IN THE SUPREME COURT OF FLORIDA

JAMES GUZMAN,

Appellant,

v. CASE NO. 80,750

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The state has followed the system of citation set out in the appellant's preliminary statement on page xi of his Initial Brief.

STATEMENT OF THE CASE

The statement of the case contained in Guzman's brief is substantially correct if somewhat over-inclusive in its lengthy, argumentative comments concerning purported conflicts of interest alleged to have occurred in this case. Only one purported conflict of interest is at issue on appeal. To the extent that Guzman's argumentative statement of the case set out on page five of his brief deals with the denial of the public defender's office motion to withdraw because of an asserted conflict between the witness Boyne and the defendant, the facts relevant to that issue are set out at pp. 18-19 of the state's brief. To the extent that Guzman discusses the denial of his motion for a mistrial based upon the testimony elicited from Boyne, that motion was rendered moot because Guzman himself testified. See, p. 25 below.

STATEMENT OF THE FACTS

The statement of the facts set out in Guzman's brief is substantially correct. However, Guzman has omitted from his statement of the facts the testimony of Martha Cronin which established that, prior to the murder, Guzman had stated to Cronin that the victim was frequently intoxicated, had money, and would be an easy target to rob. (T. 1220). Guzman made a similar statement on a later occasion, and further stated that if he robbed anyone he would have to kill them because dead witnesses do not talk. (T. 1221). Guzman has further omitted from his statement of the facts the testimony of Deputy Robert Thomas, which was that, when Cronin was brought into the Volusia County Courthouse for the trial, she had occasion to walk close to the defendant and Guzman stated to her "do the right thing girl; it's a small world". (T. 1926-1930). Guzman has also omitted that the victim in this case sustained some nineteen knife wounds, at least one of which was a defensive wound, and that either the sword owned by the victim or the survival knife habitually carried by the defendant could have inflicted these injuries. (T. 920-925; 932).

Arthur Boyne testified unequivocally that, while he did in fact write a letter attesting to Guzman's "good character", he wrote that letter because he was afraid to refuse to do so after Guzman asked him to write it. (T. 1074; 1086; 1091). Guzman testified in his own behalf, and testified that he had been convicted of seven prior felonies. (T. 1812).

In sentencing the defendant to death, the trial court found the following aggravating circumstances: that the defendant had been previously convicted of another felony involving the use or threat of violence to the person; that the capital felony was committed in the commission of a robbery and for pecuniary gain; that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; that the capital felony was heinous, atrocious or cruel; that the capital felony was committed in a cold, calculated or premeditated manner without any pretense of moral or legal justification. (R. 646-650). As found by the trial court, Guzman's attorneys conceded the lack of evidence to support any statutory mitigator. (R. 650).

SUMMARY OF ARGUMENTS

POINT 1: The trial court did not commit error in denying the request to recall a particular defense witness under the facts leading to the request to recall that witness. Further, the trial court did not err in refusing to allow the defense witness to testify to hearsay. Moreover, as to another defense witness, the trial court properly refused to allow the defendant to introduce evidence which did not exist.

POINT 2: When the penalty phase jury instructions are considered in their entirety, there was no error in the jury instructions. Moreover, given the strength of the case against Guzman, and the evidence in support of a death sentence, any error in instructions given to the penalty phase jury is harmless.

POINT 3: There was no conflict of interest as to Guzman's trial counsel, and, to the extent that a potential conflict existed between Guzman's trial attorneys and a state's witness, that conflict was obviated by an unconditional waiver by the client-witness.

POINT 4: The state's cross-examination of the defendant's hand picked expert pathologist was not prosecutorial misconduct, but was, instead, legitimate cross-examination.

POINT 5: Guzman's argument that a juror was improperly excluded for cause based upon Witherspoon v. Illinois does not entitle him to relief because the juror's answers on voir dire established that the juror's views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. That is the proper standard, and that juror was properly excused for cause.

POINT 6: Guzman's argument that a reference made by a state's witness to Guzman's prior criminal convictions entitles him to relief is without merit because Guzman placed his own criminal record before the jury when he testified. Further, the court promptly gave a curative instruction to the jury, and did not overemphasize the witness's statement. This claim is without merit.

POINT 7: Guzman's claim that the admission of two photographs of the body of his first murder victim was error does not entitle him to relief because the prior felony was clearly relevant to the sentencing proceeding, and the photographs were necessary to assist the jury in understanding the location of the murder and the method through which the victim was killed. Second, even if the two photographs should not have been admitted, any error was harmless in light of the overwhelming aggravation and total lack of mitigation present in this case.

POINT 8: The introduction of Guzman's "survival knife" was proper because the wounds inflicted on the victim were consistent with either the survival knife, or the sword owned by the victim.

POINT 9: The evidence is sufficient to support Guzman's conviction. The law is settled that circumstantial evidence alone will support a capital conviction, but, the case against Guzman was not entirely circumstantial. The defendant confessed on two occasions, and that constitutes direct evidence of guilt.

POINT 10: Guzman's claim that the trial court improperly limited closing arguments to one hour per side does not entitle him to relief because Guzman never requested additional time, even

though the trial court had indicated that more time would be available if necessary. Guzman used far less than the allotted hour, and cannot establish any abuse of discretion.

POINT 11: The jury instruction given on the definition of reasonable doubt did not improperly reduce the state's burden of proof, and did not violate the incorrect reasonable doubt jury instruction found defective in Cage v. Louisiana.

POINT 12: The trial court properly refused to instruct the jury on third degree murder because the evidence did not support the giving of such an instruction. Even the facts advanced by Guzman in support of this jury instruction would not support a finding of guilt of third degree murder.

POINT 13: The penalty phase jury instructions given in this case were correct, and do not entitle Guzman to relief. The instructions on the various aggravators applicable to this case were correct statements of the law, and were properly given. Further, the jury was properly instructed as to its advisory role in the sentencing process.

POINT 14: The trial court properly found the murder to be especially heinous, atrocious or cruel, and, under binding precedent, the application of that aggravating circumstance to a murder such as this is proper.

POINT 15: The trial court properly found the "avoiding lawful arrest" aggravating circumstance because the evidence indicated that witness elimination was the dominant motive for this murder.

