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IN THE SUPREME COURT OF FLORIDA

JAMES GUZMAN,

Appellant,

v. CASE NO. 89,640

STATE OF FLORIDA,

Appellee.

_______________________________/

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

ANSWER BRIEF OF APPELLEE

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This case returns to this Court following this Court's reversal of Guzman's conviction and sentence based upon a finding that trial counsel labored under a conflict of interest. (R1-10). This Court denied rehearing, and private counsel was appointed to represent the defendant. (R11-14).[1]

The case proceeded through the pre-trial stage, and, on December 2, 1996, jury selection began. (TR487 et. seq.). On December 4, 1996, Guzman elected to waive a jury trial for the guilt/innocence and penalty phases of his capital trial. (R403; TR1235-48). The trial court accepted that waiver, and the case proceeded to a bench trial.

Guzman was found guilty of first-degree murder and armed robbery (TR2282; R448-58), and the penalty phase of the proceedings began on December 27, 1996. At the conclusion of the penalty phase proceedings, the trial court sentenced Guzman to death, finding the following aggravating circumstances: 1) the defendant was previously convicted of another capital felony or convicted of a felony involving the use or threat of violence to the person; 2) the capital felony was committed during the course of a robbery; 3) the capital felony was committed for the purpose of avoiding a lawful arrest; 4) the capital felony was cold, calculated, and premeditated; and 5) the capital felony was especially heinous, atrocious, or cruel. (R460-464). The trial court found no

[1] The motion to appoint counsel was filed on January 26, 1995. (R14).

statutory mitigation, and, as non-statutory mitigation, found that Guzman's "alcoholism/drug use dependency" was established but was only entitled to little weight. (R467). The trial court found that no other mitigating circumstances had been established. *Id*.

Notice of Appeal was given on December 31, 1996. (R470). The record was certified as complete and transmitted on April 15, 1997. (R489).

STATEMENT OF THE FACTS

The State does not accept the argumentative and incomplete statement of the facts set out at pages 5-10 of Guzman's brief. The State relies upon the following facts.

Robin Colvin was married to the victim, David Colvin, for ten years. (TR1303-04). She testified that the victim often wore expensive jewelry and carried a lot of cash on his person. (TR1305-06). She also testified that her husband drank excessively. *Id*. In the spring of 1991, the victim moved to the Daytona Beach area. (TR1308). Ms. Colvin sent him approximately $600.00 a week, and last saw him on the weekend of July 4, 1991. (TR1309). Ms. Colvin identified the victim's diamond ring, which is worth approximately $20,000.00. (TR1310-11). Guzman stipulated to the identity of the victim. (TR 1315).

Thomas Conway was employed as a maintenance man at the Imperial Motor Lodge in Daytona Beach, Florida, in August of 1991. (TR 1315-17). He knew the victim because he lived at the hotel.

(TR1317). In August of 1991, Conway helped the victim move from room 205 to room 114. (TR1317-18). Conway last saw the victim on August 10, 1991, and, on Sunday, August 11, knocked on Colvin's door, but got no answer. (TR1318). On August 12, 1991, Conway went to the victim's room to check on him. (TR1318). Conway opened the door to room 114 with his passkey, and, when he entered the room, he and his wife saw blood and a body. (TR1319). Conway recognized the body as that of David Colvin. (TR1320). Conway left the room and locked the door without having touched anything inside of the hotel room. He then called the manager and law enforcement. (TR1320). Conway further testified that Guzman and James Yarborough had helped Colvin move into room 114. (TR1324).

Daytona Beach Police Department Detective Allison Sylvester responded to the Imperial Motor Lodge on August 12, 1991. She was the first detective to arrive at the crime scene, and, upon her arrival, she found that patrol officers had already secured the scene. (TR1328-29). Detective Sylvester described finding the body of a white male lying face down on the bed with pillows on top of the body from waist to head. (TR1330). Blood was on the pillows and around the body, and a sword was propped on the light fixture above the bed. (TR1330). The body was found in room 114 of the Imperial Motor Lodge, and was obviously a homicide. (TR1331). Detective Sylvester identified the sword that she found in the hotel room. (TR1331).

Detective Sylvester interviewed Guzman at the Imperial Motor

Lodge. (TR1495). At that time, Guzman said that he knew the victim, but had not been inside of room 114. (TR1496). When Detective Sylvester mentioned the existence of fingerprints, Guzman told her that he had helped the victim move, and that he had driven the victim's car. (TR1496-97). Guzman told Detective Sylvester that he had helped the victim move into room 114 on Wednesday or Thursday, and that he had also driven the victim to an International House of Pancakes. (TR1499). Guzman told Detective Sylvester that they went to a bar from the International House of Pancakes, and then returned to the Imperial Motor Lodge. (TR1499).

Guzman was arrested for this crime on December 13, 1991, based upon information obtained from Martha Cronin during the last week of November. (TR1502). Detective Sylvester attempted to verify the information obtained from Cronin. (TR1503). Cronin told Detective Sylvester that the victim's ring had been sold to an individual named Leroy Gadson. (TR1504). When he was interviewed, Gadson told Detective Sylvester that he had received the ring in exchange for cocaine, and identified Guzman as the person from whom he received it. (TR1504). The ring was recovered by law enforcement, and Guzman was located in South Daytona. (TR1505). At that time, Guzman voluntarily surrendered his "survival knife" to law enforcement. (TR1505-6). After having been given his *Miranda* warnings, Guzman stated that he knew nothing about the ring that had been recovered from Gadson. (TR1507-8). Guzman told Detective

Sylvester that he did not recognize the ring as the one that he sold to Leroy Gadson. (TR1509). However, Gadson identified Guzman as the individual that sold the ring to him. (TR1512). Guzman never made a statement to law enforcement. (TR1514).

Subsequently, Paul James Rogers was developed as an individual having information about the murder of David Colvin. In May of 1992, Rogers contacted Detective Sylvester and told her that Guzman had made a statement concerning the murder. (TR1514). Rogers was in the Volusia County Branch Jail at the time, and, based upon the information obtained in an interview of Rogers, a search warrant for Guzman's cell was obtained. In the course of that search, the corner of an envelope bearing the address of Rogers' mother was discovered. (TR1515). Further, a note bearing the name and phone number of the hotel where Cronin was staying was discovered. Before the details of the murder were released, Curtis Wallace had told law enforcement "if a ring is missing, I know who did it." (TR1519). Artonyo Lee made several inconsistent statements to law enforcement, and ultimately stated that he saw Colvin at the motel drink machine on Friday evening, the day before he was murdered. (TR1561-62). Throughout the investigation, no evidence was ever developed that pointed to the involvement of Curtis Wallace or Artonyo Lee. (TR1562).

Michael Rafferty was, in 1991, a crime scene analyst in the

Florida Department of Law Enforcement's Orlando Laboratory.[2] (TR1336). Mr. Rafferty responded to the Imperial Motor Lodge on August 12, 1991, at the request of the Daytona Beach Police Department. Mr. Rafferty photographed the scene, conducted a search of it, and completed a sketch of the area. (TR1338). He also collected various items of evidence. (TR1338). Bloodstains were found on the telephone hand set, and the sword that was found in the hotel room was taken as evidence. (TR1339; 1344-45). He also collected various fingerprints from the Cadillac belonging to the victim. (TR1347). Mr. Rafferty testified that there was a large amount of blood spatter at the scene, that was found mainly on the north and west walls of the room within two to three feet of the body. (TR1357). Mr. Rafferty also collected a pair of tan pants in which were found an affidavit of sale for the Cadillac that was in the victim's name, as well as two NASCAR licenses, an address book, a State of Nebraska identification card, and a State of New York Department of Motor Vehicles title for the Cadillac. (TR1353). All of these documents were in the name of David Colvin.

