IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,492

DIETER REICHMAN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

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BRIEF OF APPELLEE

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INTRODUCTION

Appellee, the State of Florida, was the prosecution in the trial court and Appellant, Dieter Reichmann, was the defendant. The parties will be referred to as they stood in the lower court. The symbol "R" will designate the 618 page record and "T" the trial transcript, which commences at page 619 of the record and continues to page 5334. All emphasis is as in original unless otherwise specified.

STATEMENT OF THE CASE

The State accepts the Defendant's Statement of the Case as accurate.

STATEMENT OF THE FACTS

The State rejects the Defendant's Statement of the Facts as incomplete and inadequate. Due to the exceedingly complex nature of this circumstantial evidence case, the following lengthy factual summary is necessary, beginning with the testimony presented at the hearing on the Defendant's several motions to suppress.

SUPPRESSION HEARING

The following witnesses were called to testify at the hearing on the Defendant's motions to suppress statements and physical evidence.

SERGEANT JAMES CUMMINGS

Sergeant Cummings was the patrol or "road" supervisor for the Miami Beach Police Department. He received a call from Officer Kelly Reid reference a shooting victim in a vehicle located at the 6700 block of Indian Creek Drive, Miami Beach. (T. 760). The Defendant was standing outside Officer Reid's marked vehicle upon his arrival. (T. 761). Sergeant Cummings instructed Officer Reid to place the Defendant in the rear seat of her car, after conducting a cautionary pat down for weapons. (T. 762). Detective Sergeant Matthews told Cummings to transport the Defendant to the station, and Cummings relayed these instructions to Officers Turner and Morgan, who were also told to wait there with the Defendant pending Sergeant Matthews arrival. (T. 763, 764). Officer Reid's call had gone out at 10:32 p.m. 10/25/87, Sergeant Cummings had arrived ten minutes later, and the Defendant departed some 20-30 minutes later. (T. 766).

On cross-examination by the State, Sergeant Cummings stated that the Defendant was under no physical restraint (T.

767), and that he did not tell the transporting officers to place the Defendant in a holding cell, but rather to wait with the Defendant in the Detective Bureau until Sergeant Matthews arrived. Sergeant Matthews did not say that the Defendant was under arrest or even that he was a suspect. (T. 768, 769). The reason he asked Officer Reid to place the Defendant in the rear seat of her car was because the Defendant was extremely nervous and upset. The rear door always remained open. (T. 773). The Defendant was treated as any other witness would be. (Id.). While the Defendant was seated in Officer Reid's vehicle, she attempted to get information from him for her report. (T. 774).

DIETER REICHMANN (THE DEFENDANT)

After the shooting, he stopped a police car to ask for help. (T. 776). The officers on the scene prevented him from going to his car to check his girlfriend's condition, and they used "soft force" to place him in a police car. (T. 778-779). The officers grabbed his hands forcefully in order to swab his hands. (Id.). They did not ask his permission, but rather told him the tests were mandatory. (T. 780). No one showed him any warrants, and when the police questioned him at the scene, they did not nor at any subsequent time read him his Miranda rights. (T. 781).

The police asked if he owned any weapons, and he replied that he had guns in his hotel room. They searched him twice at

the scene. (T. 782). They placed him in the back of a police car and drove him to the station. They did not ask his permission, and he did not even know where he was being taken. (T. 784). The officers that took him to the station placed him in a cell and told him "you're under arrest." (T. 785). At no time was he free to leave, either at the scene or the station. After four hours Sergeant Matthews arrived and released the Defendant from the cell. Sergeant Matthews apologized profusely, stating that the Defendant was placed in the cell because the other detectives thought he was guilty, which Matthews did not. Sergeant Matthews then told the Defendant to have a seat at his desk and describe how the shooting occurred, after which Matthews would decide what to do with the Defendant. (T. 786, 787).

This initial interview at the station lasted on hour, 3:00 a.m. - 4:00 a.m. 10/26/87, during which Matthews did not advise him of his Miranda rights. Sergeant Matthews then left him at the desk for 10-20 minutes, during which other detectives appeared and told the Defendant they were going to search his room at the Tahiti Hotel on Miami Beach. After Matthews' return they all drove to the Tahiti Hotel. Once there the Detectives asked the Defendant where his guns were, and the Defendant showed them the suitcase containing his 3 handguns and 40 rounds of ammunition. (T. 788, 789). They then took the Defendant's clothes, and told him he could not leave his room until further notice. (T. 790).