POINT 16: The trial court properly found the cold, calculated and premeditated aggravating circumstance under the facts of this

case and the law as it has developed in the application of this aggravating circumstance.

POINT 17: The death penalty is proportionate to this case. The trial court found five valid aggravating circumstances, one of which was a prior murder conviction. The only mitigation found in this case is weak, non-statutory mitigation. The death penalty is clearly proportionate to this offense.

POINT 18: There is no constitutional requirement that the jury's advisory sentence at the penalty phase be unanimous. This claim is foreclosed by binding precedent.

POINT 19: Guzman's pretrial motions were properly denied. Guzman is not entitled to a statement of particulars setting out the aggravating circumstances upon which the state will rely, nor is he entitled to disclosure of penalty phase evidence and witnesses. Further, the penalty phase jury was properly instructed on their advisory role. Likewise, to the extent that Guzman claims that the trial court improperly denied his motion in limine to prevent the state from referring to the grand jury indictment, that claim is without merit because the jury was repeatedly instructed that the indictment did not amount to evidence of guilt.

ARGUMENT

POINT 1

THE TRIAL COURT DID NOT ERR IN LIMITING THE TESTIMONY OF VARIOUS DEFENSE WITNESSES.

Guzman claims that the trial court committed error when the court denied his request to recall Artonyo Lee, and limited the testimony of Lee and Yarbrough. There is no error in the court's rulings, and Guzman is not entitled to relief.

A. The recall of Artonyo Lee.

Guzman claims that he should have been allowed to recall Lee to correct a purported error in his direct testimony. Specifically, Guzman claims that he "was under the impression that when Lee stated he did not 'know' the victim, Lee meant that he did not know of his existence, nor could he recognize him." Appellant's brief at 19. After Lee testified that he did not know the victim, Guzman attempted to recall him, purportedly so he could testify that he knew the victim "by sight". (T. 1621). The trial court denied that motion.

On two occasions, Lee was asked if he knew the victim, David Colvin. On both occasions, Lee's answer was no. (T. 1382; 1387). On the first occasion, Lee was shown a photograph depicting the victim and Curtis Wallace. (T. 1382). Lee stated that he did not know the victim. (Id.). On the second occasion, Lee was asked if he knew "the guy that got killed." (T. 1387). Again, Lee answered no. (Id.). Based upon the record, it is clear that Lee's responses could have been clarified at the time they were given. The trial court did not abuse its discretion in denying the defense motion to recall Lee.

The total implausibility of Guzman's position, and the lack of good faith exhibited by trial counsel, is best illustrated by Lee's direct testimony during a proffer: "Q: May I have--this is State's ten, your honor. I tender the same picture I show [sic] you before Mr. Lee, and ask you if the man in the white and gray and blue shirt, do you recognize him? A: I seen him one time. ..." (T. 1372). This occurred before Lee "misunderstood" the question referred to in Guzman's brief. Lee obviously did not misunderstand the questions put to him. Just as obviously, the testimony Guzman claims was not presented was available and could have been elicited without recalling Lee. This claim is predicated on an erroneous factual basis, and does not entitle Guzman to any relief.

Finally, even assuming that the defendant should have been allowed to recall Lee, any error is harmless because the testimony that the defendant wished to present through Lee was presented through Detectives Flynt and Wright. See, e.g., T. 1674-1676; T. 1699.). Guzman cannot complain that the testimony of these witnesses was less helpful than if the testimony had come from Lee because, even if Lee had testified, the state still would have been able to call Flynt and Wright to testify in rebuttal of Lee's testimony.[1] Guzman has nothing to complain about, and any error was harmless.

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[1] Lee had told several different stories to investigators. Obviously, these inconsistent statements were admissible in impeachment of Lee, and would have been introduced under any scenario under which Lee's claim to have seen the victim on the night of the murder was put before the jury.

B. Guzman claims that the trial court improperly sustained the state's objection to testimony by Lee about statements made to Lee by Curtis Wallace "regarding his possession of a ring which was known to be owned by [the victim]". (Appellant's brief at 22). Guzman also complains that Lee should have been allowed to testify about other hearsay statements made to him by Wallace. Id., at 23. This claim is meritless.

Guzman claims that the trial court's rulings prevented him from introducing evidence that tended to inculpate someone else. While a defendant is entitled to introduce evidence tending to incriminate another, that evidence must still meet the traditional evidentiary requirements of relevance and reliability. No case cited by Guzman holds to the contrary. The out-of-context quotation from Moreno v. State, 418 So. 2d 1223 (3rd DCA 1982) does not support Guzman's position. In fact, the evidence at issue in Moreno was clearly relevant, material, and reliable. That cannot be said about the evidence Guzman wanted to present.

Lee testified unequivocally that the victim's ring (State's Exhibit Two) was not the ring shown to him by Curtis Wallace. (T. 1371). Lee further testified that he did not know who owned that ring. (T. 1372). Despite Lee's testimony that Wallace never showed that ring to him, Guzman argues that the trial court erred by refusing to allow Lee to testify that Wallace had shown him a different ring.[2] The trial court quite properly refused to

[2] There is no dispute that State's Exhibit Two is a ring which was owned by the victim, David Colbin.

allow such irrelevant testimony. This claim is wholly specious, and does not entitle Guzman to relief.

Likewise, the refusal to allow Lee to testify concerning out-of-court statements made to him by Curtis Wallace was not error. That testimony would have amounted to classic hearsay which did not come within any exception to the hearsay rule. While Guzman suggests that that testimony was admissible as a statement against interest, Section 90.804(2)(c) of the Florida Evidence Code does not offer him any relief. Under that exception to the hearsay rule, "a statement tending to expose the declarant criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement." Given Lee's numerous statements to law enforcement, (see pp. 9-11, above), the statement Lee attributed to Wallace clearly does not meet the trustworthiness requirement of the evidence code. Consequently, it does not come within any exception to the hearsay rule, and was properly excluded.[3]

Moreover, once again the evidence which Guzman claims he should have been allowed to present through Lee was presented through other witnesses. Detective Wright testified that Lee had told him about Wallace's purported involvement in the murder. (T. 1701-1707). Obviously the jury found Lee to be incredible.