Larry Lewis was a Sergeant with the Daytona Beach Police Department in the Criminal Investigation Division in 1991.

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[2] Mr. Rafferty is now the FDLE lab director in Ft. Myers, Florida. (TR1336).

(TR1382).[3] Sergeant Lewis videotaped the crime scene in the hotel room at the Imperial Motor Lodge. (TR1383).

Doctor Terrance Steiner was the interim medical examiner for Volusia County in August of 1991. (TR1406; 1408-10). He responded to the Imperial Motor Lodge on August 12, 1991. (TR1410). Dr. Steiner testified that, while he was at the scene, he observed knife wounds on the back and side of the victim's head, blood spatter on the walls, and a skull fragment on the floor by the foot of the bed. (TR1413). The victim had nineteen stab and hack-type wounds. (TR1415). Dr. Steiner testified that the weapon was a very heavy-bladed knife or "knife-like object." (TR 1415). When a knife or knife-like object is the murder weapon, it is only possible to say that the wounds observed on the victim are consistent with a particular knife. (TR1415). Dr. Steiner testified that the sword recovered from the victim's hotel could have caused the wounds he observed, and testified that the wounds were consistent with a single-edged knife with a blade approximately one-inch wide. (TR1416). He further testified that the weapon used in the murder had a blade that was slightly curved. (TR1417). The sword recovered from the hotel room has such a blade, and is consistent with all of the wounds observed on the victim's body. (TR1418).

Dr. Steiner testified that the victim sustained eleven wounds

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[3] Mr. Lewis is presently employed as a fingerprint technician with the Volusia County Sheriff's Office. (TR1382).

to the face and scalp, which were hacking and incised injuries (TR1424; 1428); three wounds to the chest; four wounds to the back, and one to the left index finger. (TR1428). The wound to the finger virtually severed the tip of the victim's left index finger -- that injury is a defensive wound. (TR1426-27). Dr. Steiner testified that the victim was conscious and trying to fend off the assault based upon the presence of defensive wounds, and there is no reason to believe that the victim was unconscious early in the assault. (TR1433). Based upon the pattern of wounds, the victim was moving and attempting to avoid his killer. (TR1433-34). Further, it is unreasonable to expect that the killer turned the body over after the assault was completed. (TR1434). The injury to the victim's index finger is a "spiral cut", which indicates that the victim was moving when the wound was inflicted. (TR1434). The victim was conscious and aware of the assault, and no wound that was inflicted would have been immediately fatal. (TR1434). The wound to the victim's left chest area would have caused him to lose consciousness in twenty seconds to two minutes. (TR1434). The victim died of blood loss and shock due to multiple stab and incised wounds. (TR1435). The fact that the victim was intoxicated at the time of his death does not affect Dr. Steiner's opinion that the victim was conscious throughout most or all of the assault. (TR1436). Finally, Dr. Steiner testified that, in his medical opinion, David Colvin died between 3:00 p.m. and midnight on August 10, 1991. After removing the body from the scene, and having the

chance to examine the body in more detail, Dr. Steiner determined that the sword found at the scene was consistent with some or all of the wounds observed, and, moreover, was able to observe the extensive decomposition found on the front of the victim's body. (TR1459-61).[4] Further, Dr. Steiner testified that the food matter found in the victim's stomach would have been present had he eaten lunch and then been murdered at approximately 3:00 p.m.. (TR1463).

James Yarborough lived at the Imperial Motor Lodge in August of 1991. He knew David Colvin, and also recognized Guzman on sight. (TR1474-75). Mr. Yarborough saw Guzman in the victim's room on three or four occasions. (TR1476). Mr. Yarborough last saw David Colvin on the day of his death, at approximately 1:00 p.m (TR1478). Mr. Yarborough helped the victim move to a different room on the Friday preceding his death. (TR1478). Mr. Colvin frequently carried a lot of money. (TR1479). Mr. Yarborough identified the sword that belonged to the victim, and testified that it was not "bent up" like it is now. (TR1481). Mr. Colvin was known to drink heavily. (TR1482). Mr. Yarborough recalled an argument between Mr. Colvin and two other individuals, one of whom was armed with a knife. (TR1483). That incident took place long before the victim was killed, and no one tried to stab anyone during that confrontation. (TR1487).

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[4] In his brief, Guzman makes much of the fact that Dr. Steiner commented upon the condition of the sword during the videotaping at the crime scene. As set out above, that reference is spurious.

Leroy Parker is a crime lab analyst supervisor with the Florida Department of Law Enforcement. (TR1577). Mr. Parker was qualified as an expert in blood stain pattern analysis. (TR1579-80). He testified that, in his opinion, most of the blows received by the victim were inflicted while he was lying on the bed, with his head elevated above the bed not more than twelve inches. (TR1593). The victim was moving about and in a defensive posture. (TR1594). Based upon the presence of cast-off blood in the room, the killer was swinging the sharp object that inflicted the various wounds. (TR1594; 1597). The presence of splash blood on the bed, the side of the bed, and on the pillows indicates that the pillows were underneath the victim while he was bleeding. (TR1597).[5] Mr. Parker testified that the sword recovered at the scene is consistent with the blood spatter that he observed in the hotel room. (TR1599).

Yvette McNab is a serologist with the Florida Department of Law Enforcement. (TR1606). She examined the knife and sword that are in evidence in this case, and testified that no human blood was found on them. (TR1614). The absence of blood could be explained by it having been washed off. (TR1615).

Kelly May is an FDLE crime lab analyst assigned to the latent fingerprint section. (TR1618-19). He was qualified as an expert in fingerprint comparison. (TR1621). Mr. May testified that the

[5] Obviously, blood does not flow "up hill".

fingerprint found on the telephone handset in room 114 and the fingerprints lifted from the exterior of the victim's car matched the defendant's fingerprints. (TR1623-29).

Martha Cronin was a prostitute living at the Imperial Motel in August of 1991. (TR1634-35). She met Guzman in early August of 1991, and he ultimately moved in with her. (TR1636-37).[6] Cronin was familiar with the victim, and knew that he drank heavily. (TR1637-38). At one point in time, Guzman commented to Cronin that the victim would be easy to rob because he was always drunk and usually had money. (TR1639). Later, Guzman told Cronin that if he ever robbed anybody, he would have to kill them. (TR1640). Later, Guzman stated that dead witnesses can't talk, and if he ever robbed anybody, he would kill them. (TR1640-41). At the time that he made this last statement, he was holding his "survival knife" and twirling it. (TR1642).[7]

On August 10, 1991, Cronin was working very early in the morning, and returned to her room at approximately 7 a.m. (TR1642). Guzman was not there when she got back to the hotel room. (TR1643). She did not see Guzman until later that day. (TR1643). Guzman called her on the telephone, and told her that he was going to drive the victim to the bank. (TR1644). Cronin went to sleep and

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[6] Guzman's street nickname is "Chico".

[7] Guzman always had this knife in his possession. (TR1642).

awakened around 11:00 a.m. (TR1644). Guzman was not present at that time. (TR1644). Later, Guzman returned to the hotel room and said that he and Colvin had gone for breakfast and drinks. (TR1645). Guzman stated to Cronin that he was going to help the victim move, and, at that time, had the keys to the victim's car. (TR1645-46). Cronin went back to work from approximately noon until 2:00 p.m, and returned to the room between 2:30 and 3:00 p.m. (TR1646; 1649). Guzman was not present at that time, but returned within thirty minutes, appearing to be upset. (TR1649-50). Guzman had a garbage bag in his possession that appeared to contain rags. (TR1650). Guzman went out and returned in a few minutes. (TR1651). Because Guzman appeared upset, Cronin asked him what was the matter -- Guzman replied "I did it". (TR1651). When Cronin asked Guzman what he meant by his statement, Guzman stated that he had killed David Colvin. (TR1652). Cronin told Guzman that she did not want to know what had happened, but, nevertheless, Guzman later told her two different stories. (TR1653).

