IN THE SUPREME COURT OF FLORIDA

CASE NO: 73, 492

DIETER RIECHMANN,

APPELLANT,

vs.

STATE OF FLORIDA,

Appellee

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

REPLY BRIEF OF APPELLANT

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ARGUMENT

POINT I.

THE STATEMENTS TAKEN FROM THE DEFENDANT BY THE MIAMI BEACH POLICE SHOULD HAVE BEEN EXCLUDED BY THE TRIAL COURT BECAUSE THE STATE FAILED TO SHOW THAT THE DEFENDANT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS MIRANDA RIGHTS AND GAVE SUCH STATEMENTS.

Custody and interrogation are the two prerequisites that trigger the procedural safeguards specified in Miranda v. Arizona, 384 U.S. 436 (1966), and without any controversy in this appeal, the interrogation element was present at all material times.

However, in an argument that confusingly intermingles the custody requirement with a related but distinctly different issue, to-wit: "voluntariness," the AG concludes that, "the trial court's finding that the Def. was indeed not in custody was overwhelmingly supported by the testimony at the suppression hearing" (AGB-90). And this is allegedly so because all the Detectives had testified the Def. was not Mirandized for the reason that he was not in custody (AGB-90).

As is set forth in the quoted language appearing in the AG's brief from this Court's holding in Roman v. State, 475 So.2d 1228 (Fla. 1985) "(T)his inquiry [as to the existence vel non of custody"] is approached from the perspective of how a reasonable person would have perceived the situation." (AGB-90). In addition to this "reasonable person perception" test, it is uncontrovertedly a requirement of the law that the totality of the circumstances must be looked to to determine whether an

individual is in custody for Miranda purposes. Minnesota v. Murphy, 465 U.S. 420 (1984).

Succinctly stated, it is Def's contention that under the totality of the circumstances in this case---as those circumstances are set forth in the trascripts and in the Statement of the Case an Facts of both briefs, adduced at both the suppression hearing and the trial---he was in a custodial situation from the time of his contact with the first police officer until he was arrested by the ATF agents.

Regarding what constitutes custody, the United States Supreme Court in Miranda, supra, stated, in pertinent part, (at p. 725 of 16 L.Ed 2d 694):

> "The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station, or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point." (Emphasis added)

It should have been quickly apparent to the various involved police officers and the advising assistant state attorney or attorneys that Dieter Riechmann was either the killer or the extremely upset mate of the victim. Further, there was a language problem to a greater or lesser extent, whether or not the AG wants to concede such. Under these circumstances it was

absolutely (to use the AG's word) unconscionable that the police did not simply advise Def. of his Miranda rights. It was just that simple. They should have just done it. It was the right thing to do. It was wrong for the police to not have done it. When in doubt concerning the affording of a constitutional right, the police should simply afford it. It would have been that easy.

In addition to Def's being locked up in "the slammer" (to use the AG's term), upset, and to there being a language problem, these police officers literally kept after the poor man, who was all alone and in a foreign land, night and day, obviously depending on what shifts they respectively worked, which included having him do drive-arounds in the middle of the night and being subjected to hours-long interviews in the early morning hours before sunrise.

It was an almost surrealistic affair and if it wasn't designed to destabilize him, it might as well have been. Between 10/25/87 and 10/29/87 the differences between night and day had to have lost all meaning to this man. One is reminded of the words of Milton in his "Paradise Regained" written in 1671, to-wit:

> "O dark, dark, dark, amid the blaze of noon,
> irrecoverable dark, total eclipse, without
> all hope of day."

And, finally, it matters not one bit that Riechmann steadfastly maintained his innocence to the police throughout the questioning. In this regard, and as was also stated in the Miranda opinion (at p. 725 of 16 L.Ed.2d):

> ".... Similarly, for precisely the same
> reason, no distinction may be drawn between

> inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. In Escobedo itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself." (Emphasis added)

The involved repeated questioning of Dieter Riechmann without his having been Mirandized until it was through, or nearly through, constituted an unacceptable breach of his right to be afforded the benefit of the Miranda decision and the underlying constitutional protections, and none of those statements should have been permitted to be heard by the jury. Further the error in allowing such statements to be received was federal, as well as state, constitutional error (i.e., the 6th Amendment "Fair Trial" rights, the 5th and 14th Amendment Due Process rights, and the 4th Amendment right to be free of unlawful searches and seizures) and they were not harmless beyond a reasonable doubt in this all circumstantial evidence case. Chapman v. California, 386 U.S. 840.