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[3] Section 90.804 requires that the declarant be unavailable. There has been no satisfactory showing that Wallace was unavailable within the meaning of that term as used in the evidence code.

That result is hardly surprising, and this claim does not entitle Guzman to relief.

C. The "exclusion" of Yarbrough's testimony.

Guzman argues that he was improperly prevented from putting on evidence that the victim's samurai sword was used in an altercation between the victim and an unknown individual which occurred some period of time prior to the victim's murder. This claim does not entitle Guzman to relief because it is based on an incorrect factual premise. Rather than testifying that the sword in question was used in the prior altercation, Yarbrough unequivocally testified, on two occasions, that, while he remembered the altercation, he did not remember the sword being involved. (T. 975; 1322). Yarbrough further testified that "I didn't see no fights, just a lot of words". (T. 1322). There is no evidence anywhere in the record to support Guzman's assertion that the sword was ever used in this prior "altercation". Guzman elicited far more than he was entitled to present: the fact that the altercation took place. However, to assert that he should have been allowed to introduce evidence that the sword was used in that incident strains credibility. There is utterly no evidence to suggest that the sword was used, and, consequently, there can be no error. This claim does not entitle Guzman to relief.

For the reasons discussed above, the claims of error are based upon an incorrect interpretation of the record, and, consequently, there can not have been a "cumulative effect" of the exclusion of that testimony. There can be no error when the

evidence which Guzman wanted to present did not exist. Guzman is not entitled to any relief.

POINT 2

THE JURY WAS PROPERLY INSTRUCTED IN THE PENALTY PHASE.

Guzman argues that the jury was improperly instructed in the penalty phase of his capital trial because the trial court omitted the following phrase from the penalty phase jury instructions:

> The aggravating circumstances that you may now consider are limited to any of the following that are established by the evidence: ....

While that phrase is included in the standard jury instructions for use in criminal cases, its omission from the jury charge in this case does not automatically entitle Guzman to relief. Instead, when the entire charge to the jury is considered, it is apparent that there was no error.

When the charge to the jury is considered as a whole, as it must be, it is clear that the jury was specifically instructed on the potential applicability of six statutory aggravating circumstances. (R. 151-153). When the portion of the jury charge which follows the listing of the statutory aggravators is considered, it is apparent that the language of that portion of the jury instruction refers to those specific aggravating circumstances, and does not invite, encourage, or suggest that the jury could consider anything outside the six statutory aggravators. (See, e.g., R. 153; 154; 157).

Of course, juries are presumed to follow their instructions, and, given the instructions in this case which specifically listed aggravating circumstances and referred to the

statutory aggravating circumstances only, it is apparent that the instructions did not invite the jury to consider anything other than the well-established statutory aggravating circumstances. Finally, given the strength of the state's case, and the strength of the five aggravating circumstances present in this case, any error in not instructing the jury that its consideration of aggravating circumstances was limited to the statutory aggravating circumstances is harmless. There would have been no need for the jury to consider any nonstatutory aggravating circumstances to arrive at a death recommendation in this case. The state clearly established that the defendant had been convicted of seven prior violent felonies, that the murder in this case was committed for the purpose of avoiding or preventing a lawful arrest, that the murder was committed during the course of a robbery and/or committed for pecuniary gain, that the murder was especially heinous, atrocious, or cruel, and that the murder was cold, calculated and premeditated. (See, e.g., R. 645-646). When those five aggravating circumstances are weighed against the weak nonstatutory mitigation established by the defendant, it is clear that no rational fact finder could have reached any other verdict than that returned by the jury. As the trial court found in its sentencing order, any one of the statutory aggravating circumstances would have been sufficient to outweigh the "insubstantial mitigation" present in this case. (See, R. 651).

As the Eleventh Circuit stated in Elledge v. Dugger, "it cannot be gainsaid that the cruelty of the rape and the murder made it more difficult for Elledge to alter the final sentence by

adducing mitigating circumstances." Elledge v. Dugger, 823 F. 2d 1439, 1447 (11th Cir.), modified, 823 F. 2d 250 (11th Cir. 1987), cert. denied, 108 S. Ct. 1487 (1988). In this case, the state established the existence of five statutory aggravating circumstances. Guzman only presented relatively weak nonstatutory mitigating evidence. It stands reason on its head to suggest that the omission of the complained-of phrase from the penalty phase jury instructions made any difference in the outcome. Given the strength of the case against Guzman, and the strength of the evidence supporting a sentence of death, any error by the trial court was harmless.

POINT 3

NO CONFLICT OF INTEREST EXISTED AS TO GUZMAN'S TRIAL COUNSEL.

Guzman argues that a conflict of interest existed as to the public defender's office regarding Arthur Boyne and the defendant. Guzman claims that this "conflict" rendered his trial counsel ineffective. As with the two preceding claims, the facts do not support Guzman's assertions.

In a remarkably misleading piece of advocacy, Guzman asserts that despite Boyne's unconditional waiver of the attorney-client privilege (T. 1054), he was not able to impeach Boyne through the testimony of one of Guzman's attorneys (who had previously been appointed to represent Boyne in an unrelated matter). The record does not support this version of the facts. Instead, the record indicates that Boyne unconditionally waived the attorney-client privilege and that Guzman's attorney announced that he would call Assistant Public Defender Jacobson as a rebuttal witness. (T. 1054; 1064). Moreover, Guzman's attorney stated that his understanding was "that there was a complete and total waiver of the confidentiality that existed between the public defender's office and Boyne." (T. 1054). Contrary to Guzman's assertions in his brief, trial counsel was not in any way inhibited in his defense of this case. To the extent that Guzman suggests that the assistant public defender did not testify because the state objected, that claim is specious. (T. 1066). The true state of the record is that, for reasons unknown to the state, Guzman never attempted to offer the

testimony of Assistant Public Defender Jacobson. No ruling by the trial court prevented Guzman from calling Jacobson, and, given the tenacity of Guzman's defense, it is inconceivable that Jacobson would not have been called to testify if he had had anything material to say. Of course, a conflict of interest can be waived, and Boyne's waiver is clearly valid. See, e.g., Duncan v. Alabama, 881 F. 2d 1013, 1017 (11th Cir. 1989). The conflict of interest issue was resolved by Boyne's unconditional waiver of the attorney-client privilege, and Guzman suffered no prejudice. His trial counsel's ability to represent him was in no way impaired, and any claim to the contrary is utterly devoid of merit.

