IN THE SUPREME COURT OF FLORIDA

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| JAMES GUZMAN, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| vs. | ) | CASE NO. 89,640 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
| _____ | ) | |

**APPEAL FROM THE CIRCUIT COURT**
**IN AND FOR VOLUSIA COUNTY, FLORIDA**

# REPLY BRIEF OF APPELLANT

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## SUMMARY OF ARGUMENTS

POINT 1: THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL.

POINT 2: THE CONVICTION OF JAMES GUZMAN WAS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

POINT 3: THE DOUBLE JEOPARDY CLAUSE PRECLUDED GUZMAN'S SECOND TRIAL.

## ARGUMENT

### POINT 1

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL.

The Trial Court erred when it denied GUZMAN'S Motion for Mistrial based upon Rogers' testimony that GUZMAN had committed a prior murder in Miami. The trial court should have also given GUZMAN the opportunity at that point in time to have a jury trial in lieu of the non jury trial. The trial court entered a pretrial order in limine which prohibited the testimony of the prior murder in Miami. The order in limine was violated by the trial testimony of Rogers.

The trial court's ruling on the Motion for Mistrial is inherently inconsistent because: 1. The trial court strikes Rogers' testimony and 2. The trial court relies on Williamson v. State, 681 So.2d 688 (Fla. 1996) which says "such testimony is admissible." Based on Williamson, the trial court must have admitted and considered the Miami murder because in Williamson the Supreme Court declared that under those facts, the court could properly admit evidence about a collateral crime. The trial court denied defendant's Motion for Mistrial based upon the Williamson

case as its sole authority. This tends to indicate and one can infer that the trial court took into consideration as evidence the reference to the Miami murder which was ruled inadmissible and prejudicial by Order Granting Motion In Limine.

The state relies on First Atlantic National Bank v. Cobbett, 82 So.2d 870 (Fla. 1955) and says: "The court is presumed to disregard erroneously admitted evidence." Answer Brief page 25. The First Atlantic case was a civil case based upon breach of oral contract. The case was tried by the Circuit Judge without a jury and resulted in a verdict and a judgment. Id page 871. Appellee presented three witnesses. Appellant presented no witnesses and no evidence. Unlike the GUZMAN case, there was no contradictory evidence in the First Atlantic case. In the GUZMAN case each of GUZMANS only accusers, Martha Cronin and James Paul Rogers, had made pretrial statements confessing that each had lied about GUZMAN'S involvement in the murder. Cronin and Rogers were contradicted and impeached by defense witness Carmelo Garcia and by defense witness and Notary Frank Doughney who took the Affidavit of Rogers.

In the instant case the record is not clear that the trial judge discarded Rogers' testimony in light of the trial court's reliance on Williamson. In GUZMAN'S case the Rogers testimony did injuriously and harmfully effect GUZMAN'S right to a fair trial, even when considered and evaluated by an experienced trial judge.

The state relies on the case of State v. Arroyo, 422 So.2d 50, 51 (Fla 3d DCA 1982). In Arroyo the court stated at page 51:

"Ordinarily, where a trial judge sitting as fact finder erroneously admits evidence, he is presumed to have disregarded the improperly admitted evidence, and the error or its admission is deemed harmless." GUZMAN'S facts are not the ordinary facts. GUZMAN took the stand and denied committing the murder. Arroyo cites Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) "The possibility that the trial judge erroneously considered co-defendant's statement requires reversal."

In the instant case there is surely the possibility that the trial judge erroneously considered Rogers' statements regarding GUZMAN'S prior murder in Miami.

United States v. Vaughan, 443 F.2d 92 (2d Circuit 1971). "The principal issue in this appeal is whether Vaughan's right to a fair trial and his waiver of a jury were impaired by a trial court's continuous reference to and apparent reliance upon, a letter written to the court by defendant immediately prior to trial, not introduced as evidence in the case, and which at the beginning of the trial the court said it would disregard." Page 92, 93.