POINT II

> THE STATE WAS GUILTY OF PROSECUTORIAL MISCONDUCT IN THIS ALL CIRCUMSTANTIAL EVIDENCE CASE AND THEREBY VIOLATED THE DEFENDANT'S RIGHTS TO A FAIR TRIAL AND THE DUE PROCESS OF LAW UNDER THE FEDERAL AND STATE CONSTITUTIONS.

The AG has chosen "to address each instance of alleged misconduct raised by the Defendant" and without agreeing that this piecemeal response is sufficient, Def. will initially follow the same procedure and will thereafter address the situation from a totality of the circumstances perspective.

Concerning the prosecutor's "horrible crime" reference at the suppression hearing, the AG raises only the procedural response that Defense didn't object to same (AGB-92).

Regarding the prosecutor's opening statement remark that, "up until this point, the story the Defendant told the police was that..." the AG argues that there was no objection, the remark was taken out of context in Def's initial brief, and that it was "clearly not a comment on the Defendant's right to not testify at trial" (AGB-92). The ultimate and unpardonable sin in a prosecutor's argument is directing any comment towards the Def's exercise of his right to remain silent. Doyle v. Ohio, 426 US 610 (1978); Brown v. State, 367 So. 2d 616 (Fla.1979); Calloway v. Wainwright, 409 US 59 (1968); Griffin v. California, 380 US 609 (1965). Further the propriety of the comment is not affected by how inadvertent or indirect the comment might be. David v. State, 369 So.2d 943 (Fla. 4th DCA 1977).

In the instant case while the Motion to Suppress Def's Statement to the police had been denied, when the involved remark was made, the State obviously --- since the remark was made during opening statement --- had not put on the first witness, and Defense had, at that juncture, the right to object anew at trial to the Def's alleged statements to the police being allowed

in evidence, and the involved comment was at least an indirect response to the right to remain silent.

The AG all but dismisses out of hand Def's initial brief complaint that it was prosecutorial misconduct for the prosecution to have told the jury in opening statement that twenty-three grand jurors did something with respect to the Def., which "something" could only have been to indict Def., and which, as the AG points out the prosecutor nailed down anew right after the objection to the twenty-three grand jurors' statement was sustained-----by immediately thereafter reading from the indictment.

If the indictment is not evidence, and as is argued in Def's initial brief it clearly is not, then it simply logically follows that anything more than just a passing reference to its existence by the prosecutor is an attempt to raise it to the level of evidence, and that was what happened here both with respect to the "twenty three grand jurors" remark itself, and with the prosecutor continuing to talk about the indictment after the objection to that remark had been sustained. A prosecutor's arguments are to be predicated upon the evidence. Powell v. State, 93 Fla. 756, 112 So. 608 (1927); Washington v. State, 86 Fla. 533, 98 So. 605 (1923); Akin v. State, 86 Fla. 564, 98 So. 609 (1922).

Regarding the continuous reference throughout the trial to the Def's alleged "pimping" activities, while some uses of such word by State may have been appropriate to contribute to its "motive" argument, Def. contends that State went far beyond a

reasonable number of references to "pimping", with the result that this effort was simply one to demean Def's character, which is prohibitive under Sections 90.404, 90.405, 90.608, and 90.609, Fla. Stat. (Florida Evidence Code). See also Simmons v. State, 133 Fla. 645, 190 So. 756 (1939), overruled on other grounds, 195 So.2d 550 (1957).

Regarding State's reference to "metal pieces" found in one of the safe deposit boxes as being "pieces of the silencer," Def. stands by his contention that this unsolicited gratuitous remark, albeit its having been made outside the presence of the jury, was another instance of misconduct on the part of State because, (a) the State never intended to introduce the metal pieces in evidence (AGB-93) and, (b) it was just as harmful to Def. to have such remark made in the presence of the judge alone as it would have been in the presence of the jury, because it would be the judge who would ultimately decide between life and death.

Regarding the search of Def's German apartment in January of 1988, by Off. Wenk and ASA DiGregory, while it may arguably have been lawful as to the German police as being covered under the German warrant authorizing the initial search of the said apartment on November 5, 1987, it was clearly an unwarranted search on the part of Mr. DiGregory and as such was not only a Fourth Amendment violation but, as well, a Fifth and a Fourteenth Amendment violation, and a violation of Art. I, Sect. 9, Constitution of the State of Florida, and that Def. was thereby denied the benefit of the Due Process of the law.

