IN THE SUPREME COURT OF FLORIDA

JAMES GUZMAN,
Appellant,

v. **CASE NO. SC02-860**

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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STATEMENT OF THE CASE AND FACTS

On pages 1-26 of his brief, Guzman has set out, under the general heading "Procedural History," what generally corresponds to the *Florida Rules of Appellate Procedure*'s requirement that a statement of the case and facts be set out in the Initial Brief. The statement of the case and facts set out in Guzman's brief is argumentative (in that it advocates Guzman's position throughout) and inappropriately histrionic, and, for that reason, the State does not accept Guzman's version of events.

The Prior Proceedings and the Facts of the Crime

On direct appeal from his conviction and sentence of death, this Court summarized the facts and procedural history of Guzman's case in the following way:

> On January 7, 1992, James Guzman was indicted for the murder and armed robbery of David Colvin. Following a jury trial, Guzman was convicted as charged and sentenced to death. This Court subsequently reversed Guzman's convictions and death sentence and remanded for a new trial, holding that Guzman's right to a fair trial was violated because his public defender had a conflict of interest. *Guzman v. State*, 644 So. 2d 996 (Fla. 1994). Guzman was retried and again convicted and sentenced to death. We now address Guzman's appeal from the second trial. We have jurisdiction. Art. V,§ 3(b)(1), *Fla. Const*. We affirm the convictions and death sentence.

FACTS

The record of Guzman's second trial reflects the

following facts. David Colvin's body was discovered lying face down on the bed of his motel room on August 12, 1991. He had nineteen stab, incised, and hack wounds to his face, skull, back, and chest, and a defensive wound to a finger on his left hand. A skull fragment was found on the floor at the foot of the bed. Colvin's bed was soaked in blood and a large amount of blood spatter coated the walls of the room within two to three feet of the body. A bent and twisted samurai sword was found on a light fixture above the bed. No blood or fingerprints were found on the sword. However, Guzman's fingerprints were found on the telephone in the room. Colvin's blood alcohol level was determined to be .34 at the time of his death.

Dr. Terrance Steiner, the interim medical examiner for Volusia County, viewed the murder scene. Dr. Steiner testified that the weapon used to kill Colvin was a single-edged knife or knife-like object with a slightly curved, heavy blade. He stated that the incised wounds to Colvin's face and skull were consistent with a blade being drawn over an area rather than stabbed into it. Dr. Steiner testified that the defensive wound was the type suffered by a person attempting to block a blow with his hand. He further testified that the sword recovered from the room could have inflicted some of the wounds to Colvin's body, and that a survival knife like the one owned by Guzman could have inflicted other wounds. Dr. Steiner said that Colvin died as a result of loss of blood and that none of his wounds would have been immediately fatal. Based on the pattern of the wounds and the defensive wound, Dr. Steiner opined that Colvin was conscious during at least the onset of the attack. Dr. Steiner said that the fact that Colvin was intoxicated at the time of the attack did not affect his opinion that Colvin was conscious during the assault and attempting to defend himself. Dr. Steiner estimated that Colvin died between 3 p.m. and midnight on August 10.

Leroy Parker, a crime scene analyst with the Florida Department of Law Enforcement (FDLE), testified that the blood stains found in the room indicated that most of Colvin's wounds were inflicted while he was lying

on the bed in a defensive position with his head elevated within a distance of twelve inches from the bed. Parker further testified that the large amount of blood spatter on the walls of the room suggested that the killer was swinging the weapon. Parker stated that the sword found at the crime scene was consistent with the blood spatter evidence.

Approximately one week prior to the murder, Guzman and Martha Cronin, a prostitute and crack cocaine addict, began living together at the Imperial Motor Lodge. Colvin also resided at the motel, and Guzman and Colvin became acquainted. On the morning of August 10, Colvin and Guzman left the hotel in Colvin's car. Guzman and Colvin first proceeded to a tavern and drank beer, then the men went to the International House of Pancakes and ate breakfast. Guzman testified that he and Colvin returned to the motel at approximately 12 noon. Guzman stated that he gave Colvin's car and room keys back to Colvin and returned to his room. Guzman testified that at approximately 3 p.m. Curtis Wallace gave him a diamond ring that he could sell or trade for drugs. Guzman admitted that he gave the ring to Leroy Gadson in exchange for drugs and money. However, Guzman denied any involvement in Colvin's robbery and murder.

Cronin's trial testimony contradicted Guzman's. Cronin testified that Guzman told her prior to the murder that Colvin would be easy to rob because he was always drunk and usually had money. Cronin stated that Guzman told her in another conversation that if he ever robbed anybody, he "would have to kill them" because "a dead witness can't talk." Cronin testified that Guzman was holding his survival knife at the time this statement was made. Cronin claimed that, on the morning of August 10, Guzman told her that he was going to drive Colvin to the bank. Cronin stated that Guzman returned to their room that morning and showed her Colvin's car keys and room keys. Cronin testified that at approximately 3 p.m. Guzman appeared at their room with a garbage bag that contained rags. Cronin said that Guzman looked upset, and that she asked him what was wrong. Cronin testified that Guzman responded, "I did it," and confessed to murdering Colvin. Cronin stated that Guzman told her that

Colvin awakened while he was taking money from Colvin's room. Cronin testified that Guzman said that he hit Colvin in the head and then stabbed him with the samurai sword. Cronin stated that Guzman showed her a diamond ring and money that he had taken from Colvin. Cronin also stated that Guzman said he committed the murder for her.

Upon questioning by the police shortly after the discovery of Colvin's body, Guzman and Cronin both claimed to know nothing about the murder. In the latter part of November 1991, Cronin informed the police that Guzman had confessed to her that he killed Colvin. Cronin testified that Guzman had instructed her to tell the police that she knew nothing about the murder. Cronin also testified that she did not come forward earlier because Guzman threatened to harm her if she revealed what she knew about the crime. Guzman admitted that he told Cronin prior to his first trial to "do the right thing girl -- it's a small world." Paul Rogers and Guzman became friends while sharing a jail cell in the Spring of 1992. Rogers testified that Guzman confessed to him that he robbed and killed Colvin. Rogers said that Guzman told him that he used Colvin's key to enter his room after the men returned from drinking, and that Colvin awakened while Guzman was robbing him. Rogers further testified that Guzman stated that, after Colvin sat up in the bed, Guzman struck Colvin ten or eleven times with the sword. Rogers stated that Guzman said he cleaned the sword and put "everything" in a garbage bag which he disposed of in a dumpster. Rogers also stated that Guzman admitted that he took Colvin's ring and some money and traded the ring for drugs. Guzman allegedly told Rogers that he robbed and killed Colvin so Cronin would not have to earn money as a prostitute. Rogers said that Guzman threatened to kill him and his family if he informed the police about his knowledge of the murder.

Guzman was arrested for Colvin's murder on December 13, 1991. He had a survival knife in his possession at the time of his arrest. The police subsequently recovered Colvin's ring. Guzman's second trial began on December 2, 1996. In this trial, Guzman waived his right to a jury in both the guilt and penalty phases

> of the trial. (FN1) The trial court convicted Guzman of first-degree murder and armed robbery and imposed a death sentence. In its sentencing order, the trial court found the following five aggravating circumstances: (1) Guzman was previously convicted of a felony involving the use of violence; (2) the murder was committed in the course of a robbery; (3) the murder was committed for the purpose of avoiding arrest; (4) the murder was committed in a cold, calculated, and premeditated manner (CCP); and (5) the murder was especially heinous, atrocious, or cruel (HAC). The trial court found no statutory mitigating circumstances. As nonstatutory mitigation, the court found that Guzman's alcohol and drug dependency was established, but was entitled to little weight.
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> Guzman now appeals his convictions and death sentence. Guzman raises eight issues on appeal to this Court. (FN2) Three of Guzman's claims are without merit and do not warrant discussion. (FN3) Of the claims that merit discussion, one relates to the guilt phase of Guzman's trial and four pertain to the penalty phase.

Guzman v. State, 721 So. 2d 1155, 1156-59 (Fla. 1998).