Guzman first told Cronin that the victim was passed out and awakened while Guzman was trying to take money from his room. (TR1654). Guzman hit the victim in the head, knocked him out, and stabbed him with the victim's samurai sword. (TR1655). Guzman showed Cronin the victim's ring and some cash. (TR1655). Cronin identified the ring that she was shown by Guzman as the one that is in evidence. (TR1655). Cronin described the ring as having thirteen diamonds and appearing to be very expensive. (TR1656).

She told Guzman to get rid of the ring because she did not want to be involved in the murder. (TR1656). Guzman later told Cronin that he killed the victim "for her". (TR1658). Guzman took the ring to a friend of his and exchanged it for drugs and cash. (TR1658).[8]

On August 12, 1991, following the appearance of law enforcement in the area of the Imperial Motor Lodge, Guzman told Cronin to say that she wasn't there if asked by law enforcement. Guzman also told Cronin what questions she could expect from law enforcement -- the actual questions posed by investigators were close to those predicted by Guzman. (TR1661).

Following the murder, Cronin became more and more frightened of Guzman, who had become more possessive and controlling of her. (TR1662). Guzman began to set "traps" to see if she ever left the hotel room without his knowledge, and began to strip search her when she returned from work. (TR1663). Later, Guzman told Cronin that he killed the victim after fighting with him over money, and that he killed him with a sword. (TR1664). Cronin did not go to law enforcement immediately because Guzman told her there was no place where he couldn't get her, which she interpreted as being a threat. (TR1665-66). Cronin testified that she told Detective Sylvester where to locate Guzman, and was very much afraid that he would kill her because the beatings and abuse inflicted on her by

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[8] Guzman obtained crack cocaine valued between two and three hundred dollars and approximately $150.00 in cash for the ring. (TR1659).

him were worsening. (TR1776; 1781). Guzman had told Cronin that "silent witness is a dead witness." (TR1782). On the day of the murder, Guzman returned to the room that he shared with Cronin between 3:00 and 3:30 p.m.[9] (TR1787).

Leroy Gadson identified the defendant as an individual known to him in August of 1991. (TR1814-15). In August of 1991, Guzman called Gadson at 4:00 to 5:00 p.m., and stated that he had something for Gadson. (TR1820-21). Fifteen or twenty minutes later, Guzman arrived on a bicycle and showed Gadson a gold ring with lots of diamonds on it. (TR1824). Guzman wanted to sell the ring for cash and drugs. (TR1825). The negotiated deal was $250 cash and crack cocaine worth three hundred dollars. (TR1826). Gadson did not know where the ring had come from. (TR1827). When Gadson was contacted by law enforcement in late November and told that the ring was connected to a murder, he surrendered it to law enforcement. (TR1833-36). Gadson identified the ring he turned over to Detective Sylvester as the one that is in evidence.

Daytona Beach Police Officer Robert Walker came in contact with Martha Cronin on November 23, 1991. (TR1861). At that time, she said that she knew something about a murder case, and stated "just to give you an idea what I know, the victim was killed with a samurai sword, a ring was taken," and she could take law

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[9] Cronin testified that she did not know anyone by the name of Carmelo Garcia, and that she never told "Garcia" that she had lied to law enforcement about Guzman.

enforcement to the person who had the ring. (TR1864).

John Gaston is the Chief Investigator for the Volusia County Medical Examiner’s Office. (TR1866-67). He identified various photographs that were taken at the scene of David Colvin’s death, and were admitted into evidence at trial. (TR1871).

Paul James Rogers, was, at the time he testified, an inmate of the Volusia County Branch Jail who was being held awaiting trial. (TR1892-93). Rogers has seven prior felony convictions. (TR1893). Rogers knows Guzman, and was housed in the branch jail with him in May of 1992. Rogers was given no promises for his cooperation, but was told that the judge and prosecutor on his pending cases would be informed if he testified truthfully in Guzman’s trial. (TR1896).

Rogers met Guzman in April of 1992 when they were housed together at the branch jail. (TR1897). They were housed in the same cell for about two weeks, and were housed nearby for some period of time. (TR1897-98). Over this period of time, Rogers and Guzman became friends.

In May of 1992, Guzman began to talk about his case with Rogers. (TR1900). Guzman told Rogers that he was a “canine” for Cronin, and used to drive a limousine for the victim. (TR1903). Guzman told Rogers that he drove because the victim was frequently drunk, and, on the day of the murder, he drove the victim to the bank, to a bar, and then to eat breakfast. (TR1904). After returning to the Imperial Motor Lodge, Guzman kept one of the keys to Colvin’s room. (TR1904). Guzman had helped Colvin move from an

upstairs to a downstairs room, and, after having returned from breakfast, Guzman and Colvin returned to their respective rooms. (TR1905). Cronin told Guzman that she was going out to work to obtain money for crack cocaine. (TR1905). Guzman told her that, instead of her going to work, he was going to obtain money for drugs by robbing the victim. (TR1905-06). Guzman told Rogers that he went to the victim's room and was going through the dresser looking for money when Colvin woke up. (TR1906). Guzman took the sword and hit Colvin with it. (TR1907). Guzman stated that he "stuck" the victim ten or eleven times with the sword, and that, when the victim sat up in bed, Guzman hit him with the sword. (TR1907-08).[10] After Colvin was dead, Guzman cleaned up the sword "and everything" and took the victim's ring and about $600 cash. (TR1908). Guzman threw everything away, and traded the ring for crack cocaine and cash. (TR1909-10). Guzman threatened Rogers with physical harm if he said anything by putting a knife to his throat and by choking him into near-unconsciousness on two or three occasions. (TR1911). Guzman told Rogers that he could get to Rogers' family if he said anything. (TR1911). Guzman had obtained the address for the residence of Rogers' mother, who is now

[10] Guzman told Rogers that the only weapon used was the sword. (TR1907).

deceased. (TR1912).[11]

Rogers was later threatened again by Guzman after Rogers' security classification was lowered and he was moved to another cell block. (TR1919). Guzman thought that Rogers had requested that transfer to avoid Guzman. (TR1920). When Rogers explained to Guzman that his charges had been reduced, Guzman accused Rogers of lying and put a knife to his throat. (TR1921). Guzman told Rogers that he was the only person involved in the murder of David Colvin. (TR1925).

Prior to Guzman's first trial, Rogers signed an affidavit to the effect that he knew nothing about the murder. (TR1926). Rogers signed that affidavit to protect himself and his mother from potential retaliation. (TR1927). Rogers' mother died in August of 1996. (TR1927). After the presentation of Rogers' testimony, the state rested its case-in-chief. (TR1954).

In his case-in-chief, Guzman presented various evidence concerning perjury by an acquaintance of Cronin's that occurred in an apparent effort to secure Cronin's release from incarceration. (TR1975; 2005-06). Guzman also presented the testimony of four-time convicted felon Carmelo Garcia, which consisted of testimony that Cronin confessed to lying to law enforcement about Guzman's involvement in the murder of David Colvin. (TR2023 *et.seq*).

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[11] Guzman had expressly stated that the murder had occurred in August of 1991. (TR1918).

Guzman also presented the testimony of Artonyo Lee, who was living at the Imperial Motor Lodge in August of 1991. (TR2059-60). Lee ultimately testified that he has no definite knowledge about the murder of David Colvin, only what he has "heard". (TR2086).

Guzman testified that he came to Daytona Beach in April of 1991, and moved to the Imperial Motor Lodge in late June or early July of that year. (TR2089-90). Guzman testified that he obtained the victim's ring from one Wallace, and traded it for drugs and cash. (TR2113-17). Guzman denied having made any statements to anyone that he had killed David Colvin, and flatly denied any involvement in the murder. (TR2151-59; 2167). Guzman acknowledged that, prior to his last trial, he had told Cronin "do the right thing girl -- it's a small world." (TR2223).