In State v. Glosson, 462 So.2d 1082 (1985), this Court

stated, in pertinent part (at p. 1085 thereof):

> "...We reject the narrow application of the due process defense found in the federal cases. Based upon the due process provision of article I, section 9 of the Florida Constitution, we agree with Hohensee and Isaacson that governmental misconduct which violates the constitutional due process right of a defendant, regardless of that defendant's predisposition, requires the dismissal of criminal charges." (Emphasis added)

In this regard, Def. also places his reliance in United States v. Twigg, 588 F.2d 373 (3rd Cir.1978). Further, the federal Due Process clause imposes limits upon how far the Government can go in detecting crime. United States v. So, 755 F.2d 1350 (9th Cir.1985) and United States v. Thoma, 726 F.2d 1191 (7th Cir. 1984).

Def. stands by his initial brief contention that State told the trial court that Defense had seen documents which Defense represented he had not seen. This apparently was a swearing match between respective counsel and the AG is incorrect in representing otherwise.

The Record cite for Off. Schleith having testified that documents seized in Def's German apartment would be admissible in a German court, etc., is "T-7/21/88-133."

Regarding State's leading questions to its own expert witness, Mr. Rao, the AG has conceded that, in fact, such did take place, but he implies that no harm was done because Defense objections were sustained. This is an interesting "damned if you do and damned if you don't" kind of argument designed to prevent the Def. from finding any relief whatsoever in this Court for the

acts of prosecutorial misconduct if there (a) was no objection or, (b) an objection that was sustained and, as a "for instance," Def. would call to the Court's attention the following argument from the AG's brief, to-wit:

> "As to the 'So, Mr. Rhodes, let us assume...' (T-3798) question, defense counsel's objection was sustained, and properly so. As to the 'So, Mr. Rhodes, if the defense...' question (T-3799), there was no objection."

Def. stands by his initial brief contention that the Record establishes that the prosecutor was making some sort of facial expression after Def. testified in response to his attorney's question that he had previously given a truthful answer (DB-78). The making of such a facial expression at that particular time clearly conveyed to the jury that the involved prosecutor did not, in fact, believe that Def. had previously given a truthful answer, which amounts to the expression of an implied opinion by the prosecutor to that effect, and the expression by a prosecutor before the jury of his personal opinion that the Def. is guilty is not only bad form, but highly improper because such counsel is not a witness, nor under oath to speak the truth, nor called as an expert to give his opinion. Tyson v. State, 87 Fla. 392, 100 So. 254 (1924).

Regarding the prosecutor having the Def. repeat the reason why he had previously been in jail, to-wit: for "perjury, Def. stands by his initial brief contention that this was a prosecutorial hit below the belt (DB-78; AGB-96). Likewise, Def. stands by his contention that it was totally and patently unfair

and unfairly prejudicial for the prosecutor to blurt out in an objection to a Defense question that the answer thereto by the State's informant witness might put that witness in jeopardy for his life or limb (DB-77; AGB-95,96).

The Def. also stands by his contention that it was totally outrageous for the prosecutor to have asked Def. if Def. had shot his dog causing the blood to end up the way it did on the blanket (DB-79; AGB-97). The AG's response is that this was "the prosecution....attempting, via a facetious question to highlight this inconsistency" (AGB-9).

To the involved prosecutor---and to the assistant attorney general handling this appeal, as well---Def. would state that considering the totally irrevocable penalty he is facing, he is at least entitled to have those trying to convict him treat him with respect as a human being and to not try to win this case by mocking him and belittling him. If Florida must have the death penalty, there is no place for this sort of conduct in any phase of a capital case!

The AG's response to two prosecutorial comments in the presence of the jury evidencing the prosecutor's obvious belief that the Def. was not giving him truthful answers was simply that there was no objection to them, but the AG's response to the prosecutor's "I didn't think so comment" was that it was "clearly improper", but that an objection thereto was sustained, a motion to strike was granted, but that there was no motion for a mistrial. Also, the AG added that the last discussed remark was of a "minor nature...especially when viewed in the context of a

hotly disputed four week trial" (AGB-98).

Def. would submit that these differing responses of the AG for basically similar acts of misconduct on the part of State demonstrates whose arguments on this subject are the frivolous one's.