POINT 4

THE PROSECUTORIAL MISCONDUCT CLAIM.

Guzman argues that the trial court erred in denying a mistrial based upon purported prosecutorial misconduct during the examination of the defendant's handpicked expert pathologist. This claim is without merit.

The defendant's pathologist, Christopher Choporis has never performed a forensic autopsy (T. 1505); has never been licensed as a medical examiner (T. 1448); and has only testified on four occasions, always for the same assistant public defender, who is a personal friend (T. 1464). However, the fact that the prosecutor vigorously attacked the bias of this witness does not amount to prosecutorial misconduct. Instead, bias is a legitimate basis upon which to challenge the credibility of a witness. The actions of the prosecutor, which Guzman labels misconduct, are in fact nothing more than trial tactics that the defendant did not like.

Guzman's claim that the prosecutor repeatedly interrupted the witness is not supported by the record. No such interruption "occurred" at T. 1445 or T. 1446. At T. 1473, 1499, and 1500, the prosecutor was plainly attempting to prevent a lengthy, non-responsive answer to a question put to the witness on cross-examination. The fact that the trial court allowed such answers does not mean the prosecutor was engaged in any sort of misconduct. Likewise, the questioning at T. 1453, 1462, and 1604 was not repetitive of questions previously ruled on by the court. Guzman's citation to T. 1465 is particularly misleading; that

portion of the record is a side bar conference during which the state argued that the court's ruling on an objection on T. 1464 should be changed. Based on even the most cursory review of the record, there is no misconduct present.

To the extent that Guzman claims that the prosecutor attempted to mislead the jury regarding the expert witness' fees in earlier cases, that claim is specious. While the trial court did not allow the state to cross-examine the witness regarding prior fees which had been challenged by the state attorney's office, and ultimately instructed the jury as to the mechanism by which a defense expert is paid, the prosecutor's actions do not amount to misconduct. Instead, the assistant state attorney's tactics were a legitimate challenge to the witness' credibility and bias. Of course, bias is a traditional method of impeaching a witness, and it is arguable that the trial court should have permitted the state to inquire further into the witness' motivation for testifying. That is not the issue, but it is clear that the assistant state's attorney did not mislead the jury and did not engage in any misconduct. Moreover, the jury was specifically instructed on the mechanism through which a court appointed expert is paid.

To the extent that Guzman claims that the assistant state's attorney made actions, facial gestures and other behavior prejudicial to the defendant, that claim is frivolous. As stated by the assistant state's attorney, he squints when he removes his glasses because he has difficulty seeing without them. The fact that the prosecutor improvidently removed his glasses does not

state grounds for relief. To the extent that Guzman argues that the assistant state's attorney continuously quarreled with the expert witness, that claim is not supported by the record. See, pp. 20-21 above.

None of the instances referred to by Guzman amount to prosecutorial misconduct, and none of them, separately or cumulatively, amount to a basis for the granting of a mistrial. Guzman is not entitled to relief on this claim.

POINT 5

THE WITHERSPOON CLAIM.

Guzman argues that prospective juror Schantz was improperly excused for cause pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). When the standard for removal for cause is applied to the facts of this case, it is clear that Schantz was properly excluded.

In Wainwright v. Witt, 469 U.S. 412 (1985), the United States Supreme Court clarified the Witherspoon standard, stating that the proper inquiry is "whether the juror's view would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. at 424 [citations omitted]. See also, Darden v. Wainwright, 477 U.S. 165 (1986). In granting the state's challenge for cause, the trial court found that Schantz was opposed to capital punishment and was "very hesitant and questionable whether she could follow the law." (R. 736). Schantz stated that she would seek other options (R. 642), and, in fact, Guzman's trial counsel conceded that Schantz could not say unequivocally that she would follow the law. (R. 645). When the Witherspoon-Witt standard is applied to this case, it is clear that the state's challenge for cause was properly granted.

Finally, as the Supreme Court held in Witt, the ultimate decision on a challenge for cause must be made by the trial judge. Wainwright v. Witt, 468 U.S. at 428. Of course, the trial judge is ultimately required to make a finding as to the venireman's state of mind, and that finding must obviously be

based upon a determination of credibility and demeanor. Id. For that reason, such trial level determinations are entitled to deference on review. Id. The trial court in this case made just such a determination after observing the juror's demeanor and responses on voir dire. That is the very sort of credibility determination referred to in Witt, and it is entitled to deference on review. Schantz was properly excluded for cause, and Guzman is not entitled to relief.

POINT 6

THE TRIAL COURT PROPERLY DENIED GUZMAN'S MOTION FOR MISTRIAL BASED ON THE TESTIMONY OF ARTHUR BOYNE.

Guzman argues that a mistrial should have been granted based upon a passing reference made by one witness to Guzman's prior conviction. This claim is without merit for two independently adequate reasons.

First, Guzman's trial counsel objected to the witness' statement. (T. 1043). That objection was sustained, and the jury was instructed to disregard the statement. (Id.). The law is well-settled that juries are presumed to follow their instructions, and, given the court's prompt curative instruction, there can be no error. When all of the circumstances are considered, it is clear that Guzman was not prejudiced in any way. The remark was relatively innocuous, and was not repeated. Likewise, the court's curative instruction was prompt and did not overemphasize the witness' statement. Guzman is not entitled to relief.

The second reason this claim is without merit is that the fact of Guzman's prior conviction for murder was properly before the jury because the defendant testified during the guilt phase of his trial. (T. 1812, et seq). At the very beginning of that testimony, Guzman testified that he had previously been convicted of seven felonies. (T. 1812). Because the defendant placed his criminal record before the jury at the guilt phase, his motion for a mistrial based on Boyne's testimony is moot. This claim is utterly meritless.