In rebuttal, the state presented the testimony of Jimmie Flynt, a Daytona Beach Police Department Detective who was involved in the investigation of this murder. (TR2231). Detective Flynt came in contact with Guzman during the initial canvass of the motel, and, when he told Guzman of Colvin's death, Guzman asked to see the body, but did not seem to be sad or shocked, even though he said the victim was "like a godfather to him." (TR2232-33).

After due deliberation, the court found Guzman guilty of first-degree murder and armed robbery with a deadly weapon. (TR2283).

At the penalty phase of Guzman's capital trial, the state presented evidence establishing Guzman's prior convictions for one

count of second-degree murder, one count of attempted second-degree murder, two counts of armed kidnaping, and two counts of robbery with a firearm. (TR2302).

Guzman announced that he wished to present no live witnesses at the penalty phase, and waived a pre-sentence investigation. (TR2312; 2315). As his penalty phase evidence, Guzman introduced a copy of his high school diploma as well as copies of various certificates earned by Guzman from participation in various Department of Corrections programs. (TR2310-11).

At the final sentencing hearing, the defendant stated to the court that he did not want his mother to testify as a mitigation witness, and, moreover, defense counsel stated to the court that there was no evidence to support any statutory mitigator, and the only potential mitigation that was not presented was the testimony of Guzman's mother. (TR2354-55). Further, defense counsel had reviewed a report prepared by Dr. Harry Krop and decided not to use Dr. Krop as a defense witness.

At the conclusion of all argument, the trial court sentenced Guzman to death finding five aggravating circumstances[12] and weak

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[12] 1) the defendant was previously convicted of another capital felony or convicted of a felony involving the use or threat of violence to the person; 2) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnaping or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb; 3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest

non-statutory mitigation.[13]

SUMMARY OF THE ARGUMENT

Guzman's claim that he was entitled to a mistrial has no legal basis because, under settled law, in a bench trial, the Court is presumed to disregard erroneously admitted evidence. The "evidence" at issue here was excluded by the trial court, who specifically stated that the evidence would not be considered. In any event, Guzman had made the facts at issue known to the trial court when he filed a motion in limine prior to the beginning of trial.

The evidence of guilt is sufficient to sustain Guzman's conviction for first-degree murder. Because Guzman made two confessions in which he admitted his involvement in the murder of the victim, this is not a circumstantial evidence case that is governed by the specific standard applicable to such cases. Guzman's claim is nothing more than his dissatisfaction with the trial court's credibility determinations. Such a claim is not cognizable on appeal.

Guzman argues that his retrial following this Court's reversal on direct appeal of his conviction and sentence is violative of the

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or effecting an escape from custody; 4) the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification; and 5) the capital felony was especially heinous, atrocious or cruel. (TR460-64).

[13] The trial court accorded little weight to the use drugs as a mitigating factor. (TR467). No other mitigation was found. *Id.*

double jeopardy prohibitions of the United States and Florida Constitutions. This claim is foreclosed by long-standing precedent, which holds that retrial following reversal on grounds other than the sufficiency of the evidence does not violate the double jeopardy clause. Guzman's position is internally inconsistent because he argues that the trial court should have *sua sponte* granted a mistrial during the proceedings that eventually were set aside by this Court. If that is true, then there can be no double jeopardy violation associated with the retrial. Guzman's claim has no legal basis, and is not a basis for relief.

Guzman presents five "issues" in summary form. None of these issues are properly briefed, and, even if they were, none of them provide a basis for reversal of his conviction and sentence of death.

Guzman argues that his sentence of death is disproportionate because an unspecified "majority" of the aggravating circumstances applicable to this case are "not valid", and because this is not the most aggravated and least mitigated of first-degree murders. In fact, the trial court found five aggravating factors, including a prior murder conviction. No statutory mitigating circumstances were proven -- the only offered mitigation was Guzman's drug use, which was afforded little weight by the trial court. Death is clearly the proper sentence in this case.

The trial court properly found the heinous, atrocious, or

cruel aggravating circumstance based upon the evidence at trial, which established that the victim was conscious throughout a substantial portion of the attack leading to his death, as well as demonstrating that multiple stab and incised wounds were inflicted, none of which would have been immediately fatal.

The avoiding arrest aggravating circumstance is applicable to this case. Prior to the murder giving rise to this case, Guzman stated repeatedly that the victim would be easy to rob, and that, if he ever robbed anybody, he would have to kill them because a dead witness cannot talk. Under settled law, the State has established that the dominant motive for the victim's murder was the elimination of a witness.

The trial court properly found the existence of the cold, calculated and premediated aggravating circumstance because Guzman had planned, for several days, to rob and murder the victim. The murder at issue in this case falls within the criteria establishing the cold, calculated and premeditated aggravating circumstance, and the trial court's finding of that aggravator is supported by competent, substantial evidence. The fact that Guzman has reached a different conclusion based upon his interpretation of the facts means nothing. There was no error, and the death sentence should be affirmed in all respects.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED GUZMAN'S MOTION FOR MISTRIAL

On pages 12-25 of his brief, Guzman argues that the trial court erroneously denied his motion for a mistrial, which was made after the witness Rogers testified that he did not want to be around Guzman (in the County Jail) "because he done told me he killed somebody in Miami, ..." (TR1946). The basis of Guzman's argument for reversal is his claim that the trial judge relied upon the "erroneously admitted evidence." *Initial Brief*, at 18. That claim collapses when the true facts are examined.

Florida law is long-settled that, in the context of a bench trial, the court is presumed to disregard erroneously admitted evidence. In *First Atlantic National Bank of Daytona Beach v. Cobbett*, 82 So. 2d 870, 871-872 (Fla. 1955), this Court stated: "in cases tried by the Judge without a jury the Judge is in a position to evaluate the testimony and discard that which is improper or which has little or no evidentiary value." *See, Adan v. State*, 453 So. 2d 1195 (Fla. 3d DCA 1984); *Perez v. State*, 452 So. 2d 107 (Fla. 3d DCA 1984). *See also*, *Wythers v. State*, 348 So. 2d 390 (Fla. 3d DCA 1977); *Capitoli v. State*, 175 So. 2d 210 (Fla. 2d DCA 1965); *United States v. Dillon*, 436 F.2d 1093 (5th Cir. 1971); *United States v. Menk*, 406 F.2d 124 (7th Cir. 1969); *United States v. Krol*, 374 F.2d 776 (7th Cir. 1967); *United States v. Mitchell*, 297 F.2d 407 (2d Cir. 1962); *Teate v. United States*, 297 F.2d 120, 121 (5th Cir. 1961). The presumption is overcome **only** if the record shows that the court relied on the erroneously admitted

evidence. *See, e.g., State v. Arroyo*, 422 So.2d 50, 51 (Fla. 3d DCA 1982); *United States v. Vaughan*, 443 F.2d 92 (2d Cir. 1970); *United States v. Turnipseed*, 272 F.2d 106 (7th Cir. 1959). Under the facts of this case, Guzman cannot overcome the presumption of propriety that attaches in a bench trial.

Following argument on the motion for mistrial, the trial court stated:

> The Court: All right. The court rules as follows: the motion for mistrial will be denied on the authority of the *Williamson* case.
>
> The response given by the witness, Rogers, will be stricken -- the question and the answer will be stricken from the record of this case.
>
> And, Mr. Keating, what will be your position insofar as the motion for mistrial is concerned? I've denied that.
>
> Mr. Keating: Yes, sir.
>
> The Court: All right. And I will strike the question and the answer from the record, **only in the sense that the court will not consider that evidence.**

(TR1965-66). Based upon the plain statement of the trial judge, the "erroneous" evidence was not considered, the presumption is not overcome, and there is no basis for reversal.

