontarek's generic and cursory examination of Johns, which was indistinguishable from those of Pennington, Hall, and Cornelius, was unreasonable under the circumstances of this case. If Gontarek had conducted the minimum, constitutionally adequate examination of these four jurors, he could have elicited more information about their potential biases, thereby enabling him to raise for-cause challenges and strategically exercise peremptory challenges.

Gontarek's deficient voir dire performance, considered both individually and cumulatively, prejudiced Petitioner because his fate was decided by a jury predisposed to vote for death based on improper considerations. *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Petitioner was ultimately sentenced to death by a unanimous jury, a third of whom—including the foreperson—were likely impermissibly biased against him. If Gontarek had followed up on the red flags presented by these four jurors and struck them to allow unbiased jurors to sit in their place, there is a reasonable probability that the result of Petitioner's sentencing would have been different. *See Strickland*, 466 U.S. at 687.

Taylor's failure to include Johns in his trial-ineffectiveness claim was similarly unreasonable and without strategic justification. Johns's bias was apparent on the face of the record and was at least equivalent to, if not greater than that of Jurors Pennington, Hall, and Cornelius. And, as outlined above, this claim is substantial under *Martinez* because "jurists of reason would find [it] debatable." *McKiver*, 991 F.3d at 1368; *see also supra*, at n.1 (describing double deference in favor of Petitioner). Reasonable jurists could debate the district court's decision not to analyze the default under *Martinez* and consider the Juror Johns claim on its merits. As noted, *Shinn* and § 2254(e)(2) do not preclude this Court's review of the Johns component after applying *Martinez* because no evidence outside the state-court record is required for the underlying analysis.

The panel should expand the COA to include the Johns claim because it is substantively identical to Petitioner's other juror claims and it is at least reasonably debatable whether the procedural default should have been excused.

VI. The Court should expand the COA to include Petitioner's *Hurst* and *Caldwell* claim

The Court's June 7 order denied a COA as to the entirety of Petitioner's claim arising from *Hurst* and *Caldwell*. Although the order provided no reasoning for the denial, Petitioner acknowledges that his arguments involve overcoming procedural barriers, some of which stem from recent panel precedent of this Court, and that those barriers may have at least partially driven the COA denial. Petitioner also

recognizes that *Hurst* claims have become familiar in this Court and are often rejected on procedural grounds like retroactivity. But those procedural issues are not reasons to deny a COA in Petitioner's specific case, which implicates unique circumstances and arguments, and has been the subject of multiple dissents in the United States Supreme Court based specifically on *Hurst* and *Caldwell*. The panel should grant reconsideration and expand the COA to include these issues.

Reasonable jurists could debate whether Petitioner's case is distinguishable from *Knight v. Florida Department of Corrections*, 936 F.3d 1322 (11th Cir. 2019). Unlike Petitioner's case, *Knight* involved a *Hurst* claim only and did not address *Caldwell*. As Petitioner has made clear, *Caldwell* is a crucial component of his claim and does not implicate the *Hurst* retroactivity issues addressed in *Knight*. Reasonable jurists could debate the district court's novel "combined" *Hurst-Caldwell* retroactivity analysis—an analysis not supported by *Knight*. *See* ECF No. 54 at 49.

Petitioner's *Caldwell* arguments were a primary focus of Justice Sotomayor's two dissents, in which she urged the Supreme Court to "intervene in the face of this troubling situation." *Guardado v. Jones*, 138 S. Ct. 1131, 1134 (2018); *Guardado v. Florida*, 139 S. Ct. 477 (2018); *see also Reynolds v. Florida*, 139 S. Ct. 27, 32-36

(2018) (addressing *Guardado* and related certiorari denials). Justice Sotomayor is a reasonable jurist who has debated these issues in Petitioner's case.[2]

Justice Thomas has debated them on the other side, addressing Petitioner's case specifically. *Reynolds*, 139 S. Ct. at 30 (2018) (Thomas, J., concurring in denial of certiorari) (arguing that the dissent "need not worry about the jury's decisions" in Petitioner's and other cases under *Hurst* and *Caldwell*).

In addition, the *Knight* petitioner did not squarely present an argument, as Petitioner has, that *Hurst* did not announce a new rule of constitutional law but only clarified that *Ring v. Arizona*, 536 U.S. 584 (2002), applied in Florida. Reasonable jurists could debate whether *Hurst* applied an old rule announced in *Ring*. *Hurst* itself acknowledged that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's" and that the differences between the two states' schemes were "immaterial" for Sixth Amendment purposes. *See* 577 U.S. at 98. The Florida Supreme Court recognized the period between *Ring* and *Hurst* as

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[2] Although Petitioner's case is now in a federal habeas posture, there is no reason to believe Justice Sotomayor would cease debating his *Hurst* and *Caldwell* issues. *Cf. Andrus v. Texas*, No. 21-6001, 2022 WL 2111383, at *12 (June 13, 2022) (Sotomayor, Breyer, Kagan, JJ., dissenting from denial of certiorari) ("This Court's failure to act does not mark the end of the road for Andrus . . . . He still may seek federal habeas review of the Court of Criminal Appeals' ultimate denial of relief, a denial that plainly 'was contrary to, or involved an unreasonable application of, clearly established' precedents of this Court. 28 U.S.C. § 2254(d)(1)."); *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 n.3, 2413 (2021) (Sotomayor, Kagan, JJ., dissenting) (dissenting in federal habeas after previously dissenting in state postconviction).

a "fourteen-year delay in applying *Ring* to Florida." *Mosley v. State*, 209 So. 3d 1248, 1283 (Fla. 2016). These old-rule arguments were not presented in *Knight*.

Even accepting the premise that *Hurst* was a new rule, reasonable jurists could debate in Petitioner's case whether *Knight*'s holding regarding the interplay between *Teague v. Lane*, 489 U.S. 288 (1989), and *Danforth v. Minnesota*, 552 U.S. 264 (2008), should be subject to reconsideration. The idea that a federal analysis must always supplant a state court's grant of retroactivity under state law—as occurred here—misunderstands the relationship between *Teague* and *Danforth*. States are entitled to enforce retroactivity rules that are more protective than *Teague*. *See Danforth*, 552 U.S. at 266. That right, grounded in principles of comity and federalism, is impeded if it is subject to second-guessing by federal courts. *Id.* at 279-80. Particularly because of *Knight*'s recency, and the fact that the Supreme Court has not endorsed its novel analysis, the issues it addressed remain debatable.

The mere fact that *Knight* is panel precedent is not an appropriate reason to deny Petitioner a COA. To the extent this Court suggested otherwise in *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015), that approach should not be followed because it violates the COA statute and Supreme Court precedent, and has the practical effect of preventing precedent from ever being reconsidered in favor of habeas petitioners. For COA purposes, reasonable jurists need not be jurists bound by Eleventh Circuit panel precedent. If *any* reasonable

jurist could debate an issue, even if none would ultimately rule for the petitioner on the merits, a COA should issue. *See Miller-El*, 537 U.S. at 336.

The Supreme Court's decision in *McKinney v. Arizona*, 140 S. Ct. 702 (2020), does not require denying a COA either. Reasonable jurists could debate Petitioner's argument that *McKinney* does not foreclose *Hurst* retroactivity in his case. *McKinney* analyzed a pre-*Ring* death sentence, not a post-*Ring* death sentence. That matters because although the death sentence Arizona imposed on McKinney in 1996 was valid under then-existing law, the same is not true of the post-*Ring* death sentence that Florida imposed on Petitioner in 2005, during what the Florida Supreme Court called the "fourteen-year delay in applying *Ring* to Florida." *Mosley*, 209 So. 3d at 1283. *McKinney* is also distinguishable because, even if it is somehow interpreted to hold that *Hurst* is never retroactive under *Teague*, *McKinney* did not address a state court's decision under *Danforth* to grant state-law *Hurst* retroactivity. *McKinney*'s applicability to Petitioner is debatable enough for a COA.

Given the flaws with the district court's procedural analysis, *see* COA App. at 39-45, reasonable jurists could debate whether this panel should grant expand the COA to review the analysis the Florida Supreme Court applied: an automatic-harmless-error rule for any where the pre-*Hurst* advisory jury voted unanimously in favor of a death recommendation. *See Davis v. State*, 207 So. 3d 142 (Fla. 2016).

Respondent acknowledged that the Florida Supreme Court applied an "unusual harmless error analysis" in this case. Resp. at 32-33. But Respondent is wrong that harmlessness is a matter of state law only.[3] Justice Sotomayor and other Justices have noted and debated the federal constitutional flaws with the Florida Supreme Court's automatic-harmless-error rule. *See, e.g.*, *Reynolds*, 139 S. Ct. at 27-29 (Breyer, J., statement respecting denial of certiorari); *Kaczmar v. Florida*, 138 S. Ct. 1973, 1973-74 (2018) (Sotomayor, J., dissenting from denial of certiorari); *Middleton v. Florida*, 138 S. Ct. 829, 829-30 (2018) (Ginsburg, Breyer, Sotomayor, JJ., dissenting from denial of certiorari); *Truehill v. Florida*, 138 S. Ct. 3, 3-4 (2017) (Ginsburg, Breyer, Sotomayor, JJ., dissenting from denial of certiorari).

This panel should grant reconsideration and expand the COA to include Petitioner's *Hurst* and *Caldwell* claim to address the Florida Supreme Court's "myopic focus on one factor: whether the advisory jury's recommendation for death was unanimous," in purporting to conduct individualized harmlessness review, *Reynolds*, 139 S. Ct. at 33 (Sotomayor, J., dissenting from denial of certiorari).