The AG's response to Def's citing as misconduct the business about the prosecutor being "in the witness box" is too silly to warrant a reply (AGB-98).

As to the Def's complaints about the prosecutor's remarks "If I could get a straight answer, I wouldn't have" and "you a little warm, sic," the AG's responses were solely, respectively, that there was no objection or motion to strike and that there was no objection. Further, the AG argued, "as to the repetitious nature of the question, there was no objection nor motion to strike." This is the same old argument used by the AG throughout its response to this point, which if successful would just about prevent Def. from receiving any relief from this Court because of the involved prosecutorial misconduct.

Thereafter the AG agrees that State's "in the presence of the jury comment," to-wit: "Judge if he wouldn't keep coming up with these answers", was "improper," but that while a motion to strike same was granted, there was no motion for a mistrial, "which again is understandable given the minor nature of this violation" (AGB-98). This was not a minor violation! It was another deliberate demeaning of Def's truthfulness by the prosecutor. By rendering an opinion in a factual or ultimate matter concerning a case (of which the truthfulness or lacking

thereof of the Def. is certainly such a matter), a prosecutor, in effect, renders unsworn testimony not subject to cross-examination. Comment (a) to ABA Standards for Criminal Justice, The Prosecution Function (approved Draft 1971. The Nature and Consequences of Forensic Misconduct, supra note 5, at 955 (1954). Further, as is stated in Kirk v. State, 227 So. 40,43(Fla. 4th DCA 1959):

> "If his case is a sound one, his evidence is enough. If it is not sound, he should not resort to innuendo to give it a false appearance of strength. Cases brought on behalf of the State of Florida should be conducted with a dignity worthy of the client."

Regarding the AG's defense of State's bringing up in front of the jury Def's so-called "dinner invitation to prosecutor Beth Screenan that such "appeared to be one of the lighter moments of the trial," Def's counsel would assert as strongly as he could that the subject matter and possible penalty involved in this case make it far too serious a thing for anyone involved to treat it as light. It was outrageous in the extreme for the prosecutor to have made mention of this incident in the presence of the jury, and it ill behooves the State's appellate attorney to treat the matter as being anything but serious (AGB-99). The same is true with respect to the AG's treatment of the prosecutor's question to the Def., to-wit: "Do you think this is funny, Mr. Riechmann?" (AGB-100).

There were several other instances of prosecutorial misconduct referred to in Def's initial brief with responses thereto being the AG's brief (AGB-97-101) with no further

response in behalf of Def. being necessary, with the exception of the prosecutor's final parting shot at the Def., to-wit: "I have no further use for this witness" (AGB-99). The AG concedes this remark was totally improper, but adds thereto that it was of a "minor nature" and that it was therefor "understandable" why there was only an objection but not a motion to strike directed thereto (AGB-99). Succinctly stated, this remark was far from minor and it was prejudicial to the Def. for the unsworn prosecutor again saying to the jury, in effect, that the Def. was such a terrible person and/or such a liar that he, i.e., the prosecutor, had no use for him as a human being.

And, finally, the most important aspect of the AG's argument under this point is that it really misses the point in failing to address itself to "a totality of the circumstances" view of the continuing and cumulative nature of the prosecutorial misconduct of the State.

The District Court of Appeal for the Third District in its Jackson v. State, 421 So.2d 15 (Fla. 3rd DCA 1982), dealt harshly with the State for instances of prosecutorial misconduct in the case before it and, as well, in other appeals in other cases of the same circuit court district. Said the court there, in pertinent part (at pgs. 16 and 17), to-wit:

> "The volume of these cases---including multiple acts of misconduct by particular prosecutors---is so great that we can no longer believe that they represent merely isolated examples of understandable, if inexcusable, overzealousness in the heat of trial. Instead, we must suspect, however reluctantly, that the improprieties may be deliberately calculated to accomplish just what representatives of the state cannot be

> permitted---inducing a jury to convict by unfairly prejudicing it against the defendant. It is obvious that this pattern of conduct cannot be tolerated...Because of the prosecutor's prejudicial misconduct, the judgment below is Reversed and remanded for a new trial."

In Jackson, the "pattern" (which word was used by the court in that case) of instances of prosecutorial misconduct were in that case and, as well, in other cases involving the same prosecutor(s). In the instant appeal, the continuing series of prosecutorial abuse was all in this case, and if each and every one of them was not standing alone, sufficiently prejudicial to the Def's receiving a fair trial and being accorded the due process of the law, certainly the overall and net effect of all of the instances considered together was so overwhelming that this Def. was indeed deprived of a fair trial and was convicted without being accorded the Due Process of the law.