The Defendant spent the entire day, 10/26/87, in his hotel room. The police returned between 10:00 and 11:00 p.m. that night, and took his passport, driver's licence, identification and other papers. He had remained in his hotel because the police had told him he couldn't leave. (T. 791). The Defendant did not give the police permission to search either his hotel room or his car. (T. 792, 793). After seizing his papers, the detectives and Defendant drove around looking for the scene of the shooting, after which they took him back to the station for two more hours of questioning, into the early morning hours of 10/27/87 (T. 794), again without benefit of Miranda.

The Defendant spoke with the detectives later that same day via telephone, with the Defendant requesting they return his papers and let him see his girlfriend. When they refused, he sought the advise of the German consulate. (T. 794). He talked to the police at the station again the evening of the 27th (actually 1:00 a.m., 10/28/87). (T. 794). On 10/28/87, the Defendant moved out of the Tahiti Hotel and into the Howard Johnson's on Biscayne Blvd., to be closer to the German consulate. (T. 795). Also on the 28th, Sergeant Matthews called the Defendant and promised to take him to his girlfriend. The Defendant states at that time he still did not know whether she was alive or dead. (T. 796). The Defendant did not know this call from Matthews had been taped.

On 10/29/87, Sergeant Matthews asked the Defendant to again come to the station. He spent seven hours with Matthews on that date, and the Defendant was not aware he was being taped, and again was not advised of his Miranda rights. After his interview with Matthews was concluded, agents from the Federal Alcohol, Tobacco and Firearms (hereafter ATF) agency arrived and arrested him for Federal Firearms charges (relating to the forms he submitted when purchasing one of the firearms found in his room at the Tahiti Hotel, and for which he was acquitted 12/30/87, see below). (T. 800).

After his arrest 10/29/87, he was placed in the Metropolitan Correctional Center (hereafter MCC) and put in a cell with Walter Symkowski (a part-time federal informant, see below). At that point he had been appointed a Federal Public Defender for his firearms charges. (T. 801). Symkowski had a friend named Robert Stitzer, and neither of them told the Defendant they were federal informants. Symkowski asked him questions about his case. (T. 803).

The Defendant rented an apartment in Rheinfelden, Germany, and he never gave anyone permission to enter his apartment, nor did he give anyone permission to search his two safety deposit boxes at two banks in Lorrach (Rheinfelden is a city in the county of Lorrach, see below). (T. 806). The Defendant also did not give the police department permission to search his Howard Johnsons Hotel room. (T. 807).

The Defendant decided he needed a lawyer on 10/27/87. The German consulate told him to contact a Mr. Baur, and the Defendant called Baur's office and made an appointment for 10/29/87 at 4:00 p.m. The Defendant told Sergeant Matthews, also on 10/27/87, that he wanted a lawyer, and particularly he wanted Baur because Baur spoke both perfect German and English. Sergeant Matthews told the Defendant he didn't need a lawyer.

CROSS-EXAMINATION OF DEFENDANT BY STATE

On 10/27/87, the Defendant did tell Sergeant Matthews that Matthews looked like the Defendant's father, but the Defendant denied that he insisted that Matthews pose with him for a photograph. (T. 840, 841). Although he was not handcuffed at the scene, he was surrounded by officers and forced into the police car. (T. 842). He was seated in the car with his legs sticking out the open door. The officers pushed him back into the seat each time he tried to return to his own car to check his girlfriend. (T. 845, 846). He was confused by all the questions and in shock. He was upset because they wouldn't let him to go his girlfriend. (T. 847). He was not told he was under arrest at the scene. (Id.). He was upset because he couldn't see what was happening at his car. He was not physically restrained until his second attempt to return to his car. (T. 851).