> (FN1.) The waiver was at the instance of Guzman himself and was contrary to the advice of his counsel. The record reveals that Guzman's waiver was knowing, voluntary, and intelligent. Questions were asked of Guzman in open court by both the trial judge and Guzman's counsel. Guzman also signed a written waiver of his right to a jury trial.
>
> (FN2.) Guzman contends that the trial judge erred by: (1) improperly denying his motion for mistrial; (2) convicting him in the absence of substantial and competent evidence of guilt; (3) failing to dismiss the case due to double jeopardy; (4) improperly ruling on "various issues"; (5) imposing a disproportionate death sentence; (6) improperly finding the "heinous, atrocious, or cruel" aggravating circumstance; (7) improperly finding the

> "avoiding arrest" aggravating circumstance; and (8) improperly finding the "cold, calculated and premeditated" aggravating circumstance.
>
> (FN3.) Issues one, three, and four are without merit.

THE RULE 3.850 PROCEEDINGS

Guzman filed an initial 3.850 Motion to Vacate on March 22, 2000.(R392-416). He filed an Amended 3.850 Motion to Vacate on November 30, 2000. (R417-477). An evidentiary hearing was held before the Honorable William C. Johnson, Circuit Court Judge for the Seventh Judicial Circuit of Florida, in and for Volusia County, on October 22, 2001. (R1-391). An Order denying Guzman's Amended Motion to Vacate was issued on March 3, 2002. (R920-1096). Guzman timely filed a Notice of Appeal on April 1, 2002. (R1098-1099).

Fiona Goodyear was Guzman's first witness. (R26). She was an evidence technician with the Daytona Beach, Florida, Police Department in 1992. (R26). She testified that her duties included "processing evidence from the officers, preparing for auctions, destructions, maintenance of all of the evidence, preparing it for court." Her supervisor, Frank Thompson, had similar responsibilities and duties as he was a "working supervisor." (R28). The locked evidence room was located "in the middle of the main building" of the Daytona Beach, Florida,

Police Department. Only she and her fellow evidence technicians had keys and access to the room. (R27, 29, 32). During working hours, evidence was delivered directly to them. After hours, the evidence was stored in lockers and "biological evidence"[1] was stored in locked refrigerators. In addition, Ms. Goodyear said, "We also had a chute for other items that they could drop down that was secure." (R29-30). The evidence technicians were responsible for putting an agency case number on the evidence and, in some cases, the defendant's name "depending on what the property sheet contained." (R30). Under department guidelines:

> money evidence would go in the safe area, and firearms would go in a certain area. Narcotics are stored separate. If it was blood evidence, that would have to be in the refrigerator.

(R30-1). Evidence was stored in a "banker box" or boxes, and each box would contain the case number and the victim and suspect names (if known). (R31-2). Upon a written or verbal request from the detective on the case, the sealed evidence would be sent to the Florida Department of Law Enforcement for testing. (R32). Ms. Goodyear said that a log of "disposition codes" was kept in the computer; these codes were assigned to the evidence, depending on the status of the case. (R33).

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[1]Biological evidence (also called “Bio-hazard evidence”) refers generally to evidence that consists of or contains blood or other bodily fluids.

Initially, when evidence was received, it was marked with an "E" for evidence, a "zero" for hold, and "pending" in parentheses, for future disposition. (R34). The code letter "D" designated destruction, although Ms. Goodyear was not sure if that code was used in 1992 or "when the new system came on." (R35). She said evidence would be marked for destruction if " ... the case was closed; if it was ... found property and we had satisfied the guidelines for holding it and no claim had been made ... " (R35). The evidence technicians had access through their own computer system to see if cases had been closed or the statute of limitations had expired for "older cases, for misdemeanors." In addition, they would receive notices from the State Attorney's Office. Evidence in a homicide case was held for "fifty years or longer unless the defendant died or was executed, and then a year after that." (R35). When a notice was received from the State Attorney's Office, she stated, " ... we would pull the evidence, research the case in the computer, pulling the evidence, and then it would be marked in the computer that the case could be closed per the assistant state attorney's name or date ... " (R36). After the evidence was pulled, it was separated into certain areas for destruction

purposes.[2]

Biological items and narcotics were put into a separate "yellow bin" and were ultimately destroyed in the incinerator at Halifax Hospital, Daytona Beach, Florida. (R37). Ms. Goodyear said that there were times when evidence to be destroyed was collected in a bin similar to an "old post office mail bin" until enough items had been collected for destruction. She said it was not uncommon to have over one hundred items in the bin before they were collectively destroyed. (R38). Prior to a destruction, a "blank order" would be completed and either she, or Officer Thompson, would request a judge to sign it. The list of evidence and a motion would be attached to the order. After the order was signed, a date would be scheduled for "a burn on destruction." Subsequently, the evidence would be boxed up and two evidence technicians, along with Officer Thompson, would accompany the evidence to Halifax Hospital for destruction. The destruction, according to the hospital's procedures, would be witnessed by two witnesses and an affidavit would be completed. (R38, 39). Ms. Goodyear stated that there were approximately

[2]Narcotics went into certain areas as did items that could be sold at auctions. General destruction includes photos and items with no value. (R37).

three to four destructions per year, including 1992. (R40).[3]

In 1994, Ms. Goodyear was approached by Supervisor Marty White regarding an investigation of Frank Thompson. (R47, 48). She was subsequently interviewed by several investigators from DEA and the Philadelphia Police Department and testified in a federal case involving Thompson in the Eastern District of Pennsylvania. (R51). She was not aware that Thompson had sent evidence he had stolen from the evidence room,(which had purportedly been destroyed) to his relatives in Pennsylvania. (R60). Ms. Goodyear did not recall hearing about a conviction for Guzman in 1992, but she did recall seeing evidence in the case, including a sword, which she had been instructed to bring to the courtroom during the trial. (R52, 53).

On cross-examination, Ms. Goodyear stated that the evidence room computer system was changed at the beginning of 1995. (R62, 63). Upon entry of a specific piece of data, an ID number would be entered, indicating what employee had imputed the information. (R63). It was the evidence section's policy that evidence to be destroyed in a homicide case had to be cleared by

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[3]In reviewing computer printouts dated November 10, 1992, and November 18, 1992, the witness stated that evidence referenced as "Q-103, white envelopes, swabs, hair scrapings" and "Q108 and Q109, two bedspreads" had been destroyed in police department case number 91-022222, pursuant to Assistant State Attorney Vince Patrucco. (R43, 44, 55, 56).

the homicide prosecutor. (R64). After a destruction had been completed, all of the documentation involving the approved destruction would be stored in a file inside the evidence room. (R65). Upon a request, this information would have been available to an attorney on the case or someone who might want to make an inquiry regarding that type of information. (R65).

Marilyn Conlon was Guzman's next witness. She has been the Evidence Supervisor for the Daytona Beach, Florida, Police Department since 1994. Her responsibilities included "the inventory and control of all of the evidence." (R69). In September 2001, Assistant State Attorney Rosemary Calhoun contacted her and requested that she locate a piece of evidence in this case identified as "Q-103". (R70). Through the police department's old computer system, she was able to determine that the evidence marked as "Q-103" had been destroyed, and that the destruction was purportedly authorized by Assistant State Attorney Vince Patrucco. (R71, 72). Ms. Conlon stated, "Once a disposition or any type of letters come from the state attorney's office and they're acted upon, once that action is complete, they are forwarded to the records section for -- to be held in the case." (R74). She stated that she became aware through "gossip and hearsay" that Francis Thompson had been stealing items from the evidence room at the Daytona Beach

Police Department. (R76). She was never asked to give a statement or to research any matters pertaining to the Thompson investigation. (R76).