POINT III

> THE COURT ERRED IN FAILING TO REQUIRE THE STATE TO MAKE ITS DISCOVERY INFORMATION AVAILABLE AND/OR AVAILABLE ON A TIMELY BASIS IN A CASE IN WHICH THE DEFENDANT'S LIFE WAS AT STAKE.

The AG demeans Def's complaint herein as being "meritless" and as attempting "to portray the prosecution of the Def. as a ruthless juggernaut bent on masking the bastions of due process in an all-out effort to convict an innocent man" (AGB-104).

Of course, the Def. herein has at no time said anything about "a ruthless juggernaut", but speaking candidly that is indeed a reasonable description of the State's conduct in the discovery area, particularly when its deficiencies here are

coupled those in the other areas described herein. The record in this case is replete of instances of the State holding back on delaying the furnishing of discovery materials and/or of the lower court's refusal to compel the prosecution to do otherwise.

When State produced at trial certified copies of the Def's (and victim's) German address, which State argued it needed to have introduced to show the validity of the German searches, Defense objected that it had not seen the document before (T-7/20/88-11-13). State's response was that all German statements and documents had been made available to Defense but Defense countered that when during a deposition, it requested the documents, State hedged as furnishing them and thereafter State argued that the court had previously ruled it didn't have to furnish all the documents secured from the 37 German witnesses, etc., but only the one's it deemed relevant. Worse yet the court below refused to inspect in camera the German statements and documents State refused to furnish (T-7/20/88-16-18; 28, 29).

Defense thereafter had sprung on it a photo of Kersten in the bathing suit she was wearing in the dirty magazine photo but without her face covered up, which photo was introduced in evidence and State had no reply to Defense's contention that State had known about the photo for several weeks (T-7/21/88-28,29).

Added to this prosecutorial penuriousness relative to furnishing and/or timely furnishing discovery information, is the admitted action of one of the Miami Beach officers (Hanlon) in throwing away his handwritten notes used to prepare his eight

reports. Perhaps it is that a rule should be implemented in the circuit courts---and particularly in death penalty cases---such as is in effect in the US District Court for the Southern District of Florida, requiring all police to retain all rough notes.

The court denied Defense's motion for the production of two involved insurance policies despite the fact that Defense said they had never been furnished by State (T-8/2/88-67-70).

POINT IV

THE TRIAL COURT ERRED IN FAILING TO EXCLUDE EVIDENCE SEIZED FROM THE DEFENDANT IN VIOLATION OF THE RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES UNDER THE FEDERAL AND STATE CONSTITUTIONS.

With reference to the hand swabs issue, the presumption of correctness and "standard of proof" ---to use the AG's language---arguments advanced by the AG do not address themselves to the Def's contention that on a motion to suppress evidence based upon constitutional grounds, it is the prosecution's burden to prove by clear and convincing evidence that the involved constitutional right was waived and that the right was waived freely and voluntarily, if the presumption against such waiver is to be overcome. Schneckboth v. Bustamente, 412 US 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968); and United States v. Gonzalez, 842 F.2d 748 (5th Cir.,1988). See also U.S. ex rel Turner v. Rundle, 438 F.2d 839 (3rd Cir.1971) and United States v. Hernandez, 574 F.2d 1362 (5th Cir.1978).

And in this regard the AG has simply ignored the testimony elicited from its police witnesses that Def. was in shock; and/or

that he was upset; and/or he was crying; and/or he was drunk or at least had been drinking; and/or he was suspected of being on drugs; and/or and that he spoke only English.

Insofar as Def's having allegedly given his consent for the search of the Tahiti room, the AG here also has failed to address itself to the involved constitutional questions, waiver, voluntariness, etc. Further, regarding the search of that room, the AG either is close to admitting the correctness of Def's position on this matter, or it has made a Freudian slip with the following sentence that appears in his brief herein, to-wit: "The State asserts that these facts are just barely enough to establish probable cause" (AGB-107).

POINT V

THE TRIAL COURT ERRED IN ADMITTING DEFENDANT'S PRIOR CRIMINAL CONVICTIONS AND THEN IN REFUSING TO INSTRUCT THE JURY THAT IT COULD ONLY CONSIDER SAME WITH REFERENCE TO THE MATTER OF THE CREDIBILITY OF THE DEFENDANT.