POINT 7

THE GRUESOME PHOTOGRAPH CLAIM.

Guzman argues that the admission of two photographs of the body of Guzman's first murder victim was error. This claim is without merit for two independently adequate reasons.

First, Guzman has waived the section 90.403 objection contained in his brief because that claim was not raised at trial. (R. 61). Florida law is settled that claims not raised by timely objection are waived. Rutherford v. State, 545 So. 2d 853 (Fla. 1989). Moreover, evidence of the circumstances of a prior violent felony by a capital defendant is clearly admissible in the penalty phase of a capital trial. See, Rhodes v. State, 547 So. 2d 1201, 1204-1205 (Fla. 1989). Guzman's prior felony was clearly relevant to the sentencing proceeding, and any prejudicial effect of the two photographs did not outweigh their obvious probative value. The photographs were necessary to assist the jury in understanding the location of the murder and the method by which the victim was killed. Moreover, the photographs do not depict gross mutilation of the victim, nor do they focus unnecessarily on the victim's single gunshot wound. The probative value of the photographs outweighs any possible prejudice.

Second, even if the admission of the two photographs was error, that error was harmless beyond a reasonable doubt. In Duncan v. State, 619 So. 2d 279 (Fla. 1993), this Court applied harmless error analysis to the admission of a photograph of a capital defendant's prior murder victim. Id., at 282. In this

case, as in Duncan, no further reference was made to the photographs and they did not become a focal point of the proceedings. Likewise, the photographs were not urged as a basis for a death recommendation by the jury. Finally, in this case, as in Duncan, the jury was well aware that Guzman had previously been convicted of another murder.

Moreover, when the two photographs at issue are considered along with the overwhelming aggravation (and absolute lack of mitigation) present in this case, it is clear that Guzman would have received a death recommendation regardless of whether or not those two photographs had been introduced. Because it is clear beyond a reasonable doubt that the photographs did not contribute to a death recommendation by the jury, any error in their admission was harmless.

POINT 8

THE INTRODUCTION OF GUZMAN'S SURVIVAL KNIFE WAS NOT ERROR.

Guzman argues that it was error to admit his "survival knife" into evidence. This claim is without merit because it is based on an erroneous factual premise. Contrary to Guzman's claim, the state did not tie itself to the theory that the victim's sword was the only murder weapon. The medical examiner, Dr. Steiner, was shown both the sword and the survival knife, and testified that either weapon could have caused some of the wounds sustained by the victim.[4] (T. 926-927). Because some wounds were consistent with either weapon, the survival knife (which is admittedly Guzman's) was relevant. See, e.g., Section 90.401. It would have been error to exclude the knife, and Guzman's claim is specious.

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[4] The sword is state's exhibit four, and the survival knife is state's exhibit eleven. (R. 1142).

POINT 9

THE EVIDENCE IS SUFFICIENT TO SUPPORT GUZMAN'S CONVICTION.

Guzman argues that his conviction is not supported by competent and substantial evidence. A fair reading of the record does not support that claim.

The testimony of Martha Cronin, as summarized in Guzman's brief, is substantially correct. However, Guzman has omitted Cronin's testimony that Guzman stated that the victim was frequently intoxicated, had money, and would be easy to rob. (T. 1220). Cronin also testified that Guzman later made a similar statement, and then said that if he ever robbed anyone, he would kill them because dead witnesses do not talk. (T. 1221). Cronin further testified that, shortly after the murder, Guzman came into their room with a plastic shopping bag that appeared to contain rags. (T. 1226). Guzman seemed to be upset. Id. Guzman left to take the bag to the dumpster and, when he returned to the motel room, he told Cronin that he had killed the victim with his own samurai sword. (T. 1227). Cronin further testified that Guzman stated that he had committed the murder "for her". (T. 1230-1231).

Sometime later, Cronin asked Guzman to tell her about the murder. (T. 1239). At that time, Guzman stated that he had tried to borrow money from the victim and that a fight had resulted following an argument. Id. The rest of the events related by Guzman were substantially the same as his statement to Cronin immediately after the murder. Id.

Arthur Boyne testified that Guzman told him that he [Guzman] "killed the victim when he needed money for crack cocaine, but ended up with the victim's ring instead of money." (T. 1041). Leroy Gadson testified that he received the victim's ring from Guzman in August of 1991 in trade for crack cocaine and cash. (T. 1186; 1192). There is no dispute that the ring Cronin saw in Guzman's possession immediately after the murder was the property of the victim. Likewise, there is no question that the ring is the same one Guzman gave to Gadson in return for drugs and cash. (T. 1203).

Florida law is settled that circumstantial evidence alone will support a capital conviction. See, Huff v. State, 437 So. 2d 1087 (Fla. 1983). However, the case against Guzman was not entirely circumstantial. Guzman's confessions to Cronin and Boyne constitute direct evidence of guilt, not circumstantial. See, e.g., Hardwick v. State, 521 So. 2d 1071, 1075 (Fla. 1988). The weight and credibility to be afforded those statements are questions for the jury. The evidence is sufficient to support Guzman's conviction, and he is not entitled to relief. To the extent that Guzman complains that Cronin's testimony relevant to the time of the murder conflicts with the statements made by Artonyo Lee, that conflict created a credibility question for the jury. To the extent that Guzman attempts to rely on non-record matters (Appendix A) to suggest that Cronin received some benefit for her testimony, that reliance is improper. To the extent that Guzman suggests that the letter written by Boyne affects his testimony in some way, Boyne testified that he was intimated by

the defendant into writing that letter. (T. 1091). Guzman is not entitled to any relief.

POINT 10

THE LIMITATION ON CLOSING ARGUMENT CLAIM.

Guzman argues that he is entitled to relief because the trial court limited closing argument to one hour per side. Guzman also argues that he is entitled to relief because the state's objection to a portion of closing argument was sustained.

Guzman's claim regarding the limitation placed on the penalty phase closing arguments cannot entitle him to relief unless he can demonstrate an abuse of discretion by the trial court. See, e.g., May v. State, 89 Fla. 78, 103 So. 115 (1925). Guzman cannot make that showing.