On cross-examination, Ms. Conlon stated that she did not work in the property and evidence section of the police department in 1992. She did not have any first-hand knowledge of the disposition of any items of evidence during that time. However, upon assuming the supervisor's position of that department in 1994, she conducted an inventory of all of the evidence -- that project took "close to a year" to complete. (R77). With regard to item number "Q-103" (the hair evidence in this case), Ms. Conlon stated that she had five other employees within her division search for this item and had "everyone go behind me on reviewing all the inventories, all the sign-out logs, and everything else." (R78). Prior to the search, she believed that the evidence had been destroyed based upon the computer entry on the disposition of evidence.[4] (R79). It was her understanding that it was procedure for a prosecutor to issue authorization for a release or destruction of evidence in writing. She did not know whether or not that was done in this case in 1992. (R81). A copy of a destruction order should have

[4]The witness stated that she did not have any personal knowledge that evidence "Q-103" had, in fact, been destroyed. (R86).

been forwarded to the records section of the Daytona Beach Police Department. (R82).[5] Ms. Conlon testified that she did not have any knowledge on how bio-hazard evidence was handled in 1992. (R83-84). She did not recall another case where evidence had been destroyed and the case had not been closed, nor did she recall a case in which there had not been prior authorization from the State Attorney's Office for the destruction of evidence. (R85).

Michael Kerney has been the records supervisor for the Daytona Beach, Florida, Police Department since 1989. He is responsible for "maintaining all the records that come into the Daytona Beach Police Department." (R90). He stated that in cases where evidence was to be destroyed, there would be a written request, (which he called an "authorize to release"), issued from the State Attorney's office. (R91). Capital Collateral Regional Counsel had recently contacted him and requested that his department locate any disposal request related to evidence made in the Guzman case. (R91-92). He stated, "There was nothing concerning destruction of evidence attached to the official report." (R92). He became aware of an investigation involving

[5]Ms. Conlon stated that an investigator named Carlos Rodriquez, working on Guzman's behalf, had only contacted her "within the last few weeks" regarding the physical evidence in this case. (R82-3).

allegations that Francis Thompson had been stealing evidence from the Daytona Beach Police Department evidence room. Subsequently, the United States Attorney's Office requested an investigation be conducted in the records department regarding "weapons that had been logged into the department that we could no longer find. We went through destruction orders and reports looking for items of narcotics for destruction orders, disposition ... It was quite a lengthy search for information." (R93-4). In February 1996, he testified as a government witness in a trial involving Thompson.[6] (R93, 95). Eventually, Kerney found computer printouts stating that evidence had been destroyed by Thompson yet there had never been a request by the State Attorney's office or a court order authorizing its destruction. (R100-01).[7]

On cross-examination, Kerney stated that, with the exception of the request received from Capital Collateral Regional Counsel "within the last couple of weeks," he did not recall receiving any prior inquiries from them regarding Guzman's case. (R102-103). Furthermore, the information he recently provided to them regarding Guzman's case had been available since 1994. (R103).

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[6]*United States v. Francis Thompson*, Case No. 95-232.

[7]This evidence pertained to Volusia County, Florida, Case No. 91-32541 -- **that is not Guzman's case**. (R98-101).

Vincent Patrucco testified next. (R107). He is currently an Assistant State Attorney in Polk County, Florida -- he held that same position in Volusia County, Florida, in 1992. (R108). He did not recall contacting the evidence room at the Daytona Beach Police Department to request that evidence be destroyed. (R109-110). He stated, "It would not be my practice or my policy in any case to request destruction of evidence." (R110). He said that he was sure that he did not request that the hair evidence in this case be destroyed.[8] Patrucco stated that he did not know who Francis Thompson was, nor was he aware that Thompson had been under investigation for stealing evidence from the Daytona Beach Police Department's evidence room. (R112). He recalled that Allison Sylvester was the lead detective on this case. In addition, he remembered Martha Cronin had been an "important witness" for the State's case against Guzman. (R113). He was not aware that Martha Cronin had been paid $500.00 as a reward for her involvement in this case. (R114). He could not recall any specific discovery requests made by the defense regarding any benefits that Cronin received. (R116). Patrucco recalled that he spoke "briefly" with Wayne Chalu, the prosecutor in Guzman's retrial, but did not have "any in-depth conversation in terms of

[8]This is the evidence previously referenced as number "Q-103."

anything connected with previous strategies to be used or anything of the kind." (R116). He stated that he did not sign a destruction petition in this case, and, he did not recognize the signature of the assistant state attorney that signed the destruction form. (R117).

On cross-examination, Patrucco testified that he "reviewed every single page" of the case book maintained by Detective Allison Sylvester. (R118).[9] He stated that published newspaper articles regarding a reward would have been in the case book, or, would have been part of discovery. He said that he did not "recall the particulars" regarding the destruction of evidence used by the State Attorney's Office in Volusia County, Florida. (R124).

Wayne Chalu was Guzman's next witness. He is currently an Assistant State Attorney in Hillsborough County, Florida. (R133). Due to a conflict of interest, the Governor had designated the State Attorney's Office from the Thirteenth Judicial Circuit to handle Guzman's retrial. In 1995, he was assigned to prosecute Guzman. (R134). Although he handled some discovery, most of it had either been done during the first trial or during the pretrial period of the second trial before

[9]The "case book" contains approximately 400 pages of documents regarding Guzman's case. (R118).

he was involved in this case. (R135). He was aware that Martha Cronin had received a $500.00 reward, but only **after** the second trial had taken place. (R135). In addition, he did not know if she had received the reward because she was a witness in the case, or, because it was "just a reward put out there by the police for any information leading to the apprehension of -- of a person who may have been responsible for the crime ..." (R137). Had he been aware that Cronin had received a reward, "in an abundance of caution," he would have notified the defense of this information. (R138). Chalu testified that during Guzman's retrial, he was not aware that Francis Thompson had destroyed hair evidence in the Guzman case in November 1992. (R142). It was never disclosed to him that Thompson had been under investigation for stealing evidence from the police department's evidence room, nor that he had been convicted of those crimes. (R143). If he had been informed that hair evidence in Guzman's case had been destroyed by Thompson in 1992, he would have disclosed that to the defense. (R145).

On cross-examination, Chalu stated that Guzman's defense attorney pointed out impeaching matters with regard to the witness, Martha Cronin. (R146). He recalled reviewing the evidence to be used at Guzman's retrial but was not sure of the location at the time of viewing. (R148-49).

Chalu further stated that Martha Cronin was specifically important to this case because **Guzman had allegedly confessed the crime to her**. (R154). Her testimony corroborated with other physical evidence in the case. (R155, 157). In addition, Guzman also purportedly confessed to Mr. Rodgers, a "jail-house snitch." However, Rodgers subsequently recanted his statement that Guzman had confessed to him. (R155).

Allison Sylvester was a detective with the Daytona Beach Police Department in 1992 and was the lead detective on Guzman's case. (R164). She first interviewed Martha Cronin on the same day that the victim's body was discovered. Cronin did not implicate Guzman during that interview. (R165). She stated that she was aware of the $500.00 reward received by Cronin, but was not involved in the decision to offer it. Subsequently, she delivered a money order made payable to Martha Cronin in the amount of $500.00, while Cronin was in the Volusia County jail. (R166). Sylvester stated that Martha Cronin was paid the reward for "providing information that led to the arrest of James Guzman." (R168, 170, 183). She did not recall talking to Wayne Chalu about the reward money and she was not aware of any other witnesses that received a reward. (R169). She did not recall if she was questioned at Guzman's trial whether or not Martha Cronin had been paid reward money. (R172). Sylvester stated that

she was not aware that Francis Thompson had destroyed the hair evidence in Guzman's case. (R174). However, she was aware that there was an ongoing investigation of Francis Thompson. (R174-75). She thought that a copy of the receipt from the money order would have been included in one of the case books. (R179). She recalled taking statements from Vicki Faircloth and Christine Wilson regarding an incident involving David Colvin, the victim in this case. (R187). In addition, she spoke with Gail Hipps regarding an incident between Curtis Wallace and David Colvin, but did not recall the specifics. (R191).[10] Sylvester generated a police report that contained a statement from Ms. Hipps that Curtis Wallace told David Colvin, "If you get killed, you ain't going to take all that jewelry with you." (R192-93). Hipps also told her that Colvin had gotten into an argument with a couple of men that had come into his room. (R193). She recalled taking a statement from Thomas Lane, but did not remember any details as she did not "receive anything that actually made a whole lot of sense at all." (R194, 195).