Prior to his hands being swabbed, he asked what the Q-tips and bottles of liquid were for. Sergeant Matthews said, "We have to do this," or possibly "we always do this." The Defendant did not know what the officers were doing when they swabbed his hands. (T. 853-855). The Defendant admitted to owning the 3 handguns and ammunition in his room, and stated he owns no weapons in Germany. When asked if he had ever fired a gun, the Defendant refused to answer. (T. 861). He owns 3 or 4 magazines dealing with guns and ammunition. He does not recall telling cellmate Symkowski that the police did a paraffin test on his hands. (T. 862-864). He admitted telling some German friends/cellmates at MCC that the police swabbed his hands for gunshot residue, and it is possible Symkowski overheard this. (T. 864).

When he first told the police how the shooting occurred, he was standing between his car and Officer Reid's car, and states "I was not able to run through the scene." (T. 866). He believes Detective Trujillo was the first detective to question him on the scene. He understood some of what Trujillo said, and was able to tell Trujillo in English how the shooting occurred, but with difficulty. (T. 867). He remembers telling Trujillo he did own a firearm, and that it was in his hotel room. At some point Officer Psaltides tried to interpret, but Psaltides' German was a "catastrophe." (T. 869, 870). The Defendant denies that Trujillo asked him for permission to go to his room to inspect his firearm. (T. 871).

The detectives showed him a form (consent to search form, see below), but the Defendant did not understand what it was. (T. 872). He denied telling Trujillo that it was okay to go to his room to retrieve his firearms. (T. 874). He refused to sign the consent to search form because he couldn't understand it, and the translation written out by Officer Psaltides was non-sensicle . (T. 875). The Defendant again denies giving the detectives permission to search his hotel room, and denies giving them permission to search his car. (T. 876).

Once Matthews released him from the cell at the station, he was not asked if he would consent to give a statement, but rather Matthews ordered him to answer questions. (T. 897). After the initial interview, which concluded 4:30 a.m., 10/26/87, Matthews took him to his hotel room at the Tahiti. The search took 50 minutes, during which the Defendant was laying on the bed. He was then ordered to undress and his clothes were confiscated. The police kept his wallet and all his personal papers. (T. 901, 902). They told him to stay in his hotel room, which he did: "I felt as if I was under house arrest." (Id.). Sergeant Matthews ordered him not to leave his room. (T. 903).

Matthews returned at 11:30 p.m. that evening, 10/26/87, and asked the Defendant to accompany him to retrace his route prior to the shooting, and the Defendant agreed. Other

detectives, possibly Trujillo, Hanlon or Lonergan, were also present. (T. 907). The Defendant tried for two hours to retrace the route he took after leaving Bayside (a popular tourist complex in downtown Miami), but was unsuccessful. (T. 908). At no time did he ask the detectives to terminate the trip and return him to his hotel. (T. 909). They drove him to the station, where Sergeant Matthews asked and received permission to take his picture and fingerprints (Id.), and at 4:00 a.m., 10/27/87, Detective Lonergan took him back to the Tahiti Hotel. During this trip he talked to Lonergan about bicycle racing and other sports. He did not see the detectives again until very early on the 28th (T. 910) (when he gave a recorded statement, see below). Later on the 28th the Defendant rented a car and moved to the Howard Johnsons near the German consulate. The Defendant called the Detective Bureau and informed them of the move, because they told him to let them know if he moved. (T. 911, 912).

The detectives never actually told the Defendant he was under arrest, rather he got that impression because he was constantly in their presence. He did not think he was under house arrest anymore on 10/28/87. (T. 913). Also on the 28th, the Defendant called Matthews because he had seen some streets that looked familiar, and he wanted to try another attempt to locate where the shooting occurred. (T. 916).

On 10/28/87, Defendant called Matthews because he desperately wanted to see his girlfriend's body. Matthews picked up the Defendant and took him to the station. While there Matthews told him they were waiting for a call from the Coroner's Office, but it was a ruse because agents from ATF arrived and arrested him. (T. 919-923). While at the station, Matthews had made a secret recording of their conversations. (T. 923). During the entire period 10/25/87-10/29/87, the Defendant was never read his Miranda rights.

The prosecutor's final question to the Defendant was whether he had ever been convicted of a felony in Germany, and the Defendant refused to answer. (T. 929).