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[3] Respondent offered several other procedural theories for why Petitioner's arguments should not be heard on the merits, including the fact that one of the aggravators underlying his death sentence was based on a prior felony conviction, and pointed to the Florida Supreme Court's alteration of some of its state-law *Hurst* precedent since Petitioner's appeal. *See* Resp. at 32-35. But none of these issues were part of the state courts' or the district court's decisions in Petitioner's case and they are not a reason to deny a COA now. *See Guardado v. Jones*, 226 So. 3d 213, 215 (Fla. 2017) ("We agree with Guardado that *Hurst* is applicable in his case.").

VII. Conclusion

The Court should reconsider the COA's restriction on Petitioner's mitigation-ineffectiveness arguments, expand the COA to include his ineffectiveness argument regarding Juror Johns, and expand the COA to include his *Hurst* and *Caldwell* claim.

Respectfully submitted,

/s/ Sean Gunn
Sean Gunn
Mary Harrington
Amy Greer
Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough St., Suite 4200
Tallahassee, FL 32301-1300
(850) 942-8818
sean_gunn@fd.org

Counsel for Petitioner-Appellant

CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Rules 32(f) and 27(a)(2)(B), this document contains 5,195 words.

This motion also complies with the typeface requirements of Rules 27(d)(1)(E) and 32(a)(5), and the type-style requirements of Rules 27(d)(1)(E) and 32(a)(6), because it uses a proportionally spaced 14-point font (Times New Roman).

/s/ Sean Gunn
Sean Gunn

CERTIFICATE OF SERVICE

On June 28, 2022, this motion was served electronically to all counsel through the Court's CM/ECF filing system.

/s/ Sean Gunn
Sean Gunn

Eleventh Circuit Order Granting Partial COA (June 7, 2022)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 22-10957-P

JESSE GUARDADO,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Jesse Guardado's motion for a certificate of appealability is GRANTED IN PART and DENIED IN PART. The motion is granted as to parts of two claims:

1. Whether the Florida Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984) on Guardado's claim that his penalty-phase counsel was ineffective by failing to investigate and present mitigating evidence adequately, but only to the extent the particular legal theory and the specific factual foundation on which the mitigating evidence claim rests were raised and exhausted in the state courts.
2. Whether the Florida Supreme Court unreasonably applied *Strickland* on Guardado's claim that his penalty-phase counsel was ineffective by failing to challenge for cause or peremptorily strike jurors Pennington, Hall, and Cornelius.

As to all other claims and subclaims, we deny a certificate of appealability because they are not debatable, *Buck v. Davis*, 137 S. Ct. 759, 774 (2017), and they do not deserve encouragement to proceed further, *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

/s/ Robert J. Luck
UNITED STATES CIRCUIT JUDGE

District Court Order Denying § 2254 Relief (January 19, 2022)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

JESSE GUARDADO,

Petitioner,

v. CASE NO. 4:15cv256-RH

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

_____/

ORDER DENYING THE PETITION

The petitioner Jesse Guardado pled guilty in Florida state court to first-degree murder. After a penalty trial, a jury unanimously recommended the death sentence, and the judge imposed it. Mr. Guardado now challenges the sentence by petition for a writ of habeas corpus under 28 U.S.C. § 2254.

Mr. Guardado asserts his attorneys rendered ineffective assistance during jury selection and by failing to adequately investigate and present mitigation evidence. Mr. Guardado asserts he should have been allowed to represent himself during the trial, even though he asked to be represented by counsel, and at a post-trial sentencing hearing. He asserts the sentencing procedure was unconstitutional

under *Hurst v. Florida*, 577 U.S. 92 (2016), which entitles a defendant to a jury trial on any fact that makes the defendant eligible for a death sentence, and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), which holds it unconstitutional to tell a death-penalty jury its verdict will be advisory if it will be binding. Finally, Mr. Guardado asserts two death-penalty aggravating factors—especially heinous, atrocious, or cruel ("HAC") and cold, calculating, and premediated ("CCP")—were unconstitutionally applied. This order denies the petition.

I. Background

It is uncontested that Mr. Guardado murdered a 75-year-old woman—a friend who had provided him with financial assistance, a place to live, and help getting a job. Mr. Guardado pled guilty. He admitted robbing and murdering the victim, who lived in a secluded area, because he wanted money to continue his recent cocaine binge. He described hitting the victim repeatedly on the head with a "breaker bar," stabbing her numerous times with a knife, and slashing her throat. He took her jewelry, checkbook, briefcase, cell phone, and purse.

Court-appointed counsel represented Mr. Guardado at a jury trial in which the only contested issue was whether Mr. Guardado should be sentenced to death. The court told the jury, right at the outset, that its verdict would be a recommendation, not a binding determination of the sentence. The jury unanimously recommended a death sentence. The court conducted a hearing under

Spencer v. State, 615 So. 2d 688, 691 (Fla. 1993), to allow each side to present additional evidence or information and to allow Mr. Guardado to be heard in person.

The court entered a written order finding five aggravating circumstances, no "statutory" mitigating circumstances, and 19 "nonstatutory" mitigating circumstances, that is, mitigating factors properly considered under Florida Statutes § 921.141(6)(h). That statute provides for consideration of "any other factors in the defendant's background that would mitigate against imposition of the death penalty."

The aggravators were (1) the murder was committed by a person under sentence of imprisonment or on conditional release, § 921.141(5)(a), Fla. Stat. (2005); (2) the defendant was previously convicted of another . . . felony involving the use or threat of violence to the person, *id*. § 921.141(5)(b); (3) the murder was committed while the defendant was engaged in the commission of, or attempt to commit, or escape after committing, a robbery with a weapon, *id*. § 921.141(5)(d); (4) the murder was especially heinous, atrocious, or cruel, *id*. § 921.141(5)(h); and (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, *id*. § 921.141(5)(i).

The mitigators were that Mr. Guardado (1) entered a plea of guilty without asking to bargain or for a favor, (2) fully accepted responsibility, (3) according to

expert testimony, is not a psychopath and would not be a danger in prison if given a life sentence, (4) could contribute to the prison population as a plumber or an expert in wastewater treatment if given a life sentence, (5) fully cooperated with law enforcement, (6) has a good jail record with no disciplinary reports, (7) has consistently shown great remorse, (8) has suffered with lifelong addiction to crack cocaine which is the basis for his crimes, (9) has a good family and support that could help him contribute in prison, (10) would try to counsel other inmates if given life in prison, (11) suffered major trauma as a child due to crib death of a sibling, (12) suffered major trauma as a child by being sexually molested by a neighbor, (13) has a lengthy history of substance abuse in early teens graduating to alcohol and cocaine, with substance abuse treatment at about age 14 or 15, (14) suffered the death of his biological father before developing lasting memories of him, (15) was raised by his loving, thoughtful, and concerned mother and stepfather and recognized that he caused them discord with his substance abuse, (16) was under emotional duress during the time frame of the crime, (17) does not suffer a mental illness or major emotional disorder, (18) offered to release his personal property and truck to his girlfriend, and (19) previously contributed to state prison facilities as a plumber and in wastewater treatment. The sentencing order specified the weight assigned to each mitigating factor, including great

weight to factors (1), (2), (5), and (7). The remaining factors were assigned either moderate or little weight.

The judge sentenced Mr. Guardado to death.

Mr. Guardado appealed to the Florida Supreme Court, which affirmed. *Guardado v. State*, 965 So. 2d 108 (Fla. 2007). The court rejected Mr. Guardado's claim that the trial court should have allowed him to represent himself at the *Spencer* hearing. *Id.* at 113-15. The court held that the HAC and CCP aggravators were supported by the evidence. *Id*. at 117. The court rejected the claim that the death sentence was imposed in violation of *Ring v. Arizona*, 536 U.S. 584 (2002), under which a defendant has the right to a jury trial on any fact that makes the defendant eligible for a death sentence. *Guardado*, 965 So. 2d at 116-18.

Mr. Guardado moved for postconviction relief under Florida Rule of Criminal Procedure 3.851. The trial court conducted an evidentiary hearing and denied relief. The Florida Supreme Court affirmed. *Guardado v. State*, 176 So. 3d 886 (Fla. 2015). The court rejected Mr. Guardado's claim that his counsel rendered ineffective assistance during jury selection and on mitigation.

Mr. Guardado filed this federal § 2254 petition. The case was stayed to allow him to exhaust a state claim under *Hurst v. Florida*, 577 U.S. 92 (2016), in which the Supreme Court held Florida's capital sentencing scheme unconstitutional under *Ring*. Mr. Guardado filed a successive motion for

postconviction relief in the state trial court based on *Hurst*, but the proceeding was continued to allow him to seek *Hurst* relief from the Florida Supreme Court. There he filed a petition for a writ of habeas corpus based on *Hurst*. The court denied the petition. *Guardado v. Jones*, 226 So. 3d 213 (Fla. 2017), *cert. denied*, 138 S. Ct. 1131 (2018). The court held, based on its precedent, that there was error under *Hurst* but that the error was harmless because the jury recommendation for death was unanimous. *Id.* at 215.

The case returned to the trial court, where successive postconviction relief was denied for the same reasons set out in *Guardado v. Jones*. On appeal from that order, the Florida Supreme Court affirmed, noting that his argument was nearly identical to that contained in his unsuccessful petition for a writ of habeas corpus. *Guardado v. State*, 238 So. 3d 162, 163 (Fla.), *cert. denied*, 139 S. Ct. 477 (2018).

Mr. Guardado now asserts five claims in this court: ineffective assistance during jury selection; ineffective assistance on mitigation; denial of the right of self-representation; violation of *Ring*, *Hurst,* and *Caldwell*; and unconstitutional application of the HAC and CCP aggravators.

II. Standard of Review

Under the Antiterrorism and Effective Death Penalty Act, a federal habeas court may set aside a state court's ruling on the merits of a petitioner's claim only if the ruling "was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). A long and ever-growing line of cases addresses these standards in depth. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("If this standard is difficult to meet, that is because it was meant to be."); *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1125-26 (11th Cir. 2012).