On cross-examination, Ms. Sylvester stated that she did not know how Martha Cronin learned of a reward in this case.

[10]Curtis Wallace was an early suspect in the murder of David Colvin but was ultimately ruled out as a suspect. (R197-98).

(R196).[11] Sylvester further testified that an article appeared on August 15, 1991, in the local newspaper, the Daytona Beach *News Journal*, offering a reward for information that would help solve the murder of David Colvin. (R200). Upon reviewing several photographs of the victim depicting hair on the back of his thigh, Sylvester testified that Colvin had "several incised wounds on his head," and she believed that the hair on his thigh had fallen off a "sharp object." The hair was consistent with the victim's own hair, "same length" and it was "mostly bloody." She further stated, " ... it also appeared to be cut. It didn't appear to be pulled." (R201-2). Sylvester concluded:

> Based on the condition of the body and the wounds that were on the head and the blood that was on the walls ... and ... on the ... bed, it just appeared -- there's also blood droppings on the back of the victim's legs. And it appeared to me that the weapon that was used to make the wounds to the head had also cut this hair from the victim's head and had fallen off the weapon onto the back of the victim, just like the other –- the blood spatter was on the back of the victim's legs.

(R203). Sylvester stated that the police had received several statements from Antonio Lee, one of which implicated Curtis Wallace in the murder of David Colvin. (R207). None of these

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[11]Martha Cronin's mother contacted Ms. Sylvester and asked if it was possible for her daughter to receive the reward after a scheduled court appearance in case she was released from jail that day. Sylvester did not know how Cronin's mother knew of the reward money. (R196-97).

statements could be verified and Wallace had provided an alibi for his whereabouts during the time when the murder occurred. (R208).

Guzman's next witness was Gerard Keating, his trial counsel. He has been a practicing attorney for twenty years and was appointed as counsel for Guzman. (R232). He believed that Martha Cronin was the State's "key witness" because she testified that Guzman had confessed the murder to her. He said that one of his trial strategies was to impeach and discredit her testimony because it would be important in establishing reasonable doubt. (R233) He and Guzman discussed potential areas of impeachment regarding Cronin. In addition, he filed specific discovery demands upon the State Attorney's Office in this case. (R235). Pursuant to a response from the State Attorney's office that Martha Cronin was a witness and that she had not received any "agreements, assurances, or non-prosecution of leniency, offers, benefits, or understandings," he believed that Cronin had not received any benefit from the State at that time. (R238). If Detective Allison Sylvester had, in fact, paid $500.00 to Cronin on January 3, 1992, he would have expected that information to have been included in the State's Bill of Particulars. The response by the State, in his opinion, was "not accurate."(R238-9). Keating stated that he never saw the receipt written by

Detective Sylvester for payment of $500.00 to Cronin. (R240). He recalled that Cronin did not implicate Guzman in the murder when police initially questioned her. (R241). In November 1991, approximately three months after the homicide, Cronin was arrested (on unrelated charges) and subsequently implicated Guzman. (R241-2). He was not aware that a reward had been offered in the newspaper regarding this case. (R242). Had he known of the reward, he would have used that information to impeach Martha Cronin because "it tends to show bias or interest in the outcome." (R242). He recalled that Detective Sylvester testified at trial that her agreement with Cronin was for food and a hotel, as well as arranging for Cronin to get out of jail and to be placed in a "beachside hotel." He now felt that Detective Sylvester's testimony was "misleading." (R243). Furthermore, the prosecutor's closing argument was "inaccurate," but Keating stated that in his experience, Wayne Chalu was "very forthright, very honest." (R245). He was not informed that the hair evidence from the back of the victim's thigh had been destroyed by Francis Thompson with the Daytona Beach Police Department in November 1992, nor that the evidence was destroyed without a court order. (R247, 248). In addition, he was not informed that Francis Thompson had been under investigation (and subsequently convicted) for stealing and selling items from the

evidence room of the Daytona Beach Police Department. (R248, 253, 291).

He had assumed that the hair shown in photographs on the victim's thigh belonged to the victim, and that it was "dislodged" when "the perpetrator of the crime committed the crime, that he -- that he hacked -- he hacked the victim's head and dislodged parts of the skull." (R248-249). He did not consider the location of the hair evidence as significant. (R249). He would have considered the hair evidence as exculpatory, had the lab analyzed it and found that it was not Guzman's nor the victim's. He did not know who the hair, in fact, belonged to. (R250). If he had been aware of the destruction of the hair evidence, he would have "filed a motion for sanctions just to have a hearing in front of the judge ... and then let the judge sort it out." He would have included the information regarding the investigation of Francis Thompson's activities. (R251). Keating did not recall a statement made by a witness, Thomas Lane. Lane's statement suggested that he spoke with Martha Cronin who told him she only made a statement to police implicating Guzman in order to receive a reward. (R263-4).

However, Guzman told Keating that Cronin had found him with another girl, she was mad at him, and had subsequently turned

him in to police. (R266-7). Keating stated that he did not want Lane as a witness in this case, "Because Mr. Lang (sic) had lied in court to Judge Worthen ... Mr. Lang (sic) was facing a perjury charge for lying in an official proceeding ... I thought Mr. Lang (sic) would be an incredible witness, not worthy of belief ... I thought he was useless as a witness." (R268, 289, 334). It was his theory of defense that Curtis Wallace was the perpetrator in this case. He did not use a witness named Gail Hipps as "she wasn't local" and he felt the defense was able to portray Curtis Wallace as the "true perpetrator through other witnesses and other means." (R271, 286). Keating stated that the defense also had a theory that Colvin had been confronted by two men, Holt and Moore, approximately two weeks before his murder, and they had threatened him. (R275). He recalled an inmate, Paul Rodgers, had given a statement that Guzman had confessed to him, and Rodgers later recanted. (R276-7). In addition, Keating did not want to use Anthony Farina as a witness due to his own pending indictment for capital murder, his lack of credibility, and because he felt Farina’s testimony "would be the exact opposite and that Mr. Farina would actually hurt Mr. Guzman." (R278).

On cross examination, Keating stated that the "jailhouse snitch," Paul Rodgers, had access to Guzman's papers at the

county jail. (R276, 279). In addition, he put on evidence as to the altercation that took place between Colvin (the victim) and Holt and Moore through the testimony of James Yarborough. (R283, 285). However, there was no evidence or information available to him that put Moore and Holt at or near the scene of the murder at the time of the offense. (R285). He said that the testimony of Martha Cronin was the "most crucial." Furthermore, a hunting knife, (or survival knife) was recovered from Guzman, and was consistent with the weapon used in the murder of Colvin. (R292, 293).[12] In addition, Guzman had brought Colvin's ring to Leroy Gadson, to trade for "cocaine and cash" and Gadson subsequently contacted the police. (R293, 329, 330). With regard to the destroyed hair evidence, Keating stated, "I don't think -- doesn't make any sense that Mr. Thompson would take that piece of bloody hair from the victim and send it to his son or send it to somebody else because it didn't have any value." (R299). Keating did not recall Guzman telling him that Cronin had received a $500.00 reward. He said, "Guzman had a lot of input in this case, and I paid attention to everything Mr. Guzman said." (R305, 306). He felt that he had significantly impeached Martha Cronin at trial and showed the various benefits she had

[12]It was the State's theory that a sword found in the victim's room was also used as a murder weapon. (R292, 293, 294).

received from the State. (R306). However, her statement to Police in November of 1991 **and** her trial testimony was consistent. (R309).

Upon further examination, Keating testified that he, "put credence into everything that Guzman told me. Then I weighed it and evaluated it with my professional experience to see if it would end up being evidence that could be useful at trial." (R317). He stated that he did not cross-examine Martha Cronin at trial regarding the $500.00 reward because he had no pretrial discovery indicating Cronin had received such a reward. (R319). Keating stated that Guzman had testified at trial, "over my strenuous objection" that he had gotten the victim's ring from Curtis Wallace and then sold it to Leroy Gadson. (R336).