Despite Guzman's argument, he has pointed to nothing in the record that suggests that the trial judge did, in fact, consider the evidence at issue. Guzman has failed to carry his burden of overcoming the presumption of correctness that attaches in the context of a bench trial, and the conviction should be affirmed in all respects.

Further, under the particular facts of this case, the fact that Guzman had previously been convicted of a murder that occurred in Miami had been made known to the trial court through a defense motion *in limine* that concerned Rogers' testimony. That motion *in limine* stated, in relevant part, "[i]t is also expected that Paul James Rogers will state that Guzman threatened to do to Martha Cronin like the murder he did in Miami to the prostitute there." (R366).[14] The motion was granted as to that testimony.[15] (R383). Assuming, *arguendo,* that the trial testimony fell within the *in limine* ruling, there is no basis for reversal, because the trial court had already been made aware of the challenged testimony, and ruled that it would be excluded.[16] The court adhered to that ruling at trial, and it makes no sense to argue, in the face of a plain ruling to the contrary, that Rogers' trial testimony was considered by the trial judge. Even if the trial testimony was improper, there is no basis for a mistrial, and any error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986).

14

Whether the testimony at trial falls within the motion *in limine* is debatable. The court found that it did, and the State does not challenge that ruling.

15

Guzman does not explain, because he cannot, how he was prejudiced by the trial testimony but was not prejudiced by the same information when he placed it before the court in a motion *in limine.*

16

The motion *in limine* appears to be a variation of this issue that has not come up before.

To the extent that further discussion of this issue is necessary, the fact that the motion *in limine* informed the trial court that Guzman had previously been convicted of murder, and the fact that the court granted that motion, is fatal to Guzman's claim. It stands reason on its head to suggest that a defendant can obtain an *in limine* ruling excluding certain testimony (which by definition means that the judge knows what the testimony is), waive a jury trial, and then, if the *in limine* ruling is violated, obtain a reversal. That argument makes no sense -- even if the trial testimony violated the *in limine* ruling, the judge learned nothing that he did not already know (and had already found inadmissible) by virtue of the defendant's own actions.[17] There is no basis for reversal, and the conviction and sentence should be affirmed in all respects.

Finally, there is no basis for reversal because Rogers' testimony was not inadmissible in the first place because it was relevant to the issue of his credibility, as well as explaining why he did not come forward to identify Guzman for several years. The facts of this case are essentially identical to the facts of *Williamson v. State*, 681 So. 2d 688 (Fla. 1996), where this Court held that admission of evidence of the defendant's prior murder was

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[17] Rogers' testimony at trial was only that Guzman had committed a murder in Miami -- no particulars of the crime were given at trial. In contrast, the crime was described with some particularity in the motion *in limine.*

proper. *Williamson v. State,* 681 So. 2d at 695-6. Because the testimony at issue here was relevant to Rogers' credibility in explaining why he did not come forward sooner, it would not have been error to admit that testimony. Therefore, there is no basis for reversal of Guzman's conviction and sentence.

II. THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION

On pages 26-35 of his brief, Guzman argues that this is a circumstantial evidence case, and that the evidence is not sufficient to sustain the conviction. Both of those assertions are incorrect for the reasons set out below.

Guzman confessed his involvement in the murder of David Colvin to Martha Cronin and to James Rogers. Guzman told Cronin that the victim was passed out in his room, but woke up while Guzman was trying to steal cash from him. (TR1654). Guzman stated that he hit the victim in the head, knocked him out, and then stabbed him with the victim's samurai sword. (TR1655). Guzman had possession of the victim's diamond ring at that time. (TR1655). At a subsequent point in time, Guzman told Cronin that he killed the victim with his sword following a fight over money. (TR1664).

Guzman told James Rogers that, on the day of the murder, Cronin was going to go to work as a prostitute in order to obtain money with which to obtain crack cocaine. (TR1905). At that point in time, Guzman told Cronin that he was going to obtain the needed money by robbing the victim. (TR1905). Guzman told Rogers that

while he was going through the victim's dresser, the victim woke up. (TR1906). The victim sat up in the bed[18], and Guzman hit him with the sword and "stuck" him ten or eleven times. (TR1907-8). Guzman then cleaned up the sword and himself, took the victim's ring and about $600, returned to his room, and threw everything away. (TR1908-9).[19]

Despite Guzman's protestations to the contrary, this is not a circumstantial evidence case. The confessions set out above are direct evidence under settled law, and the circumstantial evidence standard does not apply to this case. *See, Myers v. State*, No. 85,617 (Fla. 1997); *Hardwick v. State*, 521 So. 2d 1071, 1075 (Fla.), *cert. denied*, 488 U.S. 871, 109 S. Ct. 185, 102 L. Ed. 2d 154 (1988). The evidence set out above, coupled with the forensic evidence and Guzman's undisputed possession of the victim's ring, is more than sufficient to sustain the conviction. When stripped of its pretensions, Guzman's claim is nothing more than a claim that the finder of fact gave too much weight to the direct evidence.

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[18] This is consistent with the testimony of FDLE analyst Leroy Parker, who testified that the victim's head was about a foot above the bed when some of the blows were struck. (TR1593).

[19] On page 28 of his brief, Guzman argues that witnesses Lee and Wallace saw the victim during the late evening hours of Saturday, August 10, or Sunday, August 11, 1991. In fact, Lee ultimately said that he saw the victim on Friday (the day before his death). (TR1562). Wallace said that he saw the victim on Saturday or Sunday -- both men were very confused about the exact time that they saw the victim. (TR2013).

That claim is not cognizable on appeal, because determinations of the credibility of witnesses are the province of the finder of fact, not of the appellate courts. *See, e.g., Demps v. State*, 462 So. 2d 1074, 1075 (Fla. 1984); *Jent v. State*, 408 So. 2d 1024, 1028 (Fla. 1981); *Land v. State,* 59 So. 2d 370 (Fla. 1952). The "arguments" contained in Guzman's brief are nothing more than his continuing quarrel with the trial court's credibility determinations. The conviction and sentence should be affirmed in all respects.

III. THE DOUBLE JEOPARDY CLAIM HAS NO LEGAL BASIS

On pages 36-41 of his brief, Guzman argues that his retrial following this Court's direct appeal reversal of his conviction and sentence violated the Double Jeopardy prohibition of the United States and Florida Constitutions. This claim has no legal basis, is foreclosed by settled law, and is founded upon an incorrect interpretation of the Double Jeopardy prohibition.

This Court is, of course, aware of the basis for its 1994 reversal of Guzman's conviction and sentence. *See, Guzman I, supra.* Guzman now argues, in an issue that was raised for the first time at the final sentencing hearing, that his retrial following an appellate reversal violated the double jeopardy clause. (R426 *et seq*). Putting aside for the moment the question of whether the issue was timely raised, the law is well-settled that retrial of a defendant whose conviction was reversed on grounds other than

sufficiency of the evidence does not violate the double jeopardy clause. *See, Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1977); *Hall v. State*, 381 So. 2d 683, 690 n. 5 (Fla. 1980). Guzman has cited no contrary authority because no such decision exists. This claim has no legal basis, and is not basis for reversal.

In connection with this argument, Guzman maintains the position that a mistrial should have been granted *sua sponte* during Guzman's first trial. However, the case cited in Guzman's brief (*Wynn v. Pound,* 653 So. 2d 1116 (Fla. 5 DCA 1995)), seems to indicate that a *sua sponte* grant of a mistrial would have been error that would have barred retrial.[20] *See also, C.A.K. v. State*, 661 So. 2d 365 (Fla. 5 DCA 1995). In any event, because Guzman takes the position that a mistrial **should** have been granted in the first trial, his double jeopardy claim collapses[21]. If the trial court should have declared a mistrial but did not, then retrial cannot violate the double jeopardy clause because retrial is the remedy that Guzman would have received. Guzman's argument is internally inconsistent, and there can be no legitimate double jeopardy claim.