Guzman's closing argument consumed thirty-six transcript pages. (R. 113-149). At no time did Guzman request additional time, even though the court was willing to adjust the allotted time as necessary. (R. 85). Moreover, the record indicates that the court convened at 1:00 p.m. (R. 96) and heard argument on the proposed jury charges out of the presence of the jury. The jury then returned to the courtroom (R. 100), and the state made final summation (R. 100-113). The defendant then presented his closing argument and the court charged the jury. (R. 113-149). After the court's charge to the jury, the jury retired at 2:35 p.m. (R. 158). Obviously, the defendant spent far less than one hour on his closing argument. The court's willingness to grant additional time, coupled with the fact that Guzman used far less than his allotted time establishes that there was no abuse of discretion. See e.g., Garcia v. State, 501 So. 2d (3d DCA 1987). Guzman is not entitled to relief.

Guzman also contends that he should have been allowed to argue what he labels as "the public policy" reasons for capital punishment. However, that argument is actually an argument that certain "nonstatutory mitigators" should be considered by the jury. The state's objection to that argument was properly sustained because it was irrelevant to the issues before the jury. See, e.g., Hitchcock v. State, 578 So. 2d 685, 689 (Fla. 1990), vacated on other grounds, 112 S. Ct. 3020 (1992); Shriner v. State, 386 So. 2d 525, 533 (Fla. 1980). This claim is without merit.

POINT 11

THE REASONABLE DOUBT JURY INSTRUCTION CLAIM.

Guzman argues that the jury was given an incorrect instruction on the definition of reasonable doubt. This claim does not entitle Guzman to relief for two independently adequate reasons.

First, Guzman did not object to the trial court's instruction on reasonable doubt. Because Guzman did not raise a timely objection to that instruction, he has waived the issue for appeal. Rule 3.390(d), Florida Rules of Criminal Procedure.

Second, the reasonable doubt instruction given in this case is the instruction set out in the standard jury instructions. See, Standard Jury Instruction (Criminal) 2.03. Moreover, this instruction has been approved by this Court. See, e.g., Brown v. State, 565 So. 2d 304, 307 (Fla. 1990). The reasonable doubt instruction given in this case did not reduce the state's burden of proof, and does not constitute a basis for reversal.

To the extent that Guzman argues that the reasonable doubt instructions violated Cage v. Louisiana, 111 S. Ct. 328 (1990), this claim is meritless. The offending language in Cage, which is not present in this case, was the use of the phase "grave uncertainty". Gaskins v. McKellar, 111 S. Ct. 2277 (1991) (Stephens, J. on denial of certiorari). Because the language upon which the decision in Cage was based is not present in Florida's standard jury instruction, there is no error. Guzman's jury was properly instructed and he is not entitled to relief.

POINT 12

THE TRIAL COURT PROPERLY REFUSED GUZMAN'S REQUESTED JURY INSTRUCTION ON THIRD DEGREE MURDER.

Guzman argues that the jury should have been instructed on third degree murder in addition to the other lesser-included offense instructions. Guzman's claim is based upon a misreading of the evidence, and an erroneous view of the law.

Guzman was found guilty of first degree premeditated murder or first degree felony-murder and guilty of robbery with a deadly weapon. (R. 577). That verdict, and the evidence supporting it, are inconsistent with a finding of guilt of third degree murder for four reasons. First, the verdict of guilt on a robbery count is a rejection by the jury of not only second degree murder and manslaughter, but also the lesser included offenses of robbery and theft. Because Guzman was found guilty of robbery, the jury made a finding which is inconsistent with any verdict on the murder charge except guilty of first degree felony-murder. See, e.g., Section 782.04, Florida Statutes. Under the terms of the statute, a murder in the course of a robbery is excluded from third degree murder. Florida Statutes, Section 782.04(4). Because Guzman was found guilty of robbery, a conviction for third degree murder would not have been consistent with the evidence. Second, the evidence does not support the giving of an instruction on third degree murder. Under the terms of the statute, third degree murder is defined as "[t]he unlawful killing of a human being, when perpetrated without any design to effect death, ..." Florida Statute, § 782.04(4) [emphasis

added]. There is no possible view of the evidence under which it is possible to conclude that this murder was "perpetrated without any design to effect death." Id. The multiple stab wounds suffered by the victim foreclose any such argument. It stands reason on its head to suggest that the infliction of at least nineteen knife wounds, at least four of which penetrated deep into the victim's chest, does not indicate a "design to inflict death." No view of the evidence can bring the facts within the definition of third degree murder, and that charge was properly refused.

Third, even if the facts of this case met the foregoing part of the definition of third degree murder, the facts argued by Guzman did not support the giving of the refused jury instruction. Even under the facts set out on page 55 of Guzman's brief, Guzman does not come within the definition of third degree murder. Those facts assume that Guzman could be convicted of third degree felony-murder even though there was no connection between his part of the "conspiracy" and the murder. Further, Guzman is suggesting that a third degree murder conviction would be proper when he took no part in the murder and had no knowledge of the murder until well after it occurred. That view of the law makes no sense, and would not support a conviction even under Tison v. Arizona, 107 S.Ct. 1676 (1987), and Walton v. Arizona, 110 S.Ct. 3047 (1990). Under Guzman's view of the evidence, there is a break in the chain of events between the theft of the ring and the murder, with the result that the "conspiracy" could not be the underlying felony to support a felony-murder conviction.

A further defect with Guzman's view of the evidence exists in his suggestion that Wallace killed the victim following a confrontation. The evidence was uncontroverted that the victim was killed in his bed and that all of the victim's injuries were inflicted while the victim was so situated. (T. 869). That evidence, which is uncontroverted, is totally inconsistent with a confrontation which escalated to a murder. The trial court properly refused to charge the jury on third degree murder.

POINT 13

THE TRIAL COURT DID NOT ERR IN REFUSING GUZMAN'S REQUESTED JURY INSTRUCTIONS.

Guzman raises various challenges to the penalty phase jury instructions given in his case. For the reasons set out below, none of those claims have merit.