James Guzman was the last witness. (R338). He stated that he had sent his trial attorney, Gerard Keating, a letter on February 12, 1995, indicating that Thomas Lane had made two sworn statements regarding Martha Cronin. One of Lane's statements indicated that Martha Cronin had received a $500.00 reward. Guzman did not have any other independent knowledge that Cronin had received the reward. (R339). He stated that he "had a suspicion that she did receive something in exchange for her information implicating me." (R342).

An Order denying Guzman's Amended Motion to Vacate was

issued on March 3, 2002. (R920-1096). Guzman timely filed a Notice of Appeal on April 1, 2002. (R1098-1099).

SUMMARY OF THE ARGUMENT

Guzman's claim that he is entitled to relief based upon a violation of *Giglio v. United States* is based upon the factually and legally inaccurate assertion that the Circuit Court applied an incorrect legal standard in denying relief on this claim. The Circuit Court followed controlling Federal and Florida law in deciding the *Giglio* claim, and resolved the facts against Guzman's position. Those facts are supported by the evidence, and there is no basis for relief.

Guzman's attempt to recast the *Giglio* claim as a violation of *Brady v. Maryland* is similarly unpersuasive. If the *Giglio* standard is somewhat more favorable to the defense, and the law supports that interpretation, then facts which fail to establish a violation of *Giglio* cannot establish a basis for relief under *Brady.* The Circuit Court correctly denied relief.

The "destruction of evidence" claim was properly denied by the Circuit Court based upon the facts, which are supported by competent substantial evidence. That factual determination should not be disturbed. This claim is procedurally barred and, alternatively, without merit, as the Circuit Court found.

The prosecutorial misconduct claim is procedurally barred,

as the Circuit Court found. That disposition should not be disturbed.

ARGUMENT

I. THE *GIGLIO* CLAIM

On pages 28-52 of his brief, Guzman argues that the collateral proceeding trial court erroneously denied relief on Guzman's claim of a *Giglio* violation. The foundation of this claim is Guzman's assertion, which is both factually and legally inaccurate, that the trial court applied the wrong standard of review when it denied relief on this claim. Despite Guzman's protestations, the trial court applied the proper legal standard, and the denial of relief is correct. A *Giglio* claim is a mixed question of law and fact, and, for that reason, the underlying facts found by the trial court are entitled to deference, but the legal conclusion is independently reviewed by the appellate court. *See, e.g., Stephens v. State,* 748 So. 2d 1028 (Fla. 1999).[13]

[13]Guzman waived a jury trial on both guilt and penalty, despite his lawyer's efforts to convince him not to do so. Trial Record at 1217. The judge who heard the collateral proceeding, Judge William Johnson, was the same judge who presided over Guzman's trial. To say the least, Judge Johnson has a unique perspective on the issues in this case, and is in an especially advantageous position with respect to the *Giglio* and *Brady* issues, given that he was the finder of fact in this case. Because that is so, there is no speculation about the "effect" of any evidence on the finder of fact.

The *Giglio* Standard

This Court has summarized the constitutional principle contained in *Giglio* in the following way:

> In order to establish a *Giglio* violation, a defendant must show that: (1) the prosecutor or witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *See Robinson v. State*, 707 So. 2d 688, 693 (Fla. 1998); *Routly v. State,* 590 So. 2d 397, 400 (Fla. 1991). The standard for determining whether false testimony is "material" under *Giglio* is the same as the standard for determining whether the State withheld "material" evidence in violation of *Brady. See Giglio,* 405 U.S. at 154, 92 S.Ct. 763. False testimony is "material" if there is a reasonable likelihood that it could have affected the jury's verdict. *See id.* Even assuming that Rose's allegations that the State misled both Rose and the jurors about the motives of Borton and Poole for testifying were true, we find that Rose cannot satisfy the "materiality" prong of *Giglio* because such evidence does not put the case in such a different light as to undermine confidence in the jury's verdict. Therefore, we affirm the trial court's denial of postconviction relief on this issue.

Rose v. State, 774 So. 2d 629, 635 (Fla. 2000). Subsequent to *Rose*, this Court held:

> In denying Ventura's claim, the trial court incorrectly relied on the materiality standard appropriate to *Brady* claims. *See United States v. Alzate*, 47 F.3d 1103, 1109-10 (11th Cir. 1995) ("Where there has been a suppression of favorable evidence in violation of *Brady v. Maryland*, the nondisclosed evidence is material: 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' ... A different and more defense-friendly standard of materiality applies where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was

> false testimony.") (citations omitted). Under *Giglio*, a statement is material if "there is a reasonable probability that the false evidence may have affected the judgment of the jury...." *Routly*, 590 So. 2d at 400. "In analyzing this issue ... courts must focus on whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." *White v. State*, 729 So. 2d 909, 913 (Fla. 1999).

Ventura v. State, 794 So. 2d 553, 563 (Fla. 2001); *see also, Tarver v. Hopper*, 169 F.3d 710 (11th Cir. 1999).

The Collateral Proceeding Trial Court's Order

In the order denying relief on the *Giglio* claim, the trial court stated:

> To establish a violation of *Giglio* [footnote omitted] a defendant must show: "(1) that the testimony was false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material." *Ventura v. State,* 794 So. 2d 553, 562 (Fla. 2001) (*quoting Robinson v. State,* 707 So. 2d 688, 693 (Fla. 1998)). "The thrust of *Giglio* and its progeny has been to insure that the jury know all the facts that might motivate a witness in giving testimony, and the prosecutor not fraudulently conceal such facts from the jury." *Id.* (*citing Robinson,* 707 So. 2d at 693(*quoting Routly v. State,* 590 So. 2d 397, 400 (Fla. 1991))). Under *Giglio*, a statement is material if "there is a reasonable probability that the false evidence may have affected the judgment of the jury." *Id.* at 563 (*quoting Routly,* 590 So. 2d at 400). "In analyzing this issue ... courts must focus on whether the favorable evidence could reasonably be taken to put the case in such a different light as to undermine the confidence in the verdict." *Id.* (*quoting White v. State,* 729 So. 2d 909, 913 (Fla. 1999).

(R930-31). That statement of the applicable legal standard is,

contrary to Guzman's claim, clearly a correct statement of the standard under which a ***Giglio*** claim is reviewed.[14]

The trial court went on to state, after finding that there was not a reasonable probability of a different result if the $500.00 reward paid to witness Cronin had been disclosed to the defense, that:

> [] this Court finds that this statement regarding the $500.00 reward being paid to Cronin **is immaterial because there is not a reasonable probability that the false evidence would put the whole case in such a different light as to undermine confidence in the verdict.** *See Ventura,* 794 So. 2d at 564-65.

(R932). That statement by the trial court is a direct reference to *Ventura*, **which Guzman himself invokes as setting out the correct law on this issue.** Guzman's repeated criticisms of the lower court are unjustified, have no basis in fact, and do not provide a basis for relief because the trial court applied the correct legal standard.