III. New Evidence

Mr. Guardado has requested an evidentiary hearing or, in the alternative, expansion of the record to include numerous declarations, reports, letters, and documents that were not submitted in state court. But under 28 U.S.C. § 2254(d)(1), review of a claim adjudicated on the merits in state court—this includes Mr. Guardado's claims—is "limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). *See also Holland v. Jackson*, 542 U.S. 649, 652-53 (2004) (applying the § 2254(e)(2) restriction on federal evidentiary hearings to a request to expand the record without a hearing); *McKiver v. Sec'y, Fla. Dep't of Corr.*, 991 F.3d 1357, 1367 (11th Cir. 2021) (rejecting a request to consider affidavits and noting the court was "limited to reviewing the reasonableness of the state appellate court's decision based on the

record that McKiver made in state court"); *Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 1254, 1263 (11th Cir. 2014).

In an effort to avoid this limitation, Mr. Guardado cites *Martinez v. Ryan*, 566 U.S. 1 (2012). There the Court held that a § 2254 petitioner can assert an ineffective-assistance-of-trial-counsel claim that was procedurally defaulted in state court if the reason for the default was ineffective assistance in the state postconviction proceeding where the claim could first have been asserted. But Mr. Guardado presented his ineffective-assistance-of-trial-counsel claim on the merits in the state postconviction proceeding; he did not default the claim. And with diligence, he could have presented the same materials he proffers now.

Mr. Guardado says his postconviction counsel, too, rendered ineffective assistance, but he has not shown that is so. If a claim as thin as this was sufficient to entitle a petitioner to a new evidentiary hearing in federal court, *Pinholster* would be a dead letter, or nearly so. Mr. Guardado is not entitled to submit new evidence in this court. And for what it may be worth, the proffered materials would not change the result, anyway.

IV. Ineffective Assistance During Jury Selection

Mr. Guardado contends that his counsel rendered ineffective assistance during jury selection. To prevail, he must meet the governing two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so

> serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

The requirements for deficient performance and prejudice set a high bar for challenges to an attorney's decisions about whether to challenge for cause or peremptorily strike—or not strike—any given juror. *See, e.g.*, *Harvey v. Warden*, 629 F.3d 1228, 1239–43 (11th Cir. 2011) (rejecting a claim of this kind).

Mr. Guardado complains of his attorney John Jay Gontarek's performance during jury selection in general and, more specifically, about his failure to challenge for cause or peremptorily strike three jurors. Mr. Guardado has fallen far short of the showing required to sustain the ineffective-assistance challenge to Mr. Gontarek's overall performance on jury selection.

This order refers to the jurors at issue on the more specific complaint by the first letters of their surnames: P, H, and C.

Several years before the murder, the victim helped juror P's son find a home to purchase. But juror P said during jury selection she could be fair, and she said she was only "somewhat" in favor of the death penalty. Mr. Gontarek testified at the postconviction hearing that he believed she would be a favorable juror because

of her lukewarm support of the death penalty. This was within the range of strategic decisions an effective attorney might make.

Some of juror H's relatives knew the victim and had expressed positive opinions of her. In addition, juror H had sold insurance to the state's lead investigator James Lorenz and knew family members of other law enforcement officers involved in the case. Mr. Gontarek testified that he did not intend to attack any officer's credibility and instead expected to elicit their testimony that Mr. Guardado had fully cooperated. Mr. Gontarek believed a juror with a connection to law enforcement officers might be favorably impressed with the cooperation and might evaluate the case unemotionally. This was within the range of strategic decisions an effective attorney might make.

Juror C's great aunt and uncle were killed in a robbery roughly 25 years before Mr. Guardado's trial. Juror C knew only what he had been told by family members and said this would not affect his jury service. Juror C also said he was only somewhat in favor of the death penalty and believed a life sentence might be more severe than death. Mr. Gontarek testified he did not challenge or strike juror C because of his lukewarm support of the death penalty. This was within the range of strategic decisions an effective attorney might make.

Mr. Guardado actively participated in jury selection and took no issue with the decisions on these three jurors or any others. The postconviction trial court

found that Mr. Gontarek's performance was not deficient. The Florida Supreme Court agreed, concluding no juror bias had been shown and that the strategic choices in exercising peremptory strikes—the defense used all but one of its allotment—were reasonable.

This ruling was correct. Even more clearly, the ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the state-court record. Mr. Guardado is not entitled to relief on this claim.

A final word about jury selection is in order. In state court, Mr. Guardado complained of Mr. Gontarek's performance as to two jurors who were excused for cause, but Mr. Guardado does not repeat that complaint here. Mr. Guardado complains here of Mr. Gontarek's performance as to a juror J, but he did not assert that claim in state court, so the claim is procedurally defaulted. *See* 28 U.S.C. § 2254(b)(1)(A) (requiring exhaustion of claims in state court). He has not alleged cause and prejudice or a fundamental miscarriage of justice as required to assert an unexhausted claim. *See, e.g.*, *Marek v. Singletary*, 62 F.3d 1295, 1301-02 (11th Cir. 1995).

V. Mitigation

Mr. Guardado claims his counsel rendered ineffective assistance by failing to adequately investigate and present mitigation evidence. Analyzing the claim

requires comparing the evidence presented during the trial and *Spencer* hearing, on the one hand, to the evidence presented at the postconviction hearing, on the other hand. This order summarizes the evidence, the state postconviction trial court's ruling, and the Florida Supreme Court's ruling. The order then addresses the claim as presented in this court.

A. The State's Trial Evidence

The lead investigator, Mr. Lorenz, obtained a recorded statement from Mr. Guardado. It was admitted into evidence and played during the trial. In the statement, Mr. Guardado told investigators he drove to the victim's home in a friend's car. It was late at night, and when he knocked on her door, she answered in "bed clothes." He said he went there because he needed money to fix his truck and knew the victim sometimes carried money in her wallet. When she answered, he said he needed to use the phone. He did not ask her for money because he had asked her before and knew she would not provide it. He said the request to use the phone was "an excuse to get her to open the door."

He said after she opened the door and turned around, he "hit her in the head with a breaker bar" that he had taken out of the car he was driving. He thought her fingers were broken when he hit her with the breaker bar when she put her hands up. He said he "thought that that would kill her, but it didn't. I hit her repeatedly with it. She fell. Just didn't seem like she was going to die." He said, "I tried to

stab her in the heart so that it would end it for her; so it would be over with. . . . I just thought it would be done and over with and it wouldn't be no more to it. But it just didn't seem to go that way."

Mr. Guardado told the officers that he stabbed her with an old kitchen knife:

> I tried to stab her once in the heart. And—And I don't mean to imply that she was cattle or anything, but back in my earlier days of incarceration, I worked in the slaughterhouse at Marianna Boys School; I used to slaughter beef. I thought that by cutting her jugular, that I may speed things along. So I made a slash across her throat. I don't know; I don't know. She may have been dead by then because it didn't seem to bleed much.

He said he thought he only slashed her neck once.

He said he had taken the knife with him to the victim's residence and thought he had stopped by his truck to retrieve it. The breaker bar was already in the car the friend loaned him. He told officers that when he knocked on the victim's door, he had the items in the small of his back. He said that when he went there, he "knew what was going to happen," adding, "that's what I went there to do; to kill her and get the money." He got about $80, which he said he used to buy drugs.

Mr. Guardado said he took the victim's purse, a briefcase, and a jewelry box. He said he burned his clothes. He said he tried to burn the knife, but the metal didn't burn. He tossed the knife and the breaker bar in different places, perhaps in a watery place, as he was driving. He told officers he thought he discarded the

jewelry box because it didn't look like it had anything of value. Later, he cashed some checks from the victim's purse. He said he bought crack and smoked it.

Mr. Guardado explained how he came to know the victim. After he was released from prison in May 2003, he found work as a water-treatment operator and needed a place to stay. He rented a trailer from the victim, but she let him out of the rental contract when he found a place he could stay for free. He began using cocaine, and it became an obsession.

When he again needed a place to stay, he went to the victim, who "took me into her house in the middle of the night; put me up for a few days in her own home; and offered me a rental on her property down there." A friend lived with him, but she could not deal with his cocaine use and moved out. He said he "lost it" and "just gave up." He said he paid the victim rent but would sometimes go to her and get some of the money back to get through the week or to buy drugs.

Mr. Guardado acknowledged that earlier on the day of the murder, at a grocery store, he put a knife to an employee's throat in an effort to get money to buy cocaine. When the man started yelling, Mr. Guardado left.

On cross-examination, Mr. Lorenz said Mr. Guardado had been cooperative. Mr. Lorenz said that when Mr. Guardado was alone with one of the officers, he suggested to the officer that if she would let him run, she could shoot him. Mr. Lorenz said that Mr. Guardado seemed remorseful and said the victim was a good

lady who treated him well. Mr. Lorenz said that when Mr. Guardado confessed, he did not attempt to bargain for a lesser sentence or ask for any favors. Mr. Lorenz said Mr. Guardado was straightforward and, in addition to providing information about the murder, provided information about drug dealers.

The medical examiner testified that the victim had traumatic head injuries and wounds of the neck, chest, hands, arms, buttocks, and fingers. The victim had at least 12 abrasions, contusions, and lacerations of the head and face. There was a little bleeding on the brain, and she had at least two incise wounds to the neck made with a sharp weapon. She had at least five stab wounds to her chest, abrasions, contusions, and lacerations of both hands, arms, and buttocks, as well as fractures of her fingers on both hands. The victim also had incise wounds to her right hand.

The medical examiner said the victim had defensive wounds, that she was conscious when she was beaten with the breaker bar and when she was stabbed, and that she was still alive when her neck was slashed, as evidenced by her "breathing in some blood."