THOMAS BAUR

Baur is a German born and educated attorney who currently resides and practices law in Miami. The Defendant called Baur in an attempt to have him qualified as an expert in German criminal law, so that he could render an opinion as to whether the search warrant the German police obtained to search the Defendant's Rheinfelden apartment, and the execution of that warrant, were legal under German law.

Baur obtained his law degree from Heidelberg University in 1975 and subsequently obtained a master degree in commercial law from the University of Miami, in 1978, and a juris doctorate

degree from the University of Miami, in 1984. (T. 809). He practiced law in Germany for two years after his graduation from Heidelberg, which included a six months internship with the State Attorney's Office in Heidelberg. His practice in Miami is limited to commercial and real estate law. (T. 810). His clients include Germans with legal business in Germany, which requires his knowledge of German law, and he has been declared an expert in German law on two occasions. (T. 811).

On voir dire by the State, Baur revealed that after his graduation from Heidelberg in 1975, he was required to serve a two year apprenticeship/internship, of which 6 months was spent at the Heidelberg State Attorney's Office. (T. 812). Baur has never practiced criminal law, with his entire criminal law background consisting of the 6 month internship described above (T. 813), and he has never represented a criminal defendant. (T. 815). Baur spent a total of two hours researching the German search and seizure statutes and the commentaries dealing therewith. (T. 819). He took only the required two semesters of criminal law at Heidelberg during his first year, 1970-71. (T. 823-826). He specializes in International Law with subspecialties in probate and real estate law. (T. 832).

Following argument of counsel, the trial court refused to qualify Mr. Baur as an expert in German criminal law. (T. 833, 834).

OFFICER JASON PSALTIDES

Officer Psaltides conducted the communications with the German police. On 10/26 he sent a teletype to the Rheinfelden police, informing them of the victim's death and that the Miami Beach Police Department was conducting an investigation. The German police subsequently inquired if the Defendant was a suspect, and within a week Psaltides responded that the Defendant was indeed a suspect. Both agencies exchanged police reports via teletype. (T. 940-944).

On cross-examination by the State, Psaltides stated that in his initial teletype of 10/26/87, he requested background information on the Defendant, which he received 10/30/87. On 11/2/87, he sent another teletype inquiring if a warrant would be needed to search the Defendant's Rheinfelden apartment. (T. 945, 946). He did not request that the German police search the Defendant's apartment. (Id). On 11/7 he received a telex stating that the German police were conducting their own investigation, and was given the German police case number. The message also stated that the German police intended to search the Defendant's apartment. It further revealed that the German authorities were considering extradition proceedings against the Defendant, and requested copies of the entire Miami Beach Police Department file. (T. 950). Later that day, 11/7/, he received a telex from Interpol stating that the Defendant's apartment had been searched 11/5. (T. 949).

On 11/9, Psaltides sent his reply, with copies of the requested documents, to the German police. In this telex Psaltides stated that the Defendant was the prime suspect. In the two prior telexes to the German police, 10/26 and 11/2, he had not specifically identified the Defendant as a suspect. (T. 951). On 11/10 Psaltides received a telex from the Swiss police, informing him of their search of the Defendant's car at the Zurich airport. (Id.). Psaltides never asked the German police to search the Defendant's safety deposit boxes.

DETECTIVE RICHARD LONERGAN

As part of his investigation in this case, he travelled to Germany 1/12/88-1/18/88. He consulted with and reviewed the files of the German police, and viewed the evidence seized from the Defendant's apartment and safety deposit boxes. (T. 965-967). On 1/14/88 he and prosecutor Kevin Digregory were shown the Defendant's apartment. At Digregory's request, the German police seized several items, including books and tapes, which remained in their possession. (T. 968, 969). The German police would not release any items because of their own ongoing investigation. (T. 971). He was told by the German police that they had jurisdiction to try the Defendant in Germany, and was present during discussions as to where the Defendant should be tried. (T. 971).