"The Government contends that absent a showing of substantial prejudice, a court sitting without a jury is presumed to base its verdict only on proper evidence. Assuming the applicability of such presumption, it is rebutted in this case by the trial judge's repeated references to, and apparent reliance upon, a matter not in evidence." Id

The presumption should not apply here because there has been substantial prejudice to GUZMAN. If the presumption does apply, it

is rebutted in this case by the trial judge's apparent reliance upon Rogers' testimony based upon the authority of Williamson. The court in Vaughan reversed the judgment and remanded for a new trial and stated: "Nonetheless, this error of the court may well have affected the integrity of the fact-finding process."

Mackey v. State, 234 So.2d 418 (3d DCA 1970). Mackey and co-defendant Kemp waived a jury and were brought to trial together before the court on Robbery charges. Kemp entered a plea. "Kemp then made an unsworn statement to the court regarding the robbery, in the course of which he implicated Mackey. The trial then was resumed against Mackey, who was found and adjudged guilty of robbery." On appeal Mackey challenges the sufficiency of the circumstantial evidence, and contends he was deprived a fair trial because the judge before whom the case was tried acquired knowledge of facts or matters prejudicial to Mackey's claim of innocence from the unsworn statement received by the judge from Kemp. Page 419. "From the foregoing it appears that the case against Mackey, based in substantial part on circumstantial evidence, may or may not have been sufficient for his conviction without the damaging statement of Kemp. The question presented is whether Mackey had a fair trial when the judge, as the trier of the facts, had heard Kemp's statement implicating Mackey." page 420. "This is not an instance of bias of the trial judge. It is to be assumed that the judge was not biased, and that he conscientiously attempted to act fairly in the case. The question is whether in this situation Mackey had a fair trial, and that depended upon whether, in evaluating the

state's evidence and the testimony of Mackey that he was unaware of the robbery and had no part therein, the trial judge could completely put out of his mind the Kemp statement implicating Mackey, and not be influenced thereby." page 420.

We can assume that GUZMAN'S trial judge was not biased and that he conscientiously attempted to act fairly in the case. The real question is whether or not GUZMAN'S trial judge could completely put out of his mind the Rogers' testimony regarding the Miami murder. It is GUZMAN'S position that even an experienced trial judge could not keep such prejudicial testimony out of his mind, especially when it was the final piece of evidence introduced by the state before resting their case.

"It may well be that in justice to the trial judge it should be presumed that in determining the guilt or innocence of Mackey, on the basis of the evidence presented in the case, he was in nowise influenced or affected by the Kemp statement, which, as it related to Mackey, was in conflict with the latter's testimony and pictured him as being equally guilty with the others. However, in a similar situation a jury would not be considered capable of so acting (Bruton v. United States, infra), and we must conclude there is a reasonable probability that the trial judge could not evaluate the evidence, as it bore on the guilt or innocence of Mackey, after hearing the Kemp statement, without to some material extent being influenced thereby. Our system of law protects against the probability of unfairness, where that appears, as well as against unfairness which is patent. Therefore, without intending any

reflection upon the trial judge, we hold that in the interest of justice the appellant should be granted a new trial, before a jury, or, if jury trial is waived, before a judge other than the one who heard the statement made by Kemp during the course of this trial." Id page 420.

It is clear in GUZMAN'S case had a jury heard Rogers' statement a mistrial would have been granted. This court should conclude in the instant case that there is a reasonable probability that the trial judge himself could not evaluate the evidence as it bore on the guilt or innocence of GUZMAN after hearing the Rogers' statement without to some material extent being influenced thereby.

The cases of Wong Sun and Vaughan and Mackey set the varying standards to apply to the trial judge when considering improper testimony. The standards are a "possibility", or "may have affected" or a "reasonable probability" that the trial judge could not evaluate the evidence without being influenced by the improper testimony.

Sexton v. State, 22 Fla.L. Weekly S469 (July 17, 1997). In Sexton the Supreme Court reversed and remanded for a new trial finding error in the introduction by the state of defendant's collateral bad acts. The court in Sexton stated at S470 "In reviewing testimony about a collateral bad act that is admitted over an objection based upon section 90.403, a trial judge must balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice. Only when the unfair prejudice substantially outweighs the probative

value of the evidence should it be excluded." The testimony of Rogers in GUZMAN'S case regarding the Miami murder was surely not necessary to the state's case. The unfair prejudice to GUZMAN substantially outweighed the little probative value of Rogers' testimony regarding the Miami murder.