The state presented the testimony of two sons of the victim and a family friend. They painted an impressive picture of the victim: committed to her family, successful in the real estate business, supportive of the community and of struggling families, active and in good health.

The state introduced certified copies of Mr. Guardado's prior Florida convictions for armed robbery, robbery with a weapon, robbery, and robbery with a deadly weapon. A probation officer testified that at the time of the murder, Mr. Guardado was being supervised on conditional release related to three of the convictions.

B. The Defense Trial Evidence

Mr. Guardado called two witnesses at trial: clinical psychologist Dr. James Larson and Mr. Guardado himself. The defense also submitted and published a letter confirming Mr. Guardado had no disciplinary or jail incident reports while detained prior to trial. The defense submitted but did not publish a letter from Patsy Umlauf, Mr. Guardado's mother.

In the letter, Ms. Umlauf described Mr. Guardado's childhood as fairly normal but noted that his biological father died when Mr. Guardado was very young and an infant brother also died. Ms. Umlauf remarried when Mr. Guardado was about age five, and his relationship with his stepfather was "good." Ms. Umlauf said Mr. Guardado and his siblings regularly attended church. She said she was not aware of any problems in his family life, and that his siblings all lead productive, professional lives. She noted that Mr. Guardado quit school and began using drugs in his teen years. She indicated that after Mr. Guardado was released from a long prison term, he was unprepared for his new life and had trouble

dealing with the pressures of his job, his romantic relationships, and an unfamiliar lifestyle. Ms. Umlauf said the victim was like a second mom to Mr. Guardado and that his crime was one of desperation driven by drugs. Ms. Umlauf was present at the trial but did not testify.

Dr. Larson testified that he interviewed Mr. Guardado four times, reviewed the arrest reports and depositions of law enforcement investigators, and became aware of Mr. Guardado's "family background" and work experience. Dr. Larson performed intelligence testing and psychological testing, finding that Mr. Guardado's IQ was in the upper part of the average range and that he had the intellectual abilities to master complex tasks. Dr. Larson found no indication of mental illness and found Mr. Guardado's mental processes were well organized, logical, and goal directed. The Minnesota Multiphasic Personality Inventory test showed no indication of mental illness but did show evidence of depression, which Dr. Larson characterized as "situational" due to current circumstances and the murder. Dr. Larson mentioned that Mr. Guardado's paranoia scale was elevated, a circumstance Dr. Larson attributed to Mr. Guardado's incarceration and worry or anxiety. Dr. Larson did not discuss Mr. Guardado's family background or his childhood. Dr. Larson made no mention in his testimony of sexual abuse as a child even though a report of abuse appeared in Dr. Larson's written report, later submitted into evidence at the *Spencer* hearing.

Dr. Larson testified that the testing scores relating to substance abuse were elevated, which was not unusual because of Mr. Guardado's history of substance-abuse since adolescence. Dr. Larson opined that Mr. Guardado was not a psychopath, was empathetic and caring, had a conscience, felt remorse, and would make a good adjustment to prison life. Based on Mr. Guardado's experience working in wastewater and freshwater management and his training as a plumber, Dr. Larson opined that Mr. Guardado could contribute in those areas if given a life sentence.

Dr. Larson opined that when the murder was committed, Mr. Guardado was under "considerable stress" due to his difficulty adjusting to life outside of prison, a DUI conviction and job loss, being out of touch with society, and his economic problems. Dr. Larson testified that Mr. Guardado turned to old habits of using cocaine and relapsed, going on a cocaine binge for approximately two weeks before the murder. Dr. Larson testified that Mr. Guardado exhibited significant genuine remorse for the murder, which he said "tragically, was a drug related incident."

Dr. Larson did not offer an opinion that any statutory mitigation existed. On cross-examination, he confirmed that when the murder occurred, Mr. Guardado was not under any extreme mental or emotional disturbance. Dr. Larson said Mr. Guardado's capacity to appreciate the criminality of his conduct and to conform to

the requirements of law were not substantially impaired. Dr. Larson agreed that the stress Mr. Guardado suffered from his cocaine addiction at the time of the murder was "absolutely" self-imposed. In addition, Dr. Larson agreed with the prosecutor's summary of his testimony:

> So to sum up your testimony, basically, it's your opinion that Jesse Guardado is a person who is not insane, suffers from no mental illnesses, suffers from no emotional disorders, suffers from no brain damage, suffers from no psychosis, knows right from wrong, knew it at the time he murdered [the victim], knew what he was doing then, and had the capacity to appreciate the wrongness and criminality of the murder of [the victim], and committed that murder solely to obtain more crack cocaine?

Dr. Larson responded, "That is my analysis. That's a good summary."

Mr. Guardado testified that he had the best mother and that she and his stepfather did a fine job of raising four boys. He also has a stepsister and stepbrother. He testified one brother is a heavy construction operator, one brother is an aircraft mechanic, one brother does flooring work, a stepbrother is a respiratory therapist, and a stepsister is an emergency-room nurse.

Mr. Guardado testified that he trained in wastewater management while incarcerated and acted as an on-call plumber in prison. He described being employed in wastewater management on his release from prison, but he lost the job when he was convicted for DUI. He then worked at another wastewater treatment plant. He said his parents and the victim helped him with living accommodations, and the victim helped him get the second wastewater job. He said that due to the

stress of reintegrating into society and difficulty with his personal relationships, he couldn't get away from cocaine and used it more and more. He said he used the drug heavily in the two weeks before the murder, and that "it was an every awake moment that [his] mind was geared to finding and getting crack." Mr. Guardado testified that when a person in that situation starts to come down, they immediately start to seek more, and that he was made "crazy with need." He admitted he knew right from wrong during the two weeks preceding the murder and went to the victim's house to get money, doing "whatever it took," but that he was trying to take responsibility for his actions. He said there was no excuse for what he did to the victim, and he still does not know why he did it.

The defense rested at the conclusion of Mr. Guardado's testimony. The judge asked Mr. Guardado himself whether he had any other evidence or mitigation he wished to present. Mr. Guardado said he would like to speak with his attorneys, and the court agreed he could, but asked him to state at that time whether he knew of any other witnesses or mitigation he wished to present. Mr. Guardado answered, "Not to my knowledge." The next day, after speaking with his counsel, Mr. Guardado testified under oath that he had no other witnesses or mitigation that he wished to present.

C. The Spencer Hearing

After return of the verdict, the court conducted a *Spencer* hearing—a hearing at which each side could present additional evidence or information for consideration on sentencing. The state presented a victim impact letter from the victim's sister. Mr. Guardado, through counsel, presented Dr. Larson's written report.

Mr. Guardado asked to speak to the judge privately. The judge denied the request. Mr. Guardado said, "I have no knowledge of any further mitigation that I can present." When asked to confirm that statement, Mr. Guardado said there were things he could not discuss in public.

D. The Postconviction Hearing

After the judgment and death sentence were affirmed on direct appeal, Mr. Guardado filed and later amended a motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. The court conducted an evidentiary hearing on the same ineffective-assistance claims now at issue here.

Ms. Umlauf—Mr. Guardado's mother—testified she was present during the trial and was willing to testify, but counsel told her doing so might upset Mr. Guardado. She testified it was counsel's decision that she not testify. She said she could have told the jury about Mr. Guardado's early years, the loss of his father and brother, and about his being sent to a juvenile facility. She testified that Mr.

Guardado had a drug problem at an early age. She described how she attempted to get him settled when he was released from prison in 2003 and how he left his first job to take one in another city, where he had little backup. She described how he struggled to learn how to live in a society in which everything was new to him, including bank accounts, credit cards, cell phones, and computers. Just days before the murder, he emailed her that he was going down a bad road and could not stop.

Mr. Guardado's friend Elizabeth Darby Padgett testified that she met Mr. Guardado in 2003 through his girlfriend, Donna Porter, with whom Mr. Guardado was deeply in love. Ms. Padgett said the group of friends went out to clubs, and he acted as their protector. After he and Ms. Porter broke up, Mr. Guardado began to drink more and began using methamphetamine and cocaine. He appeared tired and haggard and lost weight. Although Ms. Porter had allowed him to stay in her residence for a while, she made him move out when he began to change. Ms. Padgett testified that she would have testified at trial if asked. A letter from Ms. Padgett was also submitted into evidence.

Former Department of Corrections Major Rhodene Mathis testified that she worked at the Sumter Forestry Camp until 2006 and that Mr. Guardado had been at the camp, although he worked outside the camp at a wastewater-treatment facility. She could not recall him, other than his name, but the camp was minimum custody,

and no one could be assigned there if they had disciplinary reports. To her knowledge, he was a good worker.

Joanna Johnson, a social worker specializing in addiction and substance-abuse counseling, testified that she is the co-owner of treatment centers. Along with a psychologist partner, she has experience in assessments, including dual diagnoses—that is, diagnoses involving both mental health and substance abuse. She met with Mr. Guardado, administered the Addiction Severity Index test, and used various clinical tools to assess the severity of his substance abuse. She said there was a "real possibility" of "psychosis" at the time of the murder resulting from the deep influence of cocaine and the chronic run of alcohol and drugs for a prolonged period. But she did not believe Mr. Guardado was psychotic. She opined that the effect of the chronic drug use before the murder and the urgent need to obtain more drugs constituted an extreme emotional disturbance.

Ms. Johnson said the circumstances "all geared towards the fact that this was now a mental health disorder." She said Mr. Guardado's substance abuse was such that he could not conform his conduct to what is required. She disagreed with Dr. Larson's testimony at the trial that Mr. Guardado did not suffer from emotional problems; she said he was under emotional stress due to his drug dependency.