DETECTIVE ROBERT HANLON

As part of the investigation, Hanlon interviewed two federal inmates who had spent time with the Defendant at MCC, Symkowski and Stitzer (T. 997), which interview took place in January of 1988. At the time of the Defendant's arrest by ATF agents, three agents were already informed of the murder investigation by Detective Trujillo. (T. 1006). Both Symkowski and Stitzer had been informants for the federal government in other cases. (T. 1007). The Defendant had been assigned to Symkowski's cell after the Defendant's arrival at MCC (Id.), but no one from the Miami Beach Police Department requested that the Defendant be placed in Symkowski's cell or anyone else's cell. (T. 1011). Detective Hanlon first learned of the existence of Symkowski and Stitzer from the supervisor at MCC, who informed Hanlon that two inmates, Symkowski and Stitzer, had information on a Miami Beach homicide case. (T. 1012). Symkowski and Stitzer had contacted Captain Forrester at MCC, who in turn contacted Hanlon. (T. 1013).

Neither Symkowski nor Stitzer stated they had been purposely placed with the Defendant, and there is absolutely no evidence that occurred. (Id.). Hanlon had never heard of Symkowski or Stitzer and had no idea why they wanted to talk to him. (T. 1015). When he interviewed them he did not provide them any information on the Defendant or the crime, nor did he then or at any time offer any inducements or promises for their

assistance, nor did he suggest that they try and contact the Defendant at his new home in the Dade County Jail. (T. 1016).

DETECTIVE HECTOR TRUJILLO

After obtaining the 3 firearms from the Defendant's room, he contacted agents at ATF. On 10/29, he contacted ATF agent Norwicky and informed him of the Defendant's presence at the Miami Beach Police Department (where the Defendant was arrested by ATF agents at 8:00 p.m., 10/29, see below). (T. 1021-1022).

DETECTIVE SERGEANT JOE MATTHEWS

Sergeant Matthews was the shift supervisor for the Miami Beach Police Department major crimes unit the night of the murder, 10/25/87. He and Detective Hanlon arrived a little before 11:00 p.m., and Detectives Trujillo and Lonergan were already on the scene. (T. 1036, 1037). He spoke with Trujillo, who gave a brief outline of the facts, and who stated the Defendant was having difficulty communicating in English, as he was a German tourist. (T. 1039). When Matthews arrived the Defendant was leaning against one of the police cruisers. (T. 1040). The Defendant then walked over to another cruiser and sat in the back seat with legs his sticking out, and several times the Defendant got up and walked around. The Defendant was not surrounded by police officers and was free to walk around without police escort. (T. 1041).

Matthews introduced himself to the Defendant, and told him he was in charge of the investigation. The Defendant appeared able to converse adequately in English. (T. 1043). Matthews expressed his regrets for the victim's death, and explained what the investigation would entail. He definitely told the Defendant the victim was dead. (T. 1044). After speaking with the Defendant in English for several minutes, Matthews decided that an interpreter was unnecessary, as the Defendant was able to converse in English. (T. 1046).

Matthews explained to the Defendant that the police had to collect certain evidence for laboratory analysis, and he specifically explained what the gunshot residue test was and what it was for. The Defendant said he had not fired a gun that day. (T. 1047, 1048). After Matthews finished describing the test, and why they wanted to conduct the test, the Defendant put out his hands and said "go ahead, do it, no problem," or "okay, go ahead," or words to that effect. No one grabbed the Defendant's hands. (T. 1048). When the Defendant put out his hands, Matthews explained that he would not be doing the test, but rather one of the female technicians. (T. 1049).

Sergeant Matthews asked the Defendant if he would come to the station and give a statement. The Defendant's reaction was to the effect of "Why do I have to do that," and Matthews explained that the Defendant was the only witness, and they

needed to get every detail possible. The Defendant seemed to accept this explanation, and said it would be "no problem," a phrase he used on numerous occasions. (T. 1050-1051). Matthews instructed a uniformed officer to take the Defendant to the station, as Sergeant Matthews had arrived in Detective Hanlon's vehicle and had to wait for Hanlon to clear the scene. He absolutely did not tell the transporting officer to put the Defendant in a holding cell. (T. 1051, 1052).

Sergeant Matthews arrived at the station less than an hour later (not 4 hours, as the Defendant claimed). (Id.). As he walked in he saw the Defendant sleeping in a holding cell, woke the Defendant and apologized vehemently, explaining that the