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[20] Guzman refers to there being "no manifest necessity for retrial." That phrase has no meaning.

[21] Guzman argues "[a] mistrial should have been granted in the first trial *sua sponte* when Boyne testified." *Initial Brief* at 37.

On the other hand, if declaration of a mistrial **would** have been error, Guzman has no double jeopardy claim available to him, either. Under that scenario, retrial is permissible. Whether or not a mistrial should have been declared in the first trial does not matter -- reversal on appeal is no impediment to a retrial under well-settled law. This claim is without legal support, and does not provide a basis for reversal.

Guzman also claims that the prosecutor in the original trial "was at fault for causing the first trial to be reversed." *Initial Brief* at 37. That argument is incredible, given this Court's explicit ruling that "an actual conflict of interest and prejudice has been shown in this record and, consequently, that the **denial of the motion to withdraw was reversible error**." *Guzman v. State*, 644 So.2d at 999. The error during the first trial was committed by the trial judge when he denied the motion to withdraw -- Guzman cannot transform an incorrect ruling on the motion to withdraw into some sort of prosecutorial misconduct. Despite the legal inaccuracy of Guzman's position, he goes on to argue that the prosecutor's actions "and the trial court's denial [of the motion to withdraw] could only have been intended to 'provoke a mistrial so as to afford the prosecutor a more favorable opportunity to convict Guzman.'" *Initial Brief* at 38. That argument is absurd, especially in light of the fact that Guzman was convicted at his first trial. There is no basis for reversal, and the conviction and sentence

should be affirmed in all respects.

IV. "VARIOUS ISSUES"

On pages 42-43 of his brief, Guzman presents five "issues" which are argued in summary form. None of those "issues" are properly briefed[22], and, even if they were, there is no basis for reversal contained therein.

Guzman's claim that the "required elements of robbery" were not proven is not preserved for review because no motion for judgment of acquittal was made. (TR1967). While Guzman did move for a judgment of acquittal as to the murder charge, that motion did not address the robbery charge. Under settled law, the sufficiency of the evidence of robbery is not preserved for review. *Jordan v. State*, 441 So. 2d 657, 658 (Fla. 3d DCA 1983)("The defendant's various contentions that the evidence was insufficient to support his convictions for trafficking in narcotics and carrying a concealed firearm are not properly preserved for appellate review where no motion for judgment of acquittal was made at the conclusion of the case. *State v. Barber*, 301 So. 2d 7 (Fla. 1974)."); *See also,* Rule 3.380(b), *Fla. R. Crim. Pro.*[23]

Alternatively and secondarily, this claim lacks merit. While

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[22] *Williams v. State Dept. of Transportation,* 579 So. 2d 226, 231 (Fla. 1st DCA 1991); *Rodriguez v. State,* 502 So. 2d 18, 19 (Fla. 3d DCA 1986).

[23] Guzman's motion for judgment of acquittal at the close of all the evidence was directed only to the murder charge. (TR2235-41).

Guzman has not identified any shortcomings in the evidence supporting the robbery, the evidence shows that the Guzman was armed with a knife when he began the robbery; that he then used a sword belonging to the victim to kill him; that he took the property of the victim in order to obtain money for drugs; and that the victim died as a result of Guzman striking him multiple times with a sword. In light of the evidence, there is no colorable argument that the State failed to prove the taking of money and property belonging to the victim, with the intent to permanently deprive him thereof, through the use of force, violence, or assault. §812.13, *Fla. Stat.* The elements of robbery were established beyond a reasonable doubt, and the conviction for that offense should not be disturbed.

The second "issue" raised by Guzman is a claim that the trial court erred in overruling his hearsay objection to certain testimony by Cronin. The testimony at issue was Guzman's statement to Cronin that "I killed [the victim]." (TR1652). On its face, that statement is an admission by a party-opponent that falls within the §90.803(18) hearsay exception. The argument that the "record does not reflect what exception to the hearsay rule" allowed the admission of the testimony is meritless. This "claim" is not a basis for relief.

Guzman's third "claim" is a one-sentence argument that Cronin's testimony was illegally obtained and therefore

inadmissible. The basis for the claim of "illegality" is not disclosed, but that makes no difference. The law is settled that, at least in this context, Guzman has no standing to raise this claim, because it is based (apparently) on a perceived violation of **Cronin's** constitutional rights. *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S. Ct. 2908, 2915, 37 L. Ed. 2d 830 (1973) (". . . constitutional rights are personal and may not be asserted vicariously."); See also, *United States v. Pawner,* 447 U.S. 727, 100 S. Ct. 2439, 65 L. Ed. 2d 468 (1980); *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961).

Guzman's fourth "issue" is that, under §90.614.1, "Rogers [sic] trial testimony should not have been believed by the trial judge . . .." This claim is meritless for two reasons. First, §90.614 has nothing to do with the issue set out in Guzman's brief. Second, assessments of the credibility of witnesses are not the function of the appellate courts. *See, Myers, supra.* This claim has no legal basis, and therefore is not a basis for relief. Finally, this issue is not preserved for review because it was not raised below.

Guzman's final "claim" is that this Court violated some right accruing to the defendant when this Court reversed and remanded his original conviction and sentence based on one issue without deciding the remaining issues raised in brief. This issue is frivolous. Guzman received what he asked for in his prior appeal

(reversal of his conviction), and, had this Court gone on to address the remaining issues, it would have been an exercise in futility on the part of this Court. No rule of law entitles Guzman to an advisory opinion from this Court on issues that were not dispositive of his prior appeal. This issue has no legal basis, and the conviction and sentence should be affirmed in all respects.

V. DEATH IS THE PROPER SENTENCE

On page 44 of his brief, Guzman argues that death is disproportionate in this case because a "majority" of the aggravating circumstances found by the Court are not valid[24], and because "this is not the most aggravated and least mitigated of first-degree murders." This claim is wholly meritless.

In sentencing Guzman to death, the trial court found five aggravating factors:

> (1) that the defendant was previously convicted of another capital felony or convicted of a felony involving the use or threat of violence to the person;[25]
> (2) the murder was committed during the course of the commission of an enumerated felony (Armed Robbery);
> (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest;
> (4) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification;
> (5) the capital felony was especially heinous, atrocious, or cruel.

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[24] Guzman does not explain which aggravators are invalid, or why.

[25] Guzman has prior convictions for Second Degree Murder, Attempted Second Degree Murder, two counts of Armed Kidnaping, and two counts of Robbery. (TR460).

(TR460-464).

The sentencing court found that Guzman had established no statutory mitigating circumstances. (TR466-7). As non-statutory mitigation, the court found that Guzman's drug use was reasonably established as a mitigator -- it was afforded little weight. (TR467). No other non-statutory mitigation was established, and the sentencing court found (quite correctly) that the aggravation outweighed the mitigation. (TR468).

In the face of five aggravating factors, including a prior murder conviction, Guzman argues that the weak mitigating factor of "drug use" is sufficient to compel a life sentence. That argument has no legal basis, and borders on the incredible. Even if the prior violent felony aggravator was the only valid aggravating circumstance (and the State does not concede that that is so), death would still be the appropriate sentence under the facts of this case. *See, e.g., Duncan v. State*, 619 So. 2d 279 (Fla. 1993); *Ferrell v. State*, 680 So. 2d 390, 391-2 n. 2 (Fla. 1996) (prior violent felony aggravator outweighed seven non-statutory mitigators); *Windom v. State*, 656 So. 2d 432, 435, 441 n. 3 (Fla. 1995) (prior violent felony aggravator outweighed three statutory and four non-statutory mitigators); *see also*, *Williamson v. State*, 681 So. 2d 688 (Fla. 1996) (death proportionate in case with three aggravators weighed against statutory and non-statutory mitigation); *Pope v. State*, 679 So. 2d 710 (Fla. 1996) (pecuniary

gain and prior felony weighed against both statutory mental mitigators as well as non-statutory mitigation); *Geralds v. State*, 674 So. 2d 96, 105 (Fla. 1996) (death sentence upheld when substantial aggravation and no substantial mitigation); *Rhodes v. State*, 638 So. 2d 920, 927 (Fla. 1994) (death sentence upheld in case with two aggravators and "substantial mental mitigation"); *Sochor v. State*, 619 So. 2d 285 (Fla. 1993) (reversal not warranted because appellant reaches different conclusion than judge about whether mitigator is proven).