Ms. Johnson testified that Mr. Guardado began use of alcohol and marijuana in his early teens and proceeded quickly into intravenous cocaine use. She opined

that this behavior must have resulted from extreme emotional stress in his early life. She testified that his long prison term may have forced a level of sobriety from alcohol and drugs, but that this was not recovery. When he returned to liberty, he found himself in stressful circumstances arising from his employment, finances, relationships, and changed circumstances, resulting in a "full blown" relapse. She testified that his use of crack along with methamphetamine created a more addictive high that made him unable to control emotion or stop the constant need for the drug. She said he exhibited irrational behavior consistent with "drug delirium," in which the drug is the "driver of the train." Ms. Johnson opined that Mr. Guardado suffered from compulsive obsessive behavior based on substance abuse and chronic dependency on cocaine and alcohol. She opined that Mr. Guardado suffered from polysubstance dependence, a disorder listed in the Diagnostic and Statistical Manual—IV.

Forensic psychologist Greg Prichard testified that he performed a psychological evaluation of Mr. Guardado and reviewed pertinent trial materials, investigative reports, Dr. Larson's report, and historical information. Dr. Prichard interviewed Mr. Guardado about the offense and the events before and after it. He concluded that two statutory mitigators were applicable—that the capital felony was committed while Mr. Guardado was under the influence of extreme mental or

emotional disturbance and that his capacity to appreciate the criminality of his conduct or conform it to the requirements of law was significantly impaired.

Dr. Prichard placed emphasis on the significant impairment of Mr. Guardado's capacity to conform his conduct to the requirements of law. When the murder occurred, Mr. Guardado had been in full-blown addiction and relapse for two weeks, binging on cocaine. Dr. Prichard explained that binging on cocaine results in an irrational dynamic in which the person becomes obsessive, with a strong compulsion in pursuit of more of the drug, and is unable to apply "moral brakes" or reason. He said there was no way Mr. Guardado was able to reason through his behavior in a rational, sound, logical way on the night of the murder.

In finding that the statutory mitigator of extreme mental or emotional disturbance applied, Dr. Prichard explained that events in the weeks preceding the murder were stressors that acted as a catalyst to return to drugs. He cited Mr. Guardado's employment situation, his lost relationship with Ms. Porter, financial problems, and depression and anxiety, all "spinning out of control." He opined that people like Mr. Guardado who become addicts usually do so because of childhood difficulty such as sexual abuse, physical abuse, or alienation from family. If not treated, such individuals turn to self-medication with substances. Dr. Prichard also cited Mr. Guardado's difficulty in assimilating into society after his many years in the structured environment of prison.

Dr. Prichard testified that Mr. Guardado's intravenous use of cocaine as a young teen suggests extreme emotional pain, alienation, and an inability to deal with emotional aspects of his environment. He opined that Mr. Guardado did not have a major mental illness or psychosis, but likely had a depressive or anxiety illness and a history of depression and anxiety. He also diagnosed Mr. Guardado with polysubstance dependence disorder.

Mr. Guardado also introduced letters at the hearing. His stepsister Linda Snide-Warren said that when Mr. Guardado was released from prison, he was very optimistic and eager to learn about life outside prison. He counseled his teenage nephew about staying out of trouble and listened when his own parents advised him about job options, living arrangements, and dating. When he moved to the job away from home, he lost his support system and fell back on his coping mechanisms of drugs and alcohol, which took over.

Mr. Guardado's brother Bennie Guardado wrote that two brothers and their father died when Mr. Guardado was a young child. Their mother remarried a good man, and they provided for their children. Trouble began when Mr. Guardado began associating with people in a nearby apartment complex. One of the boys, who was older and had a car and boat, provided alcohol and marijuana to Mr. Guardado, who was just a teen. The letter told how Mr. Guardado met a person who provided harder drugs and had him steal to cover the cost. Mr. Guardado

began having trouble at home and was sent to a juvenile facility. No details of his stay at a juvenile facility were provided.

Mr. Guardado's former girlfriend Donna Porter wrote that she met Mr. Guardado after his release from prison. She said he was trying hard to fit in and had a shy, childlike innocence. Ms. Porter said Mr. Guardado began to change and fell in with the wrong people, who got him back into drugs, including methamphetamine. She said when he committed the murder, he had been in a drug-induced state for quite a while, and when the drugs wore off, he was very remorseful.

Mr. Guardado testified at the hearing that after Mr. Gontarek was appointed to represent him in the trial, they met only a few times and just for minutes each time. Some meetings occurred just before court hearings. Mr. Guardado said he did not think Mr. Gontarek ever asked him about information for the trial. Mr. Guardado said Mr. Gontarek did not want Mr. Guardado's mother to testify for fear her cross-examination would upset Mr. Guardado. He did not recall his counsel explaining anything to him about aggravating circumstances.

Mr. Guardado said he started drinking alcohol in junior high school and began using cocaine intravenously before turning 16. He used drugs on a regular basis when not incarcerated. He was sure he mentioned his drug addiction and dependency to his lawyers. He recounted the stress he felt in his job, where he had

to work without backup and without pay for overtime. He was dating Ms. Porter but began drinking more and reverted to drugs, including daily use of cocaine. He was jailed for a DUI and lost his job. Ms. Porter let him stay with her for a time, but he continued to drink and use drugs. He did not testify at the hearing that he was stressed to any degree by his breakup with Ms. Porter.

Mr. Guardado testified he began to doubt his attorneys, who told him to cooperate with Dr. Larson and that everything would be okay. He kept the attorneys only because his mother begged him to. He denied telling Mr. Gontarek not to call his mother to testify.

The state presented the testimony of Jason Andrew Cobb, co-counsel appointed a month before the trial. He testified he had no substantive conversations with Mr. Guardado about mitigation. He said Mr. Guardado expressed a desire to receive the death penalty and never suggested any potential mitigation. Mr. Cobb described his role as a go-between so that Mr. Gontarek would "not have to deal with the little issues of phone calls and visitation and things like that." He said he explained to Mr. Guardado 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 he needed to get ready" for the trial. Mr. Cobb said he was more or less a paralegal or a "babysitter to help pacify a defendant who complained continuously about minimal things." Mr. Cobb said he

spoke with Mr. Guardado's mother on the telephone but was not asked to reach out for other family members who might testify. Mr. Cobb said he might have spoken to Ms. Porter, whom he recalled as reluctant to testify and who did not appear to be a mitigating witness. He did not know the defense investigator who had been retained, and he never met with Dr. Larson.

Mr. Gontarek also testified at the hearing. He said he met with Mr. Guardado numerous times and believed that Mr. Guardado's remorse and acceptance of responsibility would go a long way. His strategy was to have Dr. Larson talk about Mr. Guardado's family and about Ms. Porter. The defense investigator talked to Mr. Guardado's former employer, but he could not offer anything favorable because Mr. Guardado was accused of stealing equipment. The investigator also spoke with Major Mathis from the Sumter Forestry Camp, but she did not know anything about Mr. Guardado.

Mr. Gontarek testified that Mr. Guardado did not want any mitigation to be presented and did not care if he got the death penalty; he allowed the case to be presented for his mother's sake. Mr. Gontarek said he spoke to Mr. Guardado's mother, Ms. Umlauf, numerous times. He said he asked her to testify several times but she declined, so he had her write a letter for the jury. He was surprised when reminded the letter was not published to the jury, and he agreed it would have been more effective to do so.

Mr. Gontarek said Mr. Guardado did not suggest any family members to be called to testify, and when the judge asked several times whether Mr. Guardado had any other witnesses he wished to testify, Mr. Guardado answered in the negative. Mr. Gontarek said Dr. Larson had testified in several of his past cases with success and he believed Dr. Larson's testimony proved nonstatutory mitigation, including remorse and severe cocaine addiction. Dr. Larson did not recommend any other experts be retained.

Mr. Gontarek said he presented a number of nonstatutory mitigators but could not recall all of them. He did recall admission of guilt, remorse, that the murder was "situational" in a cocaine binge, cooperation with law enforcement, good jail record, support of his mother, and that Mr. Guardado would not be violent if given life in prison. Mr. Gontarek thought Dr. Larson's answer during cross-examination—that the prosecutor's description of his testimony was a good summary—was not helpful. Mr. Gontarek testified that at the *Spencer* hearing, Mr. Guardado still did not want any mitigation presented.

E. The Trial Court's Postconviction Ruling

The state trial court denied postconviction relief.

The court found counsel not deficient in failing to call Major Mathis because she remembered Mr. Guardado's name but nothing more; she had little if anything to offer in mitigation; and what she provided was essentially cumulative to other

evidence. The court noted that Mr. Gontarek testified he spoke with Major Mathis and felt she would not be able to offer anything favorable. The court concluded there was neither deficient performance nor prejudice.

The court found counsel not deficient in failing to call Mr. Guardado's stepsister, brother, and former girlfriend. The court noted that although their letters were submitted at the postconviction hearing, the letters did not indicate the witnesses were available and willing to testify at trial. The court said that without their testimony, the court could not determine their credibility or whether the failure to call them was prejudicial.

The court found counsel not deficient in failing to call Ms. Padgett. The court said she did not know Mr. Guardado for a long period and her assertion he was reeling from his breakup with Ms. Porter could have been discredited by evidence he had another girlfriend at the time of the murder. The court did not credit Mr. Guardado's testimony that he asked counsel to contact Ms. Padgett for mitigation—an assertion inconsistent with his repeated statements on the record that he had no other mitigation witnesses he wished to present. The court said Ms. Padgett's testimony about Mr. Guardado's heavy alcohol and drug use and its effects on him would have been cumulative to the trial testimony of Dr. Larson and Mr. Guardado.

The court found counsel not deficient in failing to call Ms. Umlauf. The court credited Mr. Gontarek's testimony that he spoke with Ms. Umlauf numerous times and asked her to testify, but she refused. The court held it not deficient to forgo calling an unwilling family member. The court also concluded that her testimony at the postconviction hearing did not establish detailed mitigation and that failing to call her was not prejudicial.