To the extent that Guzman argues that the cold, calculated and premeditated aggravating circumstances unconstitutionally vague, that claim has been repeatedly rejected by this Court. See, Fotopoulous v. State, 608 So. 2d 784, 794 (1992), and cases cited therein. Likewise, the heinous, atrocious or cruel instruction given in this case was the standard jury instruction which is consistent with Proffit v. Florida. See, Hall v. State, 614 So. 2d 473, 478 (Fla. 1993); Preston v. State, 607 So. 2d 404, 410 (Fla. 1992). To the extent that Guzman complains that the "catchall" mitigation instruction is inadequate, that claim is foreclosed by binding precedent. See, Robinson v. State, 574 So. 2d 108 (Fla. 1991); Jackson v. State, 530 So. 2d 269 (Fla. 1988).

Guzman also claims that the jury was improperly instructed on its advisory role at the penalty phase. This Court has consistently held that the standard jury instruction, which was given in this case, is not violative of Caldwell v. Mississippi. See, e.g., Fotopoulous v. State, 608 So. 2d 784 (1992); Grossman v. State, 525 So. 2d 833 (Fla. 1988); see also, Dugger v. Adams, 103 L. Ed. 435 (1989). Likewise, the standard jury instruction on the weighing of aggravating and mitigating factors is

sufficient. Stewart v. State, 549 So. 2d 171 (Fla. 1989); Arengo v. State, 411 So. 2d 172 (Fla. 1982). To the extent that Guzman argues that "mitigation" was insufficiently defined, that claim is specious. The standard jury instruction properly informed the jury of the definition and function of mitigating evidence, and there is no error present.

Guzman's penalty phase jury was not precluded from considering what weak mitigation the defendant had to offer. Likewise, the jury was properly instructed as to the quantum of proof necessary to establish a mitigating circumstance. See, Brown v. State, 565 So. 2d 304 (Fla. 1990). No error is present in the penalty phase jury instructions, and Guzman is not entitled to relief.

POINT 14

THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS PROPERLY FOUND.

Guzman argues that the trial court erred in finding this murder to be especially heinous, atrocious or cruel. This claim is without merit.

The evidence is undisputed that the victim was stabbed, hacked, chopped or sliced at least nineteen times. (R. 649). At least one of those wounds was a defensive wound. Id. The evidence further established that the victim was moving about during the attack. Id. Blood spatter evidence indicated that the victim was able to raise his head a foot or so above the surface of his bed during the assault. (R. 648). The victim was lying in his bed when he was attacked. Id. The victim was found to have a blood alcohol level of 0.34, but, because he was a heavy drinker, the undisputed evidence was that the victim could tolerate such an alcohol level and continue to remain conscious and functioning. (R. 649).

Guzman argues that, because of the victim's level of intoxication, he could not have suffered very much pain. Therefore, Guzman concludes, the heinous, atrocious or cruel aggravator does not apply because the victim was anesthetized by alcohol, and because Guzman did not mean for the killing to be extraordinarily painful. Guzman's arguments fail: the first collapses based on the facts, and the second fails on the law.

Guzman's claim that because the victim was intoxicated he did not suffer is contradicted by the evidence, which

demonstrates that the victim tried to resist. Obviously, the victim had to be conscious to do that; just as obviously, there can be no doubt that the victim suffered extreme pain and terror. Whether the victim lost consciousness before the attack was over cannot be determined. However, the victim was conscious for an unknown period during which he suffered greatly. This Court has repeatedly upheld the application of the heinous, atrocious or cruel aggravator to stabbing murders. See, Trotter v. State, 576 So. 2d 691 (Fla. 1991); Campbell v. State, 571 So. 2d 415 (Fla. 1990: Floyd v. State, 569 So. 2d 1225 (Fla. 1990); see also, Owen v. State, 596 So. 2d 985 (Fla. 1992) (sleeping victim awakened by assault). This case is a proper one for the application of the heinous, atrocious or cruel aggravator.

To the extent that Guzman claims that he did not intend to make the victim suffer and that therefore the heinous, atrocious or cruel aggravator should not apply, that claim is specious for two reasons. First, this aggravator is based on the victim's perspective, not the defendant's. Hitchcock v. State, 578 So. 2d 685 (Fla. 1990). To the extent that Guzman attempts to rely on an out-of-context quotation from Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), that reliance on dicta taken from a gun-murder case is inapposite. The murder committed by Guzman is heinous, atrocious or cruel under any definition of that aggravator.

Second, to the extent that Guzman argues that his "intent" is relevant to the heinous, atrocious or cruel aggravator, the nineteen stab wounds he inflicted on his victim speak far louder

than his protestations that he did not mean to make David Colvin suffer. The unusually brutal nature of this murder indicates that Guzman thoroughly enjoyed what he was doing, and was completely indifferent to the suffering of his victim, who knew and obviously trusted Guzman. This claim has no merit.

POINT 15

THE TRIAL COURT PROPERLY FOUND THE "AVOIDING LAWFUL ARREST" AGGRAVATING CIRCUMSTANCE.

Guzman argues that the evidence is insufficient as a matter of law to establish the "avoiding lawful arrest" aggravating circumstance. A fair reading of the record establishes that Guzman has misinterpreted the evidence.

In order to support this aggravator, the dominant motive must be witness elimination. See, e.g., Dailey v. State, 594 So. 2d 254 (Fla. 1992). The evidence in this case, as summarized in the sentencing order, is sufficient to establish this aggravating circumstance. As found by the trial court, the victim knew Guzman and certainly would have been able to identify him. (R. 648). As further found by the trial court, Guzman had stated during the week preceding the murder, that the victim would be an easy target for a robbery. Id. During that same time frame, Guzman also stated that if he committed a robbery, then he would have to kill the victim because "dead witnesses don't talk." Id. The facts of this case are substantially identical to the facts of Kokal v. State, 492 So. 2d 1317 (Fla. 1986), where this Court found the defendant's statement that "dead men don't tell lies" was sufficient to support this aggravating circumstance. The evidence in this case, like the evidence in Kokal, clearly establishes that Guzman killed the victim to avoid being identified. See also, Henry v. State, 613 So. 2d 429 (Fla. 1992). The "avoiding lawful arrest" aggravating circumstance is supported by the evidence, and Guzman is not entitled to relief.