"Yet the jury could only have been inflamed by this damaging testimony and might have been moved to punish Sexton for those collateral acts by finding him guilty of the murder in this case. See Steverson v. State, 22 Fla.L. Weekly S345 (Fla. June 12, 1997) (admission of collateral evidence so prejudicial as to require a new trial.") The trial Judge in GUZMAN could only have been likewise inflamed by the Miami murder.

In Hall v. State, 381 So.2d 683 (Fla. 1980) this Court stated: "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." ... "The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers know to be unmitigating fiction. ..." The state in GUZMAN has had the windfall of having its last bit of evidence be Rogers' testimony of the Miami murder knowing as a matter of law and order that the judge should not consider it. The judge could not put it out of his mind. It would be a naive assumption that the prejudicial testimony could be overcome by a trial judge. It is an unmitigated fiction in this case. The presumption should not apply.

For the foregoing reasons, there is a reasonable probability

that Rogers' testimony regarding GUZMAN'S prior Miami murder influenced the trial court's decision as to guilt or innocence. Accordingly, this court should reverse and remand for a new trial by a jury or by another judge other then Judge Johnson who heard GUZMAN'S case without a jury.

**POINT 2**

THE EVIDENCE IS NOT SUFFICIENT TO SUSTAIN THE CONVICTION.

The state's evidence is inconclusive as to GUZMAN'S guilt. The evidence supports several different possibilities about who committed the murder. This is a predominantly circumstantial evidence case. In Guzman v. State, 644 So.2d 996 (Fla. 1994) this court stated: "The state produced circumstantial evidence connecting GUZMAN to the crime and produced two key witnesses who claimed GUZMAN confessed to them that he committed the murder." State witnesses Martha Cronin and James Paul Rogers were the only persons who linked this man to the crime. Martha Cronin and Rogers recanted their testimony before trial. While the credibility of the state's witness is not an issue for the Supreme Court on appeal, the competency and substantial nature of the evidence is. State's evidence is not competent and not substantial. The state did not disprove the defense theory that someone else committed the crime or that the state's witnesses had a motive and opportunity to lie. There is testimony from Artonio Lee that the victim was seen alive Saturday night August 10, 1991 at the coke machine. This was well after the time that Martha Cronin testified GUZMAN had confessed to her (3:00 p.m.) and well after the time that the

medical examiner pinpointed as his best time of death (3:00 to 6:00 p.m.). Time of death was an important issue in the case. Was Colvin killed before 3:00 p.m. or before 11:00 p.m. on Saturday, August 10, 1991? That determination is crucial.

The state's evidence is uncertain as to the murder weapon. The state presented two possible murder weapons, a samurai sword and survival knife. The medical examiner stated that the murder weapon could not have serrated edge nor double edge. Each of the two proposed murder weapons contain these characteristics. Even if the state's two witnesses, Martha Cronin and James Paul Rogers, could be considered to be providing direct evidence as the state argues, the totality of the evidence is circumstantial and consistent with the defendant's argument that the victim was seen still alive at 11:00 p.m. on Saturday, August 10, 1991 and that someone else committed the murder. All of the other evidence presented by the state is circumstantial and is consistent with a reasonable hypothesis of GUZMAN'S innocence which the state did not rebut. Considering the shaky ground supporting the Cronin and Rogers testimony, GUZMAN's conviction is not supported by competent substantial evidence.

Before any details of the murder were ever released Curtis Wallace told law enforcement officers on August 12, 1991 that if a ring was missing he would know who did it. Curtis Wallace possessed unique knowledge of the details of the murder on Monday morning, August 12, 1991. "The jury could reasonably conclude that this statement was evidence of guilty knowledge." Hall v. State,

381 So.2d 683 (Fla. 1980). GUZMAN himself testified that Curtis Wallace was the person who gave him the ring. GUZMAN'S and Artonio Lee's testimony places Curtis Wallace in possession of the victim's ring.