The court found counsel not deficient in failing to obtain and present additional mental mitigation. The court concluded Ms. Johnson and Dr. Prichard agreed with Dr. Larson's trial testimony that Mr. Guardado did not suffer from a major mental illness. They disagreed, however, with Dr. Larson's testimony that only nonstatutory mitigation, not statutory mitigation, was established by Mr. Guardado's history of drug and alcohol abuse, cocaine binge, and obsessive quest for the drug during the two weeks prior to the murder.

The court found no deficiency in failing to assert these were statutory rather than nonstatutory mitigators. The court found that counsel acted reasonably in not seeking additional expert evaluation and testimony after Dr. Larson found only nonstatutory mitigators. The court concluded that Dr. Larson's trial testimony presented essentially the same information as Ms. Johnson and Dr. Prichard offered at the evidentiary hearing, and that characterizing the mitigation as nonstatutory was not prejudicial.

F. The Florida Supreme Court's Postconviction Ruling

The Florida Supreme Court affirmed the denial of relief.

The court agreed with the postconviction trial court that the letters from Mr. Guardado's stepsister, brother, and former girlfriend did not demonstrate deficient performance because they did not establish the individuals were willing and available to testify. The court said no prejudice was shown from counsel's failure to contact them. The court agreed that failure to call Major Mathis was not deficient because her testimony provided little if any mitigation and was cumulative. The court agreed that failing to call Ms. Padgett was neither deficient nor prejudicial because her testimony was largely cumulative and Mr. Guardado did not ask that she be called.

The court concluded that failure to call Ms. Umlauf caused no prejudice because her testimony contained no detailed mitigation and was largely cumulative. The court also concluded, without further explanation, that no prejudice resulted from introducing but failing to publish Ms. Umlauf's letter. The court said the jury was "aware of most aspects of the mitigation evidence that the defendant claims should have been presented." *Guardado v. State*, 176 So. 3d at 895 (quoting *Troy v. State*, 57 So. 3d 828, 853 (Fla. 2011)). Because the court found no prejudice from failing to publish the letter, the court declined to address whether the failure constituted deficient performance.

On mental mitigation, the court said "[s]imply presenting the testimony of experts during the evidentiary hearing that are inconsistent with the mental health opinion of an expert retained by trial counsel does not rise to the level of prejudice necessary to warrant relief." *Id.* at 896 (quoting *Dufour v. State*, 905 So. 2d 42, 58 (Fla. 2005)). The court concluded that this is what Mr. Guardado did by asking each expert at the evidentiary hearing to agree or disagree with Dr. Larson's testimony. The court concluded the evidence established no reason for counsel to doubt Dr. Larson's opinions, even though, as it turned out later, they were not as favorable as those presented at the evidentiary hearing. The court concluded counsel had no reason to develop additional background information to support the defense's mitigation theory. *Id.* at 896 (distinguishing facts in *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1351 (11th Cir. 2011)).

G. Federal Review

Failure to investigate and present mitigation evidence has been a fertile source of successful attacks on death sentences. Here, though, the mitigation case presented at trial was fundamentally the same as Mr. Guardado now proffers. He was on a prolonged cocaine binge, out of control, in desperate search for money to buy cocaine; he is remorseful; he pled guilty and cooperated with law enforcement; he would be a useful, nonviolent life prisoner; and although he had a good and

supportive mother and stepfather, he suffered the death of his father and a brother at a young age and was later sexually molested.

Mr. Guardado was sentenced to death not for failure to establish these and other mitigating circumstances—including all those relied upon by Mr. Guardado in this court—but because there were substantial, uncontested aggravators that the jury and judge found more persuasive. This was a savage attack on a 75-year-old woman who had supported Mr. Guardado as well as others. And it was not Mr. Guardado's first violent felony. None of Mr. Guardado's new evidence would have changed these facts. It is unlikely the new evidence would have made any difference.

A petitioner is ordinarily not entitled to relief based on postconviction mitigation evidence that merely expands on or provides greater detail in support of themes presented to the jury. An attorney ordinarily does not render ineffective assistance by failing to present such evidence. *See, e.g.*, *Brown v. United States*, 720 F.3d 1316, 1327-28 (11th Cir. 2013) ("If 'the new mitigation is simply an extension of what the jury had heard,' the situation is 'critically different' from cases where 'the new mitigation was not only powerful, but of a type that counsel did not present in the penalty phase at all.'" (quoting *Rose v. McNeil,* 634 F.3d 1224, 1246 (11th Cir. 2011)); *see also Dallas v. Warden*, 964 F.3d 1285, 1310 (11th Cir. 2020) ("[N]o prejudice can result from the exclusion of cumulative

evidence." (quoting *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 649-50 (11th Cir. 2016))).

The Supreme Court has found mitigation evidence cumulative when it substantiates, supports, or explains more general testimony provided at trial. *See Cullen v. Pinholster*, 563 U.S. 170, 200-01 (2011); s*ee also Raheem v. GDCP Warden*, 995 F.3d 895, 925 (11th Cir. 2021) ("Mitigating evidence in postconviction proceedings is cumulative when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury.") (quoting *Dallas*, 964 F.3d at 1308). "[W]hen mental health is at issue, counsel does not offer ineffective assistance when it later becomes apparent that an expert who would have testified more favorably than the expert who was actually called may have existed.'" *Reaves v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1137, 1160 (11th Cir. 2017) (quoting *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1244 (11th Cir. 2015) (citing *Ward v. Hall*, 592 F.3d 1144, 1173 (11th Cir. 2010), and *Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997))).

The Eleventh Circuit has explained that in cases where penalty-phase counsel was held prejudicially deficient in investigation and presenting mitigation, the disparity between evidence presented at trial and that presented at the postconviction evidentiary hearing was "vast." "In other words, the balance

between the aggravating and mitigating evidence at trial and in postconviction proceedings shifted enormously, so much so as to have profoundly altered each of the defendants' sentencing profiles." *Dallas*, 964 F.3d at 1312.

For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), trial counsel introduced no evidence of the defendant's life history, whereas postconviction evidence showed he suffered extreme abuse, sexual molestation, and repeated rape in foster care, as well as diminished mental capacity. *Id.* at 535.

In *Andrus v. Texas*, 140 S. Ct. 1875 (2020), trial counsel "performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence," leading counsel to present an extremely weak mitigation case. *Id*. at 1881. Postconviction evidence demonstrated that the petitioner "suffered 'very pronounced trauma' and posttraumatic stress disorder symptoms from, among other things, 'severe neglect' and exposure to domestic violence, substance abuse, and death in his childhood," none of which his counsel investigated or presented in the trial court. *Id.* at 1882.

In *Porter v. McCollum*, 558 U.S. 30 (2009), the Court found counsel ineffective when the only mitigation presented at trial was inconsistent behavior when intoxicated and a good relationship with his son. *Id.* at 32. Postconviction evidence showed an abusive childhood, heroic military service, long-term substance abuse, and impaired mental capacity. *Id.* at 33. The Court said the case

was not one in which the new evidence "would barely have altered the sentencing profile." *Id*. at 41 (quoting *Strickland*, 466 U.S. at 700). The Court said the new evidence "might well have influenced the jury's appraisal" of the defendant's moral culpability. *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 398 (2000)).

In *Rompilla v. Beard*, 545 U.S. 374 (2005), the Court held counsel ineffective for failing to discover an easily accessible "range of mitigation leads that no other source had opened up" and that were different "from anything defense counsel had seen or heard." *Id.* at 390. The postconviction evidence bore "no relation to the few naked pleas for mercy actually put before the jury." *Id.* at 393. Instead, the new evidence established, for the first time, that the defendant suffered from "organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions." *Id.* at 392. This substantially impaired his ability to appreciate the criminality of his acts and conform his conduct to the law. *Id.* "In those circumstances, it went 'without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [the petitioner's] culpability, and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing.'" *Knight v. Fla. Dep't of Corr.*, 958 F.3d 1035, 1049 (11th Cir. 2020) (quoting *Rompilla*, 545 U.S. at 393).

Mr. Guardado has not shown similar circumstances. The new mental-health evidence presented at the evidentiary hearing did not show counsel failed to follow leads to new and vastly different evidence from what counsel had seen or that would likely have altered the balance of aggravators and mitigators.

Mr. Guardado also relies on *Wiggins* to support the assertion that counsel limited the investigation of background mitigation without exercising any reasonable professional judgment. "[I]t is well established that counsel's obligation to render competent performance includes 'a duty to make reasonable investigations' of potential mitigating evidence 'or to make a reasonable decision that makes particular investigations unnecessary.'" *Raheem*, 995 F.3d at 909 (quoting *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 691)). But the Supreme Court has described the deficient investigation in *Wiggins* by stating the scope of counsel's investigation "approached nonexistent" and ascribing counsel's failure to investigate to inattention and not strategy. *Andrus*, 140 S. Ct. at 1883 (citing *Wiggins*, 539 U.S. at 528). The circumstances in Mr. Guardado's case are not similar.

In *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541 (11th Cir. 2015), also cited by Mr. Guardado, the court found penalty-phase counsel ineffective where counsel "had ample information signaling the existence of potential mitigation evidence" that counsel failed to investigate. *Id.* at 554. Instead, counsel

presented no mitigation witnesses or evidence at the sentencing proceeding. *Id.* at 546. Again, the circumstances of Mr. Guardado's case are not similar.

Mr. Guardado says counsel should have delved further into sexual abuse, which was briefly mentioned in Dr. Larson's report but not discussed in his trial testimony. The trial court listed the sexual abuse as a mitigating factor, but it did so apparently over Mr. Guardado's objection; when the court mentioned the subject, Mr. Guardado said, "I'm not going to deal with that." There is no reason to believe any further treatment of this issue would have been approved by Mr. Guardado or, more importantly, would have made any difference.