To the extent that further discussion is necessary, the

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[14]Guzman cites to *Ventura* (*Initial Brief*, at 31) as containing a correct statement of the materiality standard that applies to a ***Giglio*** claim. **The trial court cited to the same portion of *Ventura.*** Guzman's argument would have this Court accept the proposition that the trial court stated the correct legal standard on one page of its extensive order, and forgot that standard two paragraphs later (where the trial court **again** cited to *Ventura*). (R932). Guzman's position, and his argument supporting it, are an incredible and misleading attempt to create error where none exists.

collateral proceeding trial court stated:

> This Court finds that these allegations do not satisfy the tests for a sufficient *Brady, Giglio,* or ineffective assistance of counsel claim. trial counsel extensively cross-examined Cronin, for over 88 pages of trial transcripts, regarding: her addiction to crack cocaine; her many arrests from prostitution; her truthfulness, her failure to initially tell police about Defendant's confession; her adoption of Lane's perjury; her letter to Defendant about her jealousy; her call to Sylvester to tell Sylvester what she wanted to hear about Defendant; her deal with the State in exchange for her testimony against Defendant, including food, lodging, and the "unarrests" and dismissal of charges; her alleged statements to a white male that she had lied about Defendant committing the murder; and the details of her testimony regarding the day of the murder. *See* Appendix D; *see also Appendix* C. Thus, this Court was aware of the fact that Cronin had made an agreement with the State to testify against Defendant. Further, there was other evidence of Defendant's guilt apart from Cronin's testimony. *See Guzman* 721 So. 2d at 1159 ("Roger's testimony was remarkably similar to Cronin's" regarding the details of the murder. ... "It is undisputed that Guzman possessed Colvin's ring and traded it for drugs and money. Finally, Dr. Steiner testified at trial that the sword and Guzman's survival knife were consistent with the murder weapon. We find that the record demonstrates Guzman's guilt.").

(R932). Those findings of fact and conclusions of law are based squarely upon the facts contained in the record of Guzman's trial, and the facts found on direct appeal, when this Court affirmed Guzman's conviction and sentence. Because that is so, and based upon the facts found by the trial court, the fact that the finder of fact (in this case, the trial court) was not aware

of the $500.00 reward does not put the whole case in such a different light as to undermine the confidence in the verdict. That is the standard by which a ***Giglio*** claim is evaluated, and Guzman has failed to establish that the testimony at issue was material under the controlling legal standard as set out in ***Ventura*** (which was decided not long before the trial court relied upon it in denying Guzman's claim). In the words of the United States Supreme Court, "[t]his willingness to attribute error is inconsistent with the presumption that state courts know and follow the law. ***See, e.g., Parker v. Dugger,*** 498 U.S. 308, 324-316 (1991); ***Walton v. Arizona,*** 497 U.S. 639, 953 (1990), ***overruled on other grounds, Ring v. Arizona,*** 122 S. Ct. 2428 (2002); ***LaVallee v. Delle Rose,*** 410 U.S. 690, 694-695 (1973) (***per curiam***)." ***Woodford v. Visciotti***, No. 02-137 (U.S., Nov. 4, 2002).[15] Guzman's claim, in its true form, is a sufficiency of the evidence claim -- the problem with such a claim is that this Court has already resolved it against him, and there has been no showing that this Court should re-visit

[15]***Visciotti*** involved a situation not unlike the one created by Guzman -- the California Courts had repeatedly cited to the controlling law (which was, in that case, ***Strickland v. Washington***), but the Ninth Circuit Court of Appeals found that the State Courts had applied an incorrect standard. The United States Supreme Court reversed the grant of federal habeas corpus relief.

that decision. On direct appeal, in finding the evidence sufficient to support Guzman's conviction, this Court stated:

> Guzman claims that the evidence is insufficient to sustain his conviction for first-degree murder. Guzman essentially challenges the credibility of witnesses Cronin and Rogers and argues that Dr. Steiner's testimony is inconsistent with the judgment of conviction. We reject Guzman's claim. First, it is the province of the trier of fact to determine the credibility of witnesses and resolve factual conflicts. *Melendez v. State*, 498 So. 2d 1258, 1261 (Fla. 1986); *Jent v. State*, 408 So. 2d 1024, 1028 (Fla. 1981). Sitting as the trier of fact in this case, the trial judge had the superior vantage point to see and hear the witnesses and judge their credibility. Our review of the record convinces us that the judge performed his fact-finding function properly.
>
> Second, this Court will not reweigh the evidence when the record contains sufficient evidence to prove the defendant's guilt beyond a reasonable doubt. *Melendez,* 498 So. 2d at 1261; *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981). The record in this case reveals the following facts: Cronin testified that Guzman had told her that Colvin would be easy to rob and that if he ever robbed anyone he would kill them. Cronin and Rogers testified that Guzman confessed to murdering Colvin. Guzman told Cronin that Colvin woke up while Guzman was in the process of robbing him. Guzman stated that he hit Colvin in the head and proceeded to stab him with the samurai sword. Guzman showed Cronin the ring he had taken from Colvin. At a later date, Guzman again confessed Colvin's murder to Cronin and told her that he killed the victim for her. Rogers' testimony was remarkably similar to Cronin's. Rogers testified that Guzman told him that Colvin woke up while Guzman was robbing him. Guzman told Rogers that he hit Colvin in the head with the sword and stabbed him ten or eleven times. Guzman also told Rogers that he took Colvin's ring and approximately $600 and cleaned up "everything." It is undisputed that Guzman possessed Colvin's ring and traded it for drugs and

> money. Finally, Dr. Steiner testified at trial that the sword and Guzman's survival knife were consistent with the murder weapon. We find that the record demonstrates Guzman's guilt.

Guzman v. State, 721 So.2d at 1159. There is no basis for relief, and the collateral proceeding trial court's denial of relief should be affirmed in all respects.[16]

II. THE *BRADY* CLAIM

On pages 52-57 of his brief, Guzman re-casts the *Giglio* claim (from the previous claim) as a claim based upon *Brady v. Maryland.* Guzman argues:

> As stated in Claim One, Mr. Guzman asserts he is entitled to application of the more "defense friendly" materiality standard of *Giglio*. However, should this Court disagree, then Mr. Guzman hereby alleges he is also entitled to relief due to a *Brady* violation committed by the State withholding from the defense that Martha Cronin had been paid the sum of $500.00.

Initial Brief, at 53. This claim is a mixed question of law and fact, and, under settled principles of appellate review, the facts found by the trial court are entitled to deference. The legal conclusions are reviewed *de novo.*

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[16]On page 51 of his brief, Guzman asserts that there is an "absence of physical evidence" because no "bloody rags" were recovered from the dumpster at the Imperial Hotel. That argument proves too much -- it assumes that Guzman, who is a multiply-convicted murderer, told the truth about his intention to dispose of the "bloody rags," that he put them in the Imperial Hotel dumpster, and he did not dispose of the evidence of his crime in another place. It does not demonstrate a lack of evidence.

Because Guzman's *Giglio* claim fails, his *Brady* claim fails as a matter of law.

The foundation of Guzman's claim is that, if this Court does not accept his position that the trial court applied the "wrong" standard to the *Giglio* claim, then he is entitled to relief **based on the same facts**, on his *Brady* claim. However, the defect in this analysis is that the *Giglio* standard, as Guzman has repeatedly argued, is more favorable to the defendant than is the *Brady* standard. If that is the law, and the case law supports that interpretation (*see, Ventura, supra*), then it is analytically and logically impossible for Guzman to win on *Brady* claim after **losing** on a *Giglio* claim. In other words, if Guzman is not entitled to relief under a standard that is more favorable to him, then he cannot be entitled to relief under a standard that is **less** favorable. Guzman's *Giglio* claim fails for the reasons set out above. Because that is so, the pendent *Brady* claim fails as well because that claim legally cannot exist if the *Giglio* claim fails.[17]

The collateral proceeding trial court

[17]Guzman explicitly links this claim to the *Giglio* claim. *Initial Brief,* at 57. If the evidence at issue is not material for *Giglio* purposes, and that is the case, then that evidence cannot meet the stricter materiality standard of *Brady.* Guzman's putative alternative argument is inaccurate and misleading, and is not a basis for relief.

decided the *Brady* claim correctly.

To the extent that further discussion of this claim is necessary, the collateral proceeding trial court set out the *Brady* standard as follows:

> To establish a violation of *Brady* a defendant must show: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Jennings v. State* 782 So. 2d 853, 856 (Fla. 2001) (*citing Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). The ultimate test under *Brady* is whether the disclosed information is of such a nature and weight that "confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different." Id. (*quoting Young v. State,* 739 So. 2d 553, 559 (Fla. 1999)).

(R930). The collateral proceeding trial court found that Guzman had not established that there was a reasonable probability of a different result had the $500.00 reward paid to Cronin been disclosed. That disposition is a correct application of the law to the facts, and, in light of the extensive impeachment of Cronin, and the other evidence of guilt, there is no error. (R931-32). The denial of relief should be affirmed in all respects.