POINT 16

THE TRIAL COURT PROPERLY FOUND THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE.

Guzman argues that the trial court improperly found the "cold, calculated and premeditated" aggravating circumstance. In support of this argument, Guzman focuses on the fact that the victim was repeatedly stabbed. However, that is not the proper focus, nor was it the basis of the trial court's sentencing order. (R. 650).

The cold, calculated and premeditated aggravator focuses more on the defendant's state of mind than on the method of the killing. Johnson v. State, 455 So. 2d 499 (Fla. 1988). Heightened premeditation is required in addition to a plan by the defendant to commit the murder which existed before the crime began. See, e.g., Thompson v. State, 565 So. 2d 1311 (Fla. 1990); Hamblen v. State, 527 So. 2d 800 (Fla. 1988). However, the heightened premeditation need not be directed toward a specific victim. Provenzano v. State, 497 So. 2d 1177 (Fla. 1986).

In its sentencing order, the trial court found that:

> The defendant's own statements demonstrate a premeditated attempt to rob someone and to kill him to eliminate witnesses, as well as a prearranged design to single out David Colvin as an easy robbery victim, whom he did then murder, at least partially to eliminate him as a potential witness. The defendant's knowledge that the victim received money regularly and the recognition that he shared with numerous others of the obvious value of the victim's ring further tend to prove his

> selection of David Colvin as his victim at least days prior to the murder. The defendant was shown to have befriended the victim to the extent that Colvin trusted the defendant enough to request that the defendant drive him, in the victim's car, to various errands the morning of the day of the murder. The defendant then kept the victim's car and room keys and returned later to the victim's room to rob and to brutally murder him.

(R. 650). When the law is applied to the facts of this case, it is clear that the cold, calculated and premeditated aggravating circumstance was properly found. See, e.g., Remeta v. State, 522 So. 2d 825 (Fla. 1988); Johnson v. State, 438 So. 2d 777 (Fla. 1984). See also, Durocher v. State, 596 So. 2d 997 (Fla. 1992); Owen v. State, 596 So. 2d 985 (Fla. 1992). Guzman is not entitled to any relief.

POINT 17

THE DEATH PENALTY IS PROPORTIONATE IN THIS CASE.

Guzman argues that the sentence of death is disproportionate to the facts. Guzman predicates this argument on his contention that certain of the aggravators found in his case are invalid. However, for the reasons discussed elsewhere in this brief, each aggravating circumstance found in this case is valid and properly applied to Guzman. Moreover, given the weak mitigation present, even one aggravator is sufficient to support the death sentence. See, R. 649.

Guzman argues that the death penalty is reserved for the most aggravated and least mitigated of first degree murders. Whether or not that is a completely accurate statement, it certainly describes this case. Five valid aggravators, including a prior murder conviction, are present in this case. The only mitigation which exists is weak, nonstatutory mitigation. Under the circumstances of this case, the death penalty is clearly proportionate. See, Freeman v. State, 563 So. 2d 73 (Fla. 1990); see also, Sochor v. State, 580 So. 2d 595 (Fla. 1991); Asay v. State, 580 So. 2d 610 (Fla. 1991); Young v. State, 579 So. 2d 721 (Fla. 1991). Guzman is not entitled to any relief.

POINT 18

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE JURY'S ADVISORY SENTENCE BE UNANIMOUS.

Guzman argues that he is entitled to relief because Florida's death penalty act does not require the jury to return a unanimous sentencing recommendation. This claim is foreclosed by binding precedent. Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990). Sochor v. Florida, 112 S. Ct. 2114 (1992), and Espinosa v. Florida, 112 S. Ct. 2926 (1992) do not compel a different result because they have nothing to do with this issue. At any rate, Guzman's jury recommended death by a vote of ten to two. Guzman's claim is without merit. See, Hildwin v. Florida, 104 L. Ed. 2d 728 (1989).

POINT 19

THE TRIAL COURT PROPERLY DENIED GUZMAN'S PRETRIAL MOTIONS.

Guzman argues that he is entitled to relief based upon the trial court's denial of four separate categories of pretrial motions. None of these claims have merit.

A. The penalty phase evidence motions.

On pp. 72-74 and 75-76, Guzman argues that the trial court should have granted his motion for a statement of particulars of the aggravating circumstances, as well as his motion for disclosure of penalty phase evidence and witnesses. These claims have been repeatedly rejected by this Court. Gore v. State, 475 So. 2d 1205 (Fla. 1985); Preston v. State, 444 So. 2d 939 (Fla. 1984); Hitchcock v. State, 413 So. 2d 741 (Fla. 1982). This claim is without merit.

B. The Caldwell v. Mississippi claim.

On page 74 of his brief, Guzman argues that the jury should not have been instructed that their role at sentencing was advisory. This claim is without merit because the advisory jury was properly instructed. See, e.g., Dugger v. Adams, 103 L. Ed. 2d 435 (1989); Owen v. State, 560 So. 2d 207 (Fla. 1990).

C. The "reference to the grand jury" motion.

Guzman argues that the trial court improperly denied his motion in limine which sought to prohibit the state from referring to the grand jury indictment. This claim is without merit.

Guzman has pointed to no references by the state to the indictment. On two occasions, the trial court instructed the jury that the indictment was not evidence of guilt. (T. 750; T. 2017). From the record, it appears that the only other reference to the grand jury came during the defendant's cross-examination of Martha Cronin. (T. 1257). Of course, juries are presumed to follow their instructions, and Guzman's jury was clearly instructed that the indictment should not be construed as evidence of guilt. Further, it is clear that the trial court's ruling on Guzman's motion relating to the grand jury indictment could have had no effect on the outcome of this trial.

CONCLUSION

Guzman's conviction and sentence of death should not be disturbed.

Respectfully submitted,

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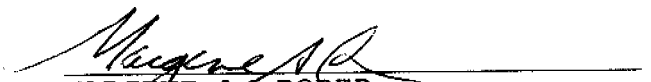
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief has been furnished by U.S. Mail to James L. Rose, 20 N. Halifax, P.O. Box 2599, Daytona Beach, FL 32115, this 20th day of January, 1994.

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