The Florida Supreme Court reasonably rejected the claim of ineffective assistance related to mitigation. Its ruling was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented. Mr. Guardado is not entitled to relief on this claim.

VI. Self-Representation

A criminal defendant of course has a right to counsel. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963). A criminal defendant also has a constitutional right to represent himself if competent to do so. *See Faretta v. California*, 422 U.S. 806 (1975). Mr. Guardado claims the trial court erred by appointing counsel to

represent him at the jury trial and by not allowing him to represent himself at the post-trial *Spencer* hearing.

A. The Trial

Mr. Guardado initially asked to represent himself. After an appropriate inquiry, the trial court found Mr. Guardado competent to do so and granted the request. He represented himself when pleading guilty. But before the jury trial on the sentence, Mr. Guardado asked for counsel. The court granted the request and appointed counsel, who represented Mr. Guardado at the trial.

In sum, Mr. Guardado was found competent to do as he wished—to represent himself or not—and was allowed to do as he requested, even when he changed his mind.

Remarkably, Mr. Guardado now says the trial court should have made him represent himself at the trial, despite his request for counsel. The assertion makes no sense. Mr. Guardado has cited no decision of any court holding that a court must deny an indigent defendant's request for appointed counsel, just because, at an earlier stage, the defendant chose to represent himself. Instead, Mr. Guardado cites cases addressing an entirely different issue: not whether a court *must* deny such a request, but whether a court *may* deny such a request.

Defendants sometimes game the system, asking to represent themselves and then insisting on representation by counsel, sometimes in an effort to delay or

otherwise disrupt a proceeding. Sometimes the trial judge denies the request. Indeed, good case management sometimes demands it. If defendants learn they can go back and forth, many will, sometimes in the middle of a trial, wreaking havoc with efforts to conduct the trial or manage the overall docket.

When a trial judge denies a request for counsel made by a defendant who has been allowed to represent himself, an issue on appeal is whether the denial was permissible—or whether, instead, the defendant was denied the right to counsel. Many courts have held a trial court acted within its discretion in denying such a renewed request for counsel. *See, e.g.*, *United States v. Kerr*, 752 F.3d 206, 221 (2d Cir. 2014); *United States v. Leveto*, 540 F.3d 200, 208 (3d Cir. 2008); *United States v. Proctor*, 166 F.3d 396 (1st Cir. 1999).

Here, though, the trial court *granted* Mr. Guardado's renewed request for counsel. Mr. Guardado complains anyway, bringing to mind the adage that no good deed goes unpunished. When Mr. Guardado asked for counsel, the trial court probably could have said no but certainly could properly say yes, as the court did.

To illustrate just how far off base Mr. Guardado now is, consider this line from his brief: "Withdrawing a *Faretta* waiver is constitutionally impermissible where the defendant is not competent . . . ." ECF No. 42 at 80. This has it backwards. A defendant who is not competent to request counsel is surely not competent to represent himself at all; if the defendant is not competent to take

actions of this kind, terminating self-representation is not only permissible, it is mandatory.

The trial court did not err by granting Mr. Guardado's request for appointed counsel at trial.

B. The Spencer Hearing

After the jury returned its verdict recommending the death penalty, Mr. Guardado said he did not wish to have a *Spencer* hearing and had no further mitigation to present. The court did not set a *Spencer* hearing and instead set the case for sentencing. But in a pre-sentencing memorandum, the state requested a *Spencer* hearing, and the court scheduled one. The hearing began with Mr. Guardado again stating he did not wish to have the hearing and had no further mitigation to present. Mr. Guardado said:

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

ECF No. 17-16 at 35.

The state responded by asserting the proper procedure, if a defendant requests counsel not to present further mitigation, is for the court to inquire whether counsel is aware of further mitigation. The court said, "Mr. Guardado, are

you in fact instructing your attorneys not to present any further mitigation on your behalf?" Mr. Guardado responded:

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

Id. at 36.

Mr. Guardado now says the court should have treated this as a request for self-representation. But Mr. Guardado, who plainly knew how to ask to represent himself if he wanted to do so, did not ask to represent himself at that time. Quite the contrary. When the court asked Mr. Guardado what additional evidence counsel should have presented at trial, Mr. Guardado said:

> Well, I am not of a legal mind; I mean I don't have the legal training to stand in this courtroom and argue with either [the prosecutor] or Mr. Gontarek about legal issues. I have no—I can't—I readily submit that their knowledge in that area is greater than mine.

Id. at 39. On any fair reading, this was Mr. Guardado's insistence that, while dissatisfied with counsel, he did *not* wish to represent himself.

Mr. Guardado nonetheless says that under *Nelson v. State*, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973), his complaints about his counsel made it mandatory for the court to conduct a further colloquy. The Florida Supreme Court, whose

rulings on state law are controlling, rejected the contention. And in any event, a state procedural violation is not, without more, a basis for federal habeas relief. *See* 18 U.S.C. § 2254(a) (allowing habeas relief for a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"); *see also Lewis v. Jeffers,* 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."); *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991) (same); *Ortiz v. Sec'y, Fla. Dep't of Corr.*, No. 16-11380-B, 2017 WL 3380604, *5 (11th Cir. Jan. 20, 2017) ("As to Ortiz's *Nelson* claim, the district court correctly concluded that it was not subject to federal habeas review because it was based on state law.").

Faretta of course establishes a federal right properly cognizable on habeas. But the Eleventh Circuit has made clear that a request for self-representation must be clear and unequivocal:

> The law governing a *Faretta* claim is settled. A court is required "to conduct a 'Faretta hearing,' at which a defendant is made aware of the dangers and disadvantages of self-representation," where a defendant makes a "clear and unequivocal assertion of a desire to represent himself." *Gill v. Mecusker*, 633 F.3d 1272, 1293 (11th Cir. 2011) (citation and internal quotation marks omitted). An unclear or equivocal request will not do. Because "shrewd litigants can exploit this difficult constitutional area by making ambiguous self-representation claims to inject error into the record, this Court has required an individual to clearly and unequivocally assert the desire to represent himself." *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990); *see also Dorman v. Wainwright*, 798 F.2d 1358, 1366 (11th Cir. 1986) ("[P]etitioner must do no more than state his request, either orally or in writing,

> unambiguously to the court so that no reasonable person can say that the request was not made.").

Edmondson v. Att'y Gen., 853 F. App'x 484, 487 (11th Cir. 2021). Mr. Guardado complained about his counsel but did not make the required "clear and unequivocal assertion of his desire to represent himself."

Finally, Mr. Guardado notes that he asked to speak to the judge privately. The judge properly refused. Mr. Guardado made no record of what he wished to say. Whether represented by counsel or proceeding pro se, Mr. Guardado had no right to an ex parte hearing—no right to present mitigation evidence or other matters without notice to the state. The court cannot be faulted for denying an improper ex parte hearing or for failing to grant whatever unknown relief Mr. Guardado might have requested.

C. Federal Review

The trial court did not err in its treatment of Mr. Guardado's request to represent himself, followed by his request for counsel, followed by his complaints about counsel. The Florida Supreme Court's ruling on these issues was not contrary to or an unreasonable application of clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the evidence presented.

Mr. Guardado asserts the Florida Supreme Court did not address the constitutional component of his claim. But the court ruled on the issues as fairly

presented by Mr. Guardado there. And this order would reach the same result even on de novo review. Mr. Guardado was allowed to represent himself when he asked to do so, and counsel was appointed for him when he asked for that. The trial court's treatment of these issues was unobjectionable.

VII. Ring-Hurst-Caldwell

Under *Ring v. Arizona*, 536 U.S. 584 (2002), a defendant is entitled to trial by jury on any fact essential to a death sentence, and the fact must be proved beyond a reasonable doubt. In *Hurst v. Florida*, 577 U.S. 92 (2016), the Court held Florida's death-penalty procedure unconstitutional under *Ring*. Long before *Ring* and *Hurst*, the Court held that a jury cannot properly be told its sentencing decision is advisory when it is not—when the jury's decision will be controlling. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Mr. Guardado was sentenced after *Caldwell* and *Ring* based on the same procedure later held unconstitutional in *Hurst*. The jury was told its sentencing recommendation was advisory. This was an accurate statement based on the state's position at that time—the position, later rejected in *Hurst*, that *Ring* did not invalidate Florida's death-penalty procedure. The Eleventh Circuit has held that *Ring* did not unmistakably foreshadow *Hurst*. *See Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249 (11th Cir. 2012).

Mr. Guardado asserts he is entitled to relief based on *Ring*, *Hurst*, and *Caldwell*.

The Florida Supreme Court rejected the claim. The court held the *Hurst* violation harmless because the jury unanimously recommended the death penalty. This holding implicitly applied to the *Ring* violation as well. The court rejected the *Caldwell* claim with no explanation other than a citation to earlier cases, including *Franklin v. State*, 236 So. 3d 989, 992 (Fla. 2018), where the court said that, prior to *Hurst*, it had "repeatedly rejected" *Caldwell* challenges to the standard instruction telling juries their death recommendations were advisory. This missed the point entirely. It was only the change in law that started with *Ring* and was applied to Florida in *Hurst* that rendered the jury's finding of an aggravator binding rather than advisory and thus implicated *Caldwell*. Prior rulings that did not address this issue could hardly be deemed dispositive.

Mr. Guardado's sentence became final on direct review prior to *Hurst*; the case is here on collateral review. "*Ring* and *Hurst* do not apply retroactively on collateral review." *McKinney v. Ariz.*, 140 S. Ct. 702, 708 (2020) (citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)). The Eleventh Circuit reached the same result in *Knight v. Florida Department of Corrections*, 936 F.3d 1322, 1337 (11th Cir. 2019).