The AG couldn't have missed the point more in his argument here if he had deliberately set out to do so and, in this regard, Def's undersigned counsel may be missing a point too, because he is unable to ascertain why in God's green earth the AG would cite Braswell v. State, 306 So.2d 609 (Fla. 1st DCA 1975), which case is cited in Def's initial brief herein for the proposition that for prior convictions to be admissible, they must not be so remote in time as to have no appreciable bearing on the Def's present credibility (AGB-111).

But the major thrust of Def. on this point in his initial brief is that the convictions were not admissible to show bad character or propensity, either in cross-examination questioning of the Def. or through extrinsic evidence of such convictions. Sections 90.404(2)(a), 90.405, 90.6088(1), and 90.609, Fla. Stat. and that, therefore, it was error on the part of the court below to refuse to charge the jury that he prior convictions were being admitted solely on the issue of credibility and were not to be considered against Def. as direct evidence of his guilt or innocence.

As is stated in Imwinkelried: "Uncharged Misconduct: What would Irving Younger have done?" Vol. 16, No. 1, Litigation, 6 (Magazine of Trial Sect., ABA, 1989):

> "All litigators---especially those with a criminal practice---must consider Rule 404(b) law in their choice of a case theory. It is hard to overstate the perils of miscalculating the effect of uncharged misconduct evidence. One court has described uncharged misconduct testimony as 'the most prejudicial evidence imaginable against an accused.' People v. Smallwood, 42 Cal.3d 415, 722 P.2d 197, 228 Cal.Rptr. 913 (1986). The evidence is so prejudicial that it can 'usually sink the defense without [a] trace.' Elliott. 'The Young Person's Guide to Similar Fact Evidence 1.' 1983 Crim.L. Rev. 284, Uncharged misconduct testimony stigmatizes the defendant and can predispose the jury to convict. A National Science Foundations-sponsored study found that the type of testimony most consistently rated highly prejudicial was 'evidence suggesting [other] immoral conduct by the defendant.' Teitelbaum. Sutton-Barbere & Johnson, 'Evaluating the Prejudicial Effect of Evidence of Evidence. Can Judges Identify the Impact of Improper Evidence on Juries?' 1983 Wis. L. Rev. 1147, 1162." (Emphasis added)

POINT VI

IT IS IN THE INTEREST OF JUSTICE THAT THE GUILTY VERDICTS, JUDGMENT AND THE SENTENCE OF DEATH BE REVERSED BY THIS COURT UNDER THE TOTALITY OF THE CIRCUMSTANCES INVOLVED IN THIS CASE.

To answer the AG's uncertainty as to "what this claim is all about," Def. would state that it is all about the fact that taking into consideration everything that occurred in this case in the court below, plus the fact that the Federal Republic of Germany has no death penalty, it is "in the interest of justice" that this Court vacate and set aside the judgment of guilty and sentence of death imposed upon this Def. It would have been more appropriate for the AG to have directed its inquiry to this Court since it is this Court's Rule 9.140(f) that the "interest of justice" ground for reversal of criminal judgments, etc., is made a part of the law.

With reference to the AG's responses under this point to the specific grounds of error claimed by Def., Def. says the following:

The AG once again misses the mark in its response about the juror Sabatino business. It was not just Def's complaint that a juror who said he was leaning toward voting to find Def. not guilty was taken off the jury; rather it was that the jury was otherwise left intact---Def's motion to strike the entire panel having been denied---with members on there that juror Sabatino told the court were leaning toward finding Defendant guilty. This was an erroneous result reached by the trial court, both because it was manifestly unfair to Def., and because it left in place a

jury that may well have been tainted by juror Sabatino's transgressions. As was stated in Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986), a criminal defendant has a right to be tried by the jury originally selected to determine his guilt or innocence, absent some compelling reason for juror substitution, which Def. contends either did not exist here or, if it did, should have entitled him to thereafter have the whole jury stricken.

The fact of the Defense trial counsel having suffered a painful leg injury by and of itself would concededly probably not warrant a reversal by this Court, but when this situation is considered in conjunction with everything else that happened in the court below, it may well have contributed to Def's not having received a fair trial.