In Guzman's case, five strong aggravating factors were proven beyond a reasonable doubt -- of those aggravators, the prior violent felony circumstance is sufficient, standing alone, to support a death sentence in the face of the virtually non-existent mitigation. Under the facts of this case, the death sentence is clearly proportionate, and should not be disturbed. *Chandler v. State*, No. 84,812 (Fla., Oct. 16, 1997); *Rolling v. State*, 695 So. 2d 278 (Fla. 1997) (four aggravators outweighed two statutory and significant non-statutory mitigation); *Henyard v. State*, 689 So. 2d 239 (Fla. 1996) (four aggravators outweighed two statutory and minor non-statutory mitigation).

VI. THE TRIAL COURT PROPERLY FOUND THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE

On pages 45-47 of his brief, Guzman argues that the trial court erroneously found that the murder was especially heinous,

atrocious, or cruel. The basis for this argument is Guzman's assertion that there "is no indication that the killing was meant to be deliberately and extraordinarily painful." *Initial Brief* at 46. This argument has no legal basis.

In finding that the especially heinous, atrocious, or cruel aggravator was proven beyond a reasonable doubt, the sentencing court stated:

> The victim in this case had been out drinking with Defendant and was drunk. Witness Cronin testified that Defendant told her the victim was passed out and appeared to wake up. At that point Defendant told her he hit him in the head, knocked him out, and stabbed him with a samurai sword.
>
> The medical examiner testified to the following facts and opinions:
>
> a. That the samurai sword and Defendant's survivors knife were consistent within the type of wounds inflicted on the victim. The sword blade was severely bent and twisted and was consistent with all the wounds on the body.
>
> b. That a total of nineteen wounds were on the body. Eleven were incised and hacking wounds to the face and skull. Seven were stab wounds to the trunk of the body and one defensive wound to a forefinger. Three of the stab wounds were to the chest and four were to the neck and back.
>
> c. That there was a fragment of decedent's skull laying at the foot of the bed. Four of the cuts on the scalp cut into, broke, and even moved parts of the underlying bony skull indicating great force and pressure of blows by a heavy blade weapon.
>
> d. That the incised wounds to the face and skull were inflicted by a blade being drawn over an area rather than stabbed into it. Hacking wounds would be inflicted by heavy, forceful striking with a blade.
>
> e. That the defensive wound to the hand was the type that

> would be suffered by a person being assaulted by a weapon who uses his hands to block a blow.
>
> f. That none of the wounds would have been immediately fatal and all the wounds contributed to the cause of death which was blood loss.
>
> g. That the victim of these wounds would be conscious for as long as one to two minutes before losing consciousness.
>
> h. That the victim here was conscious and aware of what was happening when the assault began.
>
> That the evidence in this case establishes that this murder was a consciousless and pitiless crime which was unnecessarily torturous to the victim. The wounds were inflicted in a gruesome and hideous manner evincing extreme and outrageous depravity and exemplified by an utter indifference to the suffering of another and the desire to inflict a high degree of pain. The victim was alive and conscious and experienced fear, terror, pain, and a foreknowledge of death.

(R464-6). Those findings are in accord with settled Florida law, and should be affirmed in all respects.

To the extent that further discussion of this issue is necessary, Florida law is settled that "[w]e have consistently upheld this aggravator in cases where the victim is repeatedly stabbed. *See, e.g., Finney v. State*, 660 So. 2d 674, 685 (Fla. 1995), *cert. denied*, --- U.S. ----, 116 S. Ct. 823, 133 L. Ed. 2d 766 (1996); *Pittman v. State*, 646 So. 2d 167, 173 (Fla. 1994), *cert. denied*, --- U.S. ----, 115 S. Ct. 1982, 131 L. Ed. 2d 870 (1995); *Hardwick v. State*, 521 So. 2d 1071, 1076 (Fla.), *cert. denied*, 488 U.S. 871, 109 S. Ct. 185, 102 L. Ed. 2d 154 (1988); *Johnston v. State*, 497 So. 2d 863, 871 (Fla. 1986)." *Williamson v.*

State, 681 So.2d at 698. Likewise, Guzman's argument that the victim may not have been conscious during the attack is rebutted by the testimony of FDLE analyst Leroy Parker, who testified that, based upon the blood spatter patterns observed at the crime scene, the victim's head was about one foot above the bed during a portion of the assault that caused his death. (TR1593). Mr. Parker also testified that, based upon the observed blood spatter, the victim was moving about and in a defensive posture during the attack. (TR1594). This evidence (as well as the evidence of defensive wounds) is totally inconsistent with the victim being unconscious and unaware of his death. In summary, evidence exists from which is it possible to infer that the victim was conscious during the infliction of the injuries that resulted in his death. As this Court explained in *Gudinas:*

> . . .the trial court did not abuse its discretion in finding that the HAC aggravator was proven beyond a reasonable doubt. As in *Wuornos v. State*, 644 So. 2d 1012, 1019 (Fla. 1994), we affirm this finding since "the State's theory ... prevailed, is supported by the facts, and has been proven beyond a reasonable doubt."

Gudinas v. State, 693 So.2d 953, 966 (Fla. 1997). The heinousness aggravator was proven beyond a reasonable doubt.

To the extent that Guzman argues that he did not "intend" for the victim to suffer, and therefore the heinousness aggravator does not apply, that claim is foreclosed by binding precedent. In addressing a similar "intent" issue in *Hitchcock v. State,* this Court stated:

> **That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's.** *Stano v. State*, 460 So. 2d 890 (Fla. 1984), *cert. denied*, 471 U.S. 1111, 105 S. Ct. 2347, 85 L. Ed. 2d 863 (1985). Hitchcock stated that he kept "chokin' and chokin' " the victim, and hitting her, both inside and outside the house, until she finally lost consciousness. Fear and emotional strain can contribute to the heinousness of a killing. *Adams v. State*, 412 So. 2d 850 (Fla.), *cert. denied*, 459 U.S. 882, 103 S. Ct. 182, 74 L. Ed. 2d 148 (1982).

Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990). To the extent that Guzman relies on *Omelus v. State,* that case is not controlling because it does not set out the proposition of law for which is it cited. *Omelus* was a murder-for-hire case, and this Court held, "[u]nder these circumstances, where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously [to Omelus]." *Omelus v. State*, 584 So.2d 563, 566 (Fla. 1991). The heinous, atrocious, or cruel aggravating circumstance is supported by competent, substantial evidence, and was properly found in this case. *Lawrence v. State,* 691 So. 2d 1068, 1075 (Fla. 1997), *citing, Larkins v. State,* 655 So. 2d 95, 100 (Fla. 1995). When the evidence is viewed in the light most favorable to the prevailing theory, as it must be, Guzman's theory is inconsistent with the facts. *See, e.g., Wuornos v. State*, 644 So. 2d 1012, 1019 (Fla. 1994). Guzman's sentence of death should be

affirmed in all respects.