Caldwell, too, is not retroactively applicable on collateral review. *See Sawyer v. Smith*, 497 U.S. 227 (1990). To be sure, *Caldwell* was decided before Mr. Guardado was sentenced. But it was only *Hurst*—not *Caldwell* itself—that exposed the constitutional flaw in telling the jury that its decision would be advisory. The Eleventh Circuit has said, albeit in an unpublished and thus nonbinding decision, that a defendant "cannot use *Caldwell* as an end run around federal retroactivity law." *Miller v. Comm'r, Ala. Dep't of Corr.*, 826 F. App'x 743, 750 (11th Cir. 2020). It would be an odd result indeed if two nonretroactive decisions—*Hurst* and *Caldwell*—could combine to allow an after-the-fact challenge to an instruction that was proper when given.

This order rejects the *Ring-Hurst-Caldwell* claim on the ground that under *McKinney*, *Hurst* does not apply retroactively on collateral review, and that, under *Sawyer* and *McKinney*, *Caldwell* does not apply on collateral review based on an instruction that was accurate when given and was shown to be erroneous only by *Hurst*.

VIII. Aggravators

Mr. Guardado contends that the state court's findings on the HAC and CCP aggravating factors were based on insufficient evidence. He also contends that the instructions for those factors were unconstitutionally overbroad when applied to his crime and did not sufficiently narrow the class of cases to which the death

penalty applies. On direct appeal, Mr. Guardado argued that the evidence was insufficient to support the finding of either aggravating factor.

The trial court found the murder met the HAC factor because it was conscienceless, pitiless, and unnecessarily torturous. The sentencing order noted that Mr. Guardado administered a savage attack with repeated blows to the victim's head and limbs with a metal bar that she tried to fend off. When she did not die, Mr. Guardado repeatedly stabbed her in the chest and then slashed her throat.

The Florida Supreme Court agreed that the evidence supported the HAC factor, citing evidence that the victim suffered a flurry of blows and was repeatedly stabbed while trying to fend off the attack and that her throat was slashed. *Guardado*, 965 So. 2d at 116. The record supports these statements. In a § 2254 proceeding, the state court's factual determinations are presumed to be correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). That burden has not been met.

The state correctly contends that the claim of *unconstitutionality* of the aggravating factors was not raised in state court and is procedurally barred. And the claim is unfounded on the merits.

Mr. Guardado contends that the HAC jury instruction was not properly and constitutionally limited. He says the Florida Supreme Court failed to consider

whether the instruction was valid. He argues the instruction was vague and overbroad and should not be applied to his crime, which he contends was not shown to be conscienceless or torturous because it was cocaine-induced and he is remorseful.

To survive a vagueness challenge, the words "especially heinous, atrocious, or cruel" must be accompanied by limiting language. *See Marquard v. Sec'y for Dep't of Corr.*, 429 F.3d 1278, 1315-16 (11th Cir. 2005) (citing *Maynard v. Cartwright,* 486 U.S. 356, 365 (1988)); *Bradley v. Nagle,* 212 F.3d 559, 570 (11th Cir. 2000)). Mr. Guardado's jury instructions met this standard:

> "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

ECF No. 17-16 at 6-7.

In *Marquard*, the court upheld this very instruction—and upheld its application on chillingly similar facts: "Marquard stabbed the victim, threw her to the ground, tried to drown her, and hacked at her neck with a knife, and . . . she did not die immediately but tried to struggle." *Marquard*, 429 F.3d at 1317. Mr. Guardado says he stabbed and bludgeoned his victim and cut her throat not

intending to torture her but to put her out of her misery, but the assertion is weak on the facts and wrong on the law. *See Marquard*, 429 F.3d at 1316 n.33.

No United States Supreme Court case holds that this jury instruction was not sufficiently limited. Mr. Guardado is not entitled to habeas relief based on the HAC aggravator.

Mr. Guardado also challenges the CCP aggravator on grounds of insufficient evidence and unconstitutionality. The trial court found the aggravator applicable partly because Mr. Guardado calmly arranged to drive his friend's car to work for the night shift. He knew he had clean clothes in the car. The breaker bar used in the murder was in the car, and he retrieved it to carry into the victim's home. He drove to his disabled truck to obtain a knife. He admitted that he chose the victim because of her secluded location and because she knew him; he admitted he planned to kill her. Mr. Guardado now says the murder was spontaneous and irrational, based only on his compulsion to obtain drugs. But there was ample evidence of a calculated plan.

The Florida Supreme Court concluded that the CCP aggravator had been proven beyond a reasonable doubt. *Guardado*, 965 So. 2d at 117. The court noted its precedent holding that a chronic drug user can act according to a deliberate plan, as occurred here, and said Mr. Guardado was not deprived by his drug use or addiction of the ability to plan and execute the murder. *Id.*

The trial court gave Florida's standard jury instruction:

> "Cold" means the murder was the product of calm and cool reflection. "Calculated" means having a careful plan or prearranged design to commit murder. A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premediated intent to kill must be formed before the killing. However, in order for this aggravating circumstance to apply, a heightened level of premeditation demonstrated by a substantial period of reflection is required.

ECF No. 17-16 at 7.

Mr. Guardado asserts this was unconstitutionally overbroad and failed to properly limit application of the death penalty when applied to a person on a cocaine binge. He says the murder cannot be characterized as "cold"—as the product of calm and cool reflection. But an obsessive desire to obtain money to buy more drugs does not necessarily preclude a calm and cool selection of a victim and implementation of a plan. Mr. Guardado's own recitation of his actions on the night of the murder show that he decided to obtain money no matter what it took and was able to do so after an earlier effort to rob a store failed. Mr. Guardado described how he gathered necessary weapons and obtained the means to carry out his plan. No evidence was presented to indicate he was other than calm and cool in making and carrying out the plan. As the Florida Supreme Court said, there was no evidence that his obsessive desire to obtain money for drugs deprived him of the

ability to make a cool and calm plan to obtain that money from this victim by any means necessary. There was no evidence of frenzy, panic, or rage. His actions were not "mad acts prompted by wild emotion." *Maulden v. State*, 617 So. 2d 298, 303 (Fla. 1993) (quoting *Santos v. State*, 591 So.2d 160, 163 (Fla.1991)).

Mr. Guardado has offered no support for his claim that facts like these cannot support the CCP aggravator or that the instruction unconstitutionally failed to limit the class of cases to which the death penalty should apply.

The state court's ruling on these aggravators was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and the ruling was not based on an unreasonable determination of the facts in light of the state-court record.

IX. Certificate of Appealability

When a district court denies a § 2254 petition, it must simultaneously grant or deny a certificate of appealability. The petitioner must obtain a certificate of appealability as a prerequisite to an appeal. *See* 28 U.S.C. § 2253(c)(1). A court may issue a certificate of appealability only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). *See Miller-El v. Cockrell,* 537 U.S. 322, 335-38 (2003) (explaining the meaning of this term); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (same); *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); *see also Williams v. Taylor*, 529

U.S. 362, 402-13 (2000) (setting out the standards applicable to a § 2254 petition on the merits). As the Court said in *Slack*:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."

529 U.S. at 483-84 (quoting *Barefoot*, 463 U.S. at 893 n.4). In order to obtain a certificate of appealability when dismissal is based on procedural grounds, a petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

Mr. Guardado has not made the required showing.

X. Conclusion

Mr. Guardado pled guilty to a brutal murder and robbery. He received a full and fair penalty trial and was sentenced to death. The Florida Supreme Court's rejection of his various claims was not contrary to or an unreasonable application of federal law and was not based on an unreasonable determination of the facts in light of the evidence presented. Mr. Guardado is not entitled to relief.

IT IS ORDERED:

1. The petition for writ of habeas corpus filed under 28 U.S.C. § 2254 is denied with prejudice.

2. A certificate of appealability is denied.

3. The clerk must enter judgment and close the file.

SO ORDERED on January 19, 2022.

s/Robert L. Hinkle
United States District Judge

District Court Order
Denying Rehearing
(February 22, 2022)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

JESSE GUARDADO,

Petitioner,

v. CASE NO. 4:15cv256-RH

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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ORDER DENYING THE MOTION TO ALTER OR AMEND THE JUDGMENT OR TO RECONSIDER DENIAL OF A CERTIFICATE OF APPEALABILITY

A Florida state court sentenced the petitioner to death. He challenged the sentence by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The order of January 19, 2022 denied the petition and denied a certificate of appealability. Judgment was entered the same day.

The petitioner has moved to alter or amend the judgment or to reconsider the denial of a certificate of appealability. For the most part, the motion simply reargues the merits. The motion also offers a rather uncharitable reading of the January 19 order. The order was and is correct.

Only two points warrant further mention.

First, a district court must address all claims in a petition of this kind, but a district court is not obligated to address the petitioner's arguments sentence by sentence. I considered with care all of the petitioner's prior arguments and indeed every word of the petition. The January 19 order adequately explained the result. This was a ruling—not an attempt to open or prolong a dialogue with the petitioner.

Second, the motion asserts, with absolutely no basis, that the January 19 order denied a certificate of appealability not based on the governing standards—which were accurately set out in the order—but simply because the order rejected the petitioner's claims on the merits. That is not correct. I have ruled on hundreds of habeas petitions, granting some, denying many. Each time I have denied a petition, I have considered whether to grant a certificate of appealability. I have granted a certificate of appealability many times despite denying the underlying petition. In short, I know the difference between the merits and the standards that govern a certificate of appealability. My judgment was and is that in this case, the petitioner did not make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

IT IS ORDERED:

The motion to alter or amend the judgment or reconsider denial of a certificate of appealability, ECF No. 56, is denied.

SO ORDERED on February 22, 2022.

s/Robert L. Hinkle
United States District Judge