With reference to "the mysterious bench conference," Def. reiterates what was argued in his initial brief and that was that in a capital case, nothing should be off the record. That may seem a harsh request, but it is this Def's contention that this is exactly what was intended by the language of Rule 9.140(4)(a), Fla. R. of App. Proc., that this Court be furnished "the complete record." And if this requirement is harsh, it is not nearly as harsh as is the law allowing a person to be punished by being killed.

The AG's response to Def's complaint in his initial brief that it was detrimental to Def's receiving a fair trial for news media people to be clicking their camera in the courtroom and thereby disrupting the proceedings is another instance of a frivolous attitude toward the seriousness of what is involved in

this case.

Def. stands on his contention that it was unfair to him for the State to be allowed to put in evidence the federal firearm form signed by him without also allowing his counsel to bring to the jury's attention that he was found innocent of the federal firearm criminal charges arising from his having filled out, etc., the said forms.

POINT VII

THE EVIDENCE IN THIS ALL CIRCUMSTANTIAL EVIDENCE FIRST DEGREE MURDER-DEATH PENALTY APPEAL WAS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICTS, JUDGMENT AND THE IMPOSITION OF THE DEATH PENALTY.

With a slight reservation, the AG accepts the major legal argument contended by the Def. regarding the standard or test to be applied by this Court in assessing the sufficiency of the evidence in this all circumstantial evidence case, which standard is that the State not only must prove beyond a reasonable doubt that the circumstances are consistent with guilt, but also that it is inconsistent with any reasonable hypothesis of innocence. And in this regard, the AG not only acknowledges that this is a longstanding rule but, in addition, that it was recently reaffirmed by this Court in Duckett v. State, 15 FLW 5439 (Fla.Sept. 6, 1990).

The "slight reservation" of the AG regarding the circumstantial evidence standard consists of its argument that in reviewing an insufficiency of the evidence claim, the appellate court must assume the trier of fact resolved all factual conflicts against the Def. and in this regard the case of E.Y. v.

State, 390 So.2d 776, 778 (Fla. 3d DCA 1980) is cited (AGB-114). Def. has no quarrel with this as a general statement of the law, but would add thereto that the Ely case was not a circumstantial evidence, must less an all circumstantial evidence, case and that the all circumstantial evidence case appellate standard of review stands fully on its own feet and should not be subjected to being watered down by having other sub-standards of review being attached to it.

In attempting to argue this all circumstantial evidence standard, etc., the AG, in effect, calls upon the Court to read the recitation of the evidence and testimony contained in its Statement of the Case and the Facts, along with the entire record with great care...."because all the facts build on those before, and only by viewing all the evidence as a whole can the full picture be grasped." Def. concurs that the members of the Court should indeed read everything that is either part of the Record or contained in the appellate briefs.

Cutting through the verbiage of the AG's argument as to how the evidence was inconsistent with any reasonable hypothesis of innocence, the very clear bottom line factual issue in this regard was whether the proposition that Def. was seated in the driver's seat at the time Kersten was shot is inconsistent with the evidence presented.

The AG argues that, "(t)he State's serologist" (Mr. Rhodes) testified that the blood evidence was inconsistent with the driver's seat being occupied at the time of the shooting, and that the round specks (indicating they had travelled in a

straight line from the victim's head) could not have gotten there if the driver's seat was occupied" (AGB-117). The "blood evidence" the AG refers to as having been found by Mr. Rhodes on the passenger door was four stains or round droplets ranging from half a millimeter up to "point eight millimeters" (T-7/27/88-75-88). Further, Rhodes described them as "Presumptively Blood", which he said meant that the stains tested positive for "the possible presence of blood." He said he found stains on the passenger window as well as on the door itself. He said the stains of "Presumptive Blood" would be consistent with high velocity blood spatters and consistent with blood coming from the right side of Kersten's head. He said the pattern also would be consistent with blood aspirating from a person's nose or mouth (T-7/27/88-89-91). Rhodes also testified that some of the stains on the driver's side door tested negatively for blood (T-7/27/88-121-125). He testified----in response to one of many State leading questions to him----that there would be no interference by the driver's seat with the "high velocity blood splatter" on the driver's side door, etc., (Rhodes testified to the prosecutor that the Presumptively Blood stains on the driver's door were high velocity blood splatter "if you want to call it that") if the driver's "seat back was as if it is in an upright position", but that as the seat would be moved forward, there would be such interference as it came into line with the door lock's location (T-2/27/88-130-132).