Alternatively and secondarily, without conceding error of any sort, death would still be the proper penalty even if the heinousness aggravator was not considered. In his brief, Guzman challenges only three of the five aggravators found by the sentencing court. Even assuming, *arguendo*, that all three of the challenged aggravators should not have been found, the sentence does not change. The remaining aggravators of murder during an enumerated felony by an individual with prior violent felony convictions are sufficient, by themselves, to support a sentence of death. *See, Ferrell, supra; Duncan, supra.* Of course, the fact that Guzman committed this murder shortly after he had been released from prison after serving the sentence imposed as a result of his previous murder conviction hardly shows that he has been, or can be, rehabilitated. Given that Guzman has the "loathsome distinction" of having previously been convicted of murder, the prior violent felony aggravator, standing alone, is sufficient to support a sentence of death. *Demps v. Dugger,* 514 So.2d 1092, 1093 (Fla. 1987). If there was error, and the State does not concede that that is so, that error was harmless beyond a reasonable doubt, and, as such, does not provide a basis for reversal. *See, State v. DiGuilio, supra.*

VII. THE AVOIDING ARREST AGGRAVATING CIRCUMSTANCE APPLIES TO THIS CASE

On pages 48-49 of his brief, Guzman argues that the "avoiding

arrest" aggravating circumstance does not apply to his case because the evidence does not "support as the only reasonable conclusion that [the victim] was killed primarily to eliminate him as a witness." *Initial Brief* at 49. This claim is meritless.

In the sentencing order, the trial court made the following findings as to this aggravator:

> State Witness Martha Cronin was the Defendant's girl friend. She lived with Defendant in her room at the Imperial Motel. She testified that the Defendant had on several occasions discussed robbery in general and that he had specifically stated to her "it would be easy to rob Dave because he was drunk all the time and usually had money."
>
> Witness Cronin further testified that Defendant had on other occasions stated to her that "if he ever robbed anybody he'd have to kill them;" "that a dead witness can't talk;" "so if he ever did commit that crime he would have to kill a person." Cronin stated that Defendant would be twirling and fiddling with the survival knife that he always had on his person when making such statements.
>
> These statements by Defendant in the context of the facts of this case are sufficient to establish that the Defendant's sole and dominant motive for this murder was the elimination of Colvin as a witness.
>
> The Court finds that the existence of this aggravating factor has been established beyond and to the exclusion of any reasonable doubt.

(R461-2). Those findings are supported by competent, substantial evidence, are not an abuse of discretion, and are fully in accord with settled Florida law.

As discussed at pages 45-46, above, the State's theory prevailed at trial, and it was not an abuse of discretion for the

sentencing court to finding that the avoiding arrest aggravator was proven beyond a reasonable doubt. *See, Gudinas, supra; Wuornos, supra.* Moreover, under the prior decisions of this Court, the State established that the dominant motive for the victim's murder was the elimination of a witness. *See, e.g., Kokal v. State*, 492 So. 2d 1317 (Fla. 1986) (". . . dead men don't tell lies" sufficient to support aggravator); *Koon v. State,* 513 So. 2d 1253 (Fla. 1987); *Lightbourne v. State*, 438 So. 2d 380 (Fla. 1983) (defendant admitted knowing victim); *Herring v. State*, 446 So. 2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S. Ct. 396, 83 L. Ed. 2d 330 (1984); *Johnson v. State*, 442 So. 2d 185 (Fla. 1983), *cert. denied*, 466 U.S. 963, 104 S. Ct. 2182, 80 L. Ed. 2d 563 (1984). This aggravating circumstance was properly found. *Lawrence, supra; Larkins, supra; Wuornos, supra,* and Guzman's death sentence should be affirmed in all respects.

Alternatively and secondarily, if there was error in the consideration of this aggravator, that error was harmless beyond a reasonable doubt. *State v. DiGuilio, supra;* see pages 46-47, above.

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

On pages 50-51 of his brief, Guzman argues that the trial court should not have found the existence of the cold, calculated and premeditated (CCP) aggravating circumstance. This claim is without merit because this aggravator is established beyond a

reasonable doubt.

In finding the CCP aggravating circumstance, the sentencing court made the following findings:

> Several days before this murder Defendant stated to Cronin "it would be easy to rob Dave because he was drunk all of the time and usually had money." Defendant had engaged her in discussions of robbery in general and told her "if he ever robbed anybody he'd have to kill them"; so if he ever committed that crime he'd have to kill a person."
>
> Defendant had for some time been calmly reflecting on killing and robbing Colvin. On the day of the murder, Defendant had been out drinking with Colvin and knew he was drunk. Defendant saw his opportunity and planned to kill and rob Colvin. He had taken Colvin back to his room and had kept Colvin's key ring. He showed the key ring to Cronin and told her he was going to help Colvin move. State Witness Rogers also testified Defendant told him he had kept the key to Colvin's room.
>
> When Cronin returned to her room the Defendant was not there. He returned to the room carrying a small plastic garbage bag. He appeared upset. The contents of the bag appeared to Cronin to be white rags. He left the room and returned a few minutes later without the plastic bag. She asked him what was wrong. He said "I did it." She asked him what he meant by that. He responded "I killed David."
>
> Cronin testified Defendant later told her that David was passed out and appeared to wake up. Defendant knocked Colvin out <u>then</u> stabbed him with a samurai sword.
>
> That explanation by Defendant to Cronin is supported by the medical examiner's testimony that the initial wounds to the front of the body occurred earlier in the assault and the victim suffered a defensive wound to the left forefinger trying to ward off a blow. The body was then either rotated or moved to the face down position. This testimony indicates the victim was first stabbed as he lay on his back in the bed.
>
> The State presented witness Paul Rogers who testified Defendant had confessed this murder to him while they were in jail. Rogers said Defendant told him he had driven Colvin to the bank and had gone drinking with him;

> that he had kept the key to Colvin's room when they returned. Rogers also testified that Defendant told him Colvin woke up when he was in the room; that he hit him with the samurai sword then stuck him 10-11 times; that he then cleaned up the sword, took a ring and cash, went to his room and cleaned up; then put everything in a bag and threw it in a dumpster.
>
> Rogers version of Defendant's confession to him is strikingly similar to the confession Cronin testified Defendant made to her.
>
> The sequence described by Rogers would explain why there was blood found in the inner right front pocket of decedent's tan pants as testified by State witness McNab.
>
> These facts clearly establish that this was a cold, calculated and premeditated murder. The premeditation was heightened premeditation. There is no evidence to even suggest moral or legal justification.
>
> The Court finds that the existence of this aggravating factor has been established beyond and to the exclusion of any reasonable doubt.

(R462-64). Under settled law, those findings establish the existence of the CCP aggravator.

Florida law is clear that the CCP aggravator is established when the robbery is planned in advance with a plan to leave no witnesses. *Remeta v. State,* 522 So. 2d 825 (Fla. 1988). The CCP aggravator is also established when the defendant talked about killing the victim before the murder was carried out. *Harvey v. State*, 529 So. 2d 1083 (Fla. 1988). *See also*, *Monlyn v. State*, 22 Fla. L. Weekly S631 (Fla., Oct. 9, 1997); *Marquard v. State*, 641 So. 2d 54, 55 (Fla. 1994) (plot formed to kill victim in advance of murder). The murder of David Colvin falls within each of the foregoing criteria, and the finding of the cold, calculated and

premeditated aggravator should not be disturbed. The order of the trial court is supported by competent, substantial evidence, and the fact that Guzman has reached a different conclusion based upon his interpretation of the facts means nothing. *Lawrence*, *supra; Larkins*, *supra; Wuornos*, *supra.* The death sentence should not be disturbed.

Alternatively and secondarily, if there was error, it was harmless beyond a reasonable doubt. *DiGulio*, *supra*.

CONCLUSION

Guzman's convictions and sentence of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief of Appellee has been furnished by U.S. Mail to Gerard F. Keating, 318 Silver Beach Avenue, Daytona Beach, Florida 32118, this _______ day of November, 1997.

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Of Counsel