III. THE "BAD FAITH" DESTRUCTION OF EVIDENCE CLAIM[18]

On pages 57-74 of his brief, Guzman argues, at length, that the destruction of a clump of bloody hair found at the murder scene (located on the back of the victim's thigh) entitles him to a new trial. Included within this claim is an ineffective assistance of counsel claim based upon the "failure" of defense counsel to discover that the hair had been destroyed.

This claim was the subject of an evidentiary hearing, and, because that is so, the standard of review applied by this Court in reviewing the trial court's ruling on the motion to vacate is: "As long as the trial court's findings are supported by competent substantial evidence, 'this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997), *quoting Demps v. State*, 462 So. 2d 1074 (Fla. 1984), *quoting Goldfarb v. Robertson*, 82 So. 2d 504 (Fla. 1955); *Melendez v. State*, 718 So. 2d 746 (Fla. 1998). The trial court's denial of relief is supported by competent substantial evidence, and should not be

[18]This claim contains subsidiary *Brady* and ineffective assistance of counsel components, which appear beginning on page 71 of the *Initial Brief.*

disturbed.

The substantive "bad faith destruction of evidence" claim is procedurally barred, and, alternatively, without merit, as the collateral proceeding court found. In upholding a procedural bar to presentation of this claim the Court stated:

> This Court agrees with the State[‘s assertion of a procedural bar] and finds that these allegations do not satisfy the test for newly discovered evidence. To establish a claim of newly discovered evidence, the defendant must show: (i) that the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and could not have been discovered through due diligence; and (ii) that the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Jones v. State,* 591 So. 2d 911, 915-16 (Fla. 1991). In the instant case, trial counsel testified that although he did not specifically remember the hair on the victim’s thigh, he reviewed the evidence in this case at the time of trial and was aware of the hair evidence but did not attribute much significance to it because there were no signs of interference with the victim’s rectum and the medical examiner told counsel that the victim’s skull was fragmented and spattered around the room due to the blunt force wounds, thus, counsel presumed the hair was from the victim. *See* October 23, 2001 Evidentiary Hearing Transcripts at 247-60; 291-303; *see also* October 22, 2001 Evidentiary Hearing Transcripts at 78; 91-92; 103 (evidence room supervisor testified that items of evidence in Defendant’s case is the same today as in 1995 when the inventory was completed; records supervisor testified that there was no request form the State Attorney or court order regarding the destruction of evidence in Defendant’s case and this information was available since 1994). As such, the destruction or loss of the hair evidence could have been easily discovered by counsel through due diligence at the time of the 1996 trial. Since this claim is not newly discovered evidence, this claim is procedurally barred as a claim that could have or should have been raised at trial and

> on direct appeal. *See Fla. R. Crim P.* 3.850(c); *State v. Riechmann,* 777 So. 2d 342, 361 n.20 (Fla. 2000) (holding that *Brady* claim regarding missing crime scene photographs was procedurally barred because defendant could and should have raised the issue on direct appeal since claim pertained to the trial record) (*citing Francis v. Barton,* 581 So. 2d 583 (Fla. 1991)); *Lopez v. Singletary*, 634 So. 2d 1054, 1056 (Fla. 1993) (holding that *Brady* violation was procedurally barred because it could have been raised on direct appeal); *cf. Lightbourne v. Dugger*, 594 So. 2d 1364, 1365 (Fla. 1989) (holding that *Brady* violation allegations sufficiently demonstrated the facts on which the claim is predicated were unknown to defendant or his attorney and could not have been ascertained by the exercise of due diligence, therefore, the claim was not procedurally barred.)

(R934-35). The collateral proceeding trial court properly denied this claim on procedural bar grounds, and that ruling, which follows settled Florida law, is supported by competent, substantial evidence and should not be disturbed.[19]

In addition to denying relief on procedural bar grounds, the trial court also found that the "destruction of evidence" claim failed because Guzman had failed to carry his burden of showing bad faith in the "loss or destruction" of the evidence. (R935). The trial court applied *Arizona v. Youngblood*, wherein the United States Supreme Court held:

> We think that requiring a defendant to show bad faith on

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[19]The procedural bar was the primary basis for the trial court's denial of relief on this claim. (R935). The fact that the court entered alternative findings on the merits (or lack thereof) of this claim does not affect the primacy of the procedural bar ruling.

> the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. **We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.**

Arizona v. Youngblood, 488 U.S. 51, 58 (1988) [emphasis added]. The trial court concluded, **based upon the evidence**, that Guzman had not demonstrated bad faith on the part of the State. The court stated:

> Based upon the evidence presented, bad faith by the State has not been shown. This evidence only shows that the hair evidence from Defendant's case has been permanently lost from the Daytona Beach Police Department's evidence room since 1995. There was no evidence presented that [Francis] Thompson, or anyone else, actually destroyed the hair evidence. The hair evidence is only assumed to have been destroyed based on the computer entries. Nor was there any evidence presented that Thompson or the police, by their conduct, indicated that the hair evidence could form a basis for exonerating Defendant. In fact, the lead detective testified that based on the condition of the body, *i.e.,* several incised wounds on the head, and the crime scene, *i.e.,* hair on thigh same color and length as victim's head hair, it appeared to be cut rather than pulled from root, and blood spatter on walls and victim's legs, she assumed the hair evidence was from the victim. *See* October 22, 2001 Evidentiary Hearing Transcripts at 201-03. Further, the lead detective testified that she submitted the hair evidence to FDLE for testing. *See* October 22, 2001 Evidentiary Hearing Transcripts at 209-11. However, the April 3, 1992 FDL report stated that no hair comparisons had been performed because there were not adequate hair standards. *See id.; see also*

> Defendant's Exhibit #5. The detective testified that it was not possible at the time of the report to obtain adequate hair standards because the victim had already been buried. *See id.; see also* State's Trial Exhibit #13 (death certificate, signed August 12, 1991, showing victim was cremated). Finally, the lead detective stated that the hair evidence was not significant to this case. *See id.* at 211; *see also* October 23, 2001 Evidentiary Hearing Transcripts at 249; 301 (trial counsel did not attach much significance to the hair evidence because the victim's skull had been shattered and fragments of the skull were dislodged and found in other parts of the room). Therefore, the failure to preserve of the hair evidence is not a denial of due process of law.

(R936-37). Despite Guzman's claims to the contrary, and despite his harsh criticism of the trial court, the findings set out above are supported by competent substantial evidence, and should not be disturbed.[20] Guzman's arguments to the contrary are just that -- arguments that were rejected by the trial court after considering all of the evidence. There is no basis for relief on this procedurally barred and meritless claim.

With respect to the *Brady* component of this claim, the collateral proceeding trial court denied relief finding the claim to be procedurally barred and meritless because Guzman

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[20]On page 62 of his brief, Guzman makes the curious argument that the trial court should not have enforced the procedural bar to the destruction of evidence claim because the "prosecutors and law enforcement officers involved" in this case did not know the evidence had been destroyed, either. He points to no legal support for this position, which is contrary to the "prosecution team" theory underlying *Brady* and *Giglio.* This claim is unsupported by argument, and is frivolous. *See*, *Lawrence v. State*, 27 Fla. L. Weekly S877, 880 (Fla. Oct. 17, 2002).

could not show prejudice. (R938). The court held:

> As stated under Ground XII, *supra*, this claim is legally insufficient because the destruction of the hair evidence could have been easily discovered through the exercise of due diligence. "Although the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the *Brady* test, it continues to follow that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)(holding that State did not commit *Brady* violation regarding the contents of the victim's briefcase because defendant was aware of this material where his investigator testified that he attempted to get the contents of the briefcase and was told they had been returned to the victim's family; defendant was aware of the location of the contents of the briefcase and could have compelled the production of the document by requesting a subpoena duces decum, thus, no *Brady* violation occurred because the evidence cannot be found to have been withheld from the defendant)(quoting *Occhicone v. State*, 768 So. 2d 1037, 1041-42 (Fla. 2000)). Since this claim does not satisfy the test for a *Brady* violation, this claim is procedurally barred as a claim that could have or should have been raised at trial and on direct appeal. *See* Fla. R. Crim. P. 3.850(c); *Riechmann,* 777 So. 2d at 361 n. 20 (holding that *Brady* claim regarding missing crime scene photographs was procedurally barred because defendant could and should have raised the issue on direct appeal since claim pertained to the trial record)(citing *Francis*, 581 So. 2d at 583); *Lopez*, 634 So. 2d at 1056 (holding that *Brady* violation was procedurally barred

because it could have been raised on direct appeal); *cf. Lightbourne*, 549 So. 2d at 1365 (holding that *Brady* violation allegations sufficiently demonstrated the facts on which the claim is predicated were unknown to defendant or his attorney and could not have been ascertained by the exercise of due diligence, therefore, the claim was not procedurally barred).