On cross-examination Rhodes testified that he did not know how the blood, i.e., the "Presumptively Blood," got onto the

driver's side of the inside of the car and he admitted that "deflection" was a possibility although not a probability (T-7/27/88-169-195).

If there was a possibility that the stains on the driver's side door and window were not blood, or if they were blood but might have been animal's blood, then there was a possibility that those stains were not made by Kersten's blood and that being the case, regardless of whether the location of the back of the driver's side seat, or of the position of the passenger's side seat, it follows a priori that it is also possible that when Kersten was shot, Defendant was----as he said he was----sitting in the driver's side seat.

Further, regarding the matter of the blood findings (or non-findings), Crime Scene Technician Ecott testified at the trial, in pertinent part, that he didn't recall seeing blood or a blanket on the driver's seat; that other than observing that blood had run down the back of the right front seat, he did not recall seeing any blood on any other part of the seats or on a plaid robe on the driver's seat which could have been the case because the seats were red; that he made no note of blood on the back of the driver's seat that he thought warranted investigation by a serologist; that there was blood splatter on the right front passenger seat and across Kersten's dress; that the towels and video camera in the back seat had blood on them; that there was "some spray", and "some hair and suspect brain matter" on the headliner; that there was blood on the involved pair of pants and that "the heavier concentration" of blood thereon was consistent

with "transfer blood"; and that there were some transfers of blood on the towels and robes in the car and on Kersten's clothing (T-7/18/88-175-190; 7/19/88-42-56).

MBP Crime Scene Technician testified she noted blood on Def's right thumb area, his hand, and his right pants leg.

Specifically regarding the involved blanket, Serologist Rhodes testified at the trial (in response to State's leading question as to whether it would have been unusual for him to have been unable to find high blood velocity splatters thereon) that "this surface is very rough and it would be very difficult to find a stain that small" (T-7/27/88-133). He said he conducted a phenolphthalein test on the blanket from which he concluded "there was possibly blood" therein; that he folded the blanket the way he saw it folded in photographs, etc., and determined there were twenty-one spots on the upside portion that were "Presumptively Blood" and three spots on the underside portion that were "Presumptively Blood" (T-7/27/88-130-156). Rhodes further testified (in a State leading hypothetical question) that these findings with respect to the "Presumptive Blood" found on the blanket would be consistent with the "Presumptive Blood" found on the right side door (T-2/27/88-137-139).

Regarding the gunshot residue matter, State's so-called expert, Mr. Rao, incredibly testified that he could not expect to find the number of particles he found on Def's right hand on a person who fired through a window (T-7/29/88-158-169). However, he later admitted that it was possible for a person to get gunshot residue on themself from being in close proximity to

where a gun is fired (T-7/29/88-243).

As is set forth in the Statement of the Case and the Facts of Def's initial brief, and to a lesser extent in the argument portion thereof, Rao's testimony was incredible in several respects, including his constantly changing answers as to the number of gunshot residue particles he found on Def's and Kersten's persons and clothes and his unbelievable answer regarding the number of particles that came out of a gun when it is fired, but insofar as the involved sufficiency of the evidence issue is concerned, it is even more significant that the State's case, insofar as it depends upon Rao's testimony, and, as well, Quirk's and Rhodes' testimony, falls short because all the State elicited from its experts was their opinions as to whether what they determined was consistent with State's theory of the case, which was that Def. was not inside the car and, specifically, that he was not in the driver's side seat when the fatal bullet was fired into Kersten's head. The sine quo non, or without which not, evidence and testimony which State did not elicit from its said experts was whether what its experts determined was inconsistent with the Def's being seated in the driver's seat when the fatal shot was fired.

Therefore the evidence in this all circumstantial evidence case was not inconsistent with Def's version of what had happened and that being the case under the above-described standard of appellate review to be followed in all circumstantial evidence cases, as enunciated this past September by this Court in the Duckett case, supra, this Court should reverse the guilty

verdicts, the judgment and the sentence of death entered therein and order this Def. released.

CONCLUSION

The Defendant, Dieter Riechmann, again prays the Court to reverse the verdicts and judgment finding him guilty of first degree murder and possession of a firearm during the commission of a felony, of the death sentence and other sentence imposed thereon, and discharging him from further prosecution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Initial Brief was mailed this 7th day January, 1991, to the Office of the Attorney General, State of Florida, 401 N.W. 2nd Avenue, Miami, Florida.

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