Curtis Wallace and Artonio Lee saw the victim alive between 9:00 p.m. and 12:00 midnight on August 10, 1991. Dr. Steiner's time of death supports the victim being seen alive between 9:00 p.m and 12:00 p.m.. Curtis Wallace confessed to killing Colvin and had money belonging to the victim. The ring that GUZMAN sold to Gadson was the same ring that Curtis Wallace gave GUZMAN to sell. Curtis Wallace was a suspect before GUZMAN was.

Officer Walker testified that Martha Cronin told him she knew something about a murder case on the same day and time that Martha Cronin was being arrested for an active warrant. Martha Cronin only gave the said information in exchange for her deal allowing her to be unarrested and released to a beach side motel.

In Andreu v. State, 22 Fla.L. Weekly D1351 (2d District May 30, 1997) the court reversed Andreu's conviction because the evidence was insufficient to find Andreu guilty of the crime of Attempted Second Degree Murder. In Andreu two state witnesses gave pretrial statements implicating Andreu. The two state witnesses, Collins and Price, recanted their pretrial statements. At the end of the state's case at the close of the evidence defense counsel moved for a judgment of acquittal on the grounds that Andreu could not be convicted based solely on Collins' and Price's prior inconsistent statements. "As a matter of law in a criminal

prosecution a prior inconsistent statement standing alone is insufficient to prove guilt beyond a reasonable doubt. Andreu at page D1352 ... Our review of the record confirms that both these witnesses recanted their previous accounts of the incident, and that those accounts were inconsistent with their trial testimony. No other evidence corroborated Price and Collins early version of the episode."

In the instant case GUZMAN'S two main accusers Martha Cronin and James Paul Rogers made prior inconsistent pretrial statements and provided the only evidence at trial supporting GUZMAN'S conviction.

For the foregoing reasons the verdict is not supported by competent substantial evidence.

**POINT 3**

THE DOUBLE JEOPARDY CLAUSE PRECLUDED GUZMAN'S SECOND TRIAL.

Burks v. United States, 437 US 1, 98 S.Ct 2141, 57 L.Ed. 2d 1, (1978) "The double jeopardy clause of the Fifth Amendment forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which is failed to muster in the first proceeding."

In the instant case the prosecution used the second trial to supply evidence which it failed to muster in the first proceeding to-wit: James Paul Rogers. James Paul Rogers did not testify in the first trial. Arthur Boyne did testify in the first trial but not the second. Arthur Boyne was also represented by the Public Defender in the first trial. That was the grounds for reversal

which could be considered trial error induced by the State Attorney's knowing misconduct.

After Boyne testified in the first case he was sentenced to prison for murder. He also filed extravagant and untruthful motions regarding the former prosecutors and police. (R. 384-396) Boyne filed a Federal lawsuit in Arizona against the former prosecutor in this case. That made Boyne not a desirable state witness at the second trial.

In Point 4 number 5 page 42 Initial Brief GUZMAN has raised the issue of the misconduct of the prosecutor during the first trial. This Supreme Court never ruled on said misconduct in the former appeal. It is GUZMAN'S position that if this court had indeed ruled on that issue in his favor that the second trial would have been barred by the double jeopardy claim. "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials." Burks at page 9

In United States v. Rios, 637 F.2d 728 (10th Cir. 1980) the court stated: "Thus, the double jeopardy clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby expose defendants to the substantial burdens imposed by multiple prosecutions."

The action of the State Attorney, Vince Patrucco, in the first trial in presenting Boyne's testimony was intended to provoke a

mistrial request and to subject GUZMAN to multiple prosecution if the mistrial was granted.

## CONCLUSION

Based on the foregoing reasons and authorities, Appellant respectfully requests this Honorable Court to reverse his conviction and remand for a new trial.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to KENNETH NUNNELLY, ESQUIRE, 444 Seabreeze Blvd., Suite 500, Daytona Beach, FL 32118 and by mail delivery to JAMES GUZMAN, Florida State Prison, R-1-S-15, P.O. Box 181, Starke, Florida, 32091, this 7th day of January, 1998.

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