Although this Court is denying this claim based on the procedural bar, it notes that Defendant has failed to satisfy his burden of showing prejudice. *See, Jennings*, 782 So. 2d at 856 ("The ultimate test under *Brady* is whether the disclosed information is of such a nature that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.") First, as stated under Ground XII, *supra,* there is no showing of the State's bad faith in the failure to preserve the hair evidence, thus, there is no violation of due process. Second, the primary theory of defense at trial was that Curtis Wallace, a black male, was the real killer, rather than Defendant. *See* October 23, 2001, Evidentiary Hearing Transcripts at 286; S*ee also* October 22, 2001, Evidentiary Hearing Transcripts at 204. Third, as stated under Ground XII, *supra*, there was no evidence presented that Thompson, or anyone else, actually destroyed the hair evidence or that Thompson or the police, by their conduct, indicated the hair evidence could form a basis for exonerating Defendant. hence, impeachment and a motion to dismiss the charges based on such alleged *Brady* violations, i.e., failure to disclose the destruction or loss of Caucasian brown hair evidence and Thompson's convictions, would not have, in a reasonable probability, changed the result of the trial. *See also Guzman*, 721 So 2d at 1159 (finding that the evidence contained in the record

> demonstrates Defendant's guilt).
>
> Regarding the *Giglio* portion of this claim, Defendant presented no evidence at the evidentiary hearing on this claim. Therefore, he has not meet his burden. *Cf. Oakley*, 677 So. 2d at880. Moreover, based on the theory of defense and the fact that there is no showing of bad faith by the State, the destruction or loss of the hair could not reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict. *See, Ventura*, 794 So. 2d at 563.

(R938-9).

Those findings are supported by competent substantial evidence, and should not be disturbed.

With respect to the ineffective assistance of counsel component of this claim, the collateral proceeding trial court found that Guzman has failed to carry his burden under *Strickland v. Washington.* The Court stated:

> This Court finds that Defendant has failed to meet his burden under *Strickland.* First, the hair was tested, but the results were inconclusive due to the lack of adequate hair standards from the victim, and further standards could not be taken from the victim because his body had been cremated in 1992. *See* October 22, 2001 Evidentiary Hearing Transcripts at 209-11; *see also* Defendant’s Exhibit #5; State’s Trial Exhibit # 13. Second, as stated under Grounds XII and XIII, there is no due process violation from the failure to preserve the hair evidence. Third, as stated under Ground XIII, the theory of defense was that Curtis Wright, a black male, was the actual murderer, and the missing hair evidence was Caucasian brown hair. *See* October 23, 2001 Evidentiary Hearing Transcripts at 286; *see also* October 22, 2001 Evidentiary Hearing Transcripts at 204; Defendant’s Exhibits #1 &#2; Defendant’s November 30,

> 2000 3.850 Motion at 21, n.36; Defendant's October 15, 2001 Amended 3.850 Motion. Therefore, there is not a reasonable likelihood that had the fact of the destruction or loss of the hair evidence been introduced at trial, the outcome of the proceedings would have been different. *See also Guzman,* 721 So. 2d at 1159 (finding that the evidence contained in the record demonstrates Defendant's guilt).

(R939-40). That is a clear finding of no prejudice under *Strickland,* which is a sufficient basis for denial of relief on ineffective assistance of counsel grounds.[21] To the extent that further discussion of this claim is necessary, Guzman cannot establish deficient performance on the part of counsel, either. The defense theory was that a black male, Wallace, was the "real killer." (R204, 286). Likewise, trial counsel was well aware, from the crime scene photos, of the fact that a clump of hair was located on the back of the victim's thigh when his body was found. (R246-7). That hair appeared to come from a Caucasian individual (and, on visual examination, appeared to be consistent with the victim's hair), and would have done nothing to support the defense theory that Wallace was the actual killer.[22] In short, the fact that counsel did not pursue testing

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[21]Of course, under *Strickland*, the Court need only address the deficient performance prong or the prejudice prong since, if the defendant cannot make **both** showings, he is not entitled to relief.

[22]There is not, and never has been, any suggestion that the victim was sexually assaulted.

of the clump of hair (which was gone by the time counsel got into the case) cannot and does not amount to deficient performance. Even if counsel had discovered the absence of the hair, the posture of the case would not be different than it now is. Guzman has not shown bad faith in connection with the hair evidence, and that is dispositive of the issue because bad faith could not have been shown at the time of trial, either. In the absence of bad faith, which Guzman cannot establish, there is no basis for relief, and, consequently, no basis for relief on ineffective assistance of counsel grounds.

IV. THE PROSECUTORIAL MISCONDUCT CLAIM

On pages 75-79 of his brief, Guzman argues that he is entitled to relief based upon "improper conduct" on the part of the prosecutor. This claim, which was Claim VI in Guzman's Rule 3.850 motion, was denied on procedural bar grounds by the collateral proceeding trial court. (R605-6). That ruling is correct, is in accord with settled Florida law, and should not be disturbed because it is supported by competent substantial evidence.

In denying relief on this claim, the trial court stated:

> Defendant claims that the State improperly brought out the fact that Cronin had been administered a polygraph examination by compounding counsel's ineffectiveness for introducing the letter written by Cronin which referenced the examination. Defendant also claims that the State elicited improper and inadmissible evidence

> from Yarbrough regarding Defendant's collateral crime of drug use and/or possession. This Court finds that the instant claim is based on prosecutorial misconduct which is not cognizable in a Rule 3.850 motion for postconviction relief because it attempts to raise matters that could have or should have bee raised on direct appeal. Therefore, it is procedurally barred from consideration. *See Brown v. State*, 755 So. 2d 616, 621 (Fla. 2000) (*citing Urbin v. State*, 714 So. 2d 411, 418 (Fla. 1998)); *Teffeteller v. Dugger*, 734 So. 2d 1009, 1022-23 (Fla. 1999); *Robinson v. State*, 707 So. 2d 688, 697-707 (Fla. 1998); *Maharaj v. State*, 684 So. 2d 726 (Fla. 1996); *Reed v. State*, 640 So. 2d 1094, 1095 (Fla. 1994); *Johnson v. State,* 593 So. 2d 206 (Fla. 1992); *Kelley v. State*, 569 So. 2d 754 (Fla. 1990); *see also, Fla. R. Crim. P.* 3.850(c).

(R606). The disposition on procedural bar grounds is a correct application of Florida law, and the lower court should be affirmed in all respects.

To the extent that further discussion of this claim is necessary, Guzman has not even acknowledged that the trial court denied relief on this claim on procedural bar grounds, nor has he attempted to explain why that procedural ruling is incorrect. In the absence of any legal argument by Guzman addressing the issue before this Court, there is no need for consideration of the prosecutorial argument claim. In any event, Guzman's trial was a bench trial, and judges are, of course, presumed to know and follow the law. If any of the procedurally barred matters are truly improper, and the State does not concede that they were, the trial court is presumed not to have considered them.

See, e.g., Walton, supra. This claim is not a basis for relief.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all requested relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to **James L. Driscoll, Jr.**, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of January, 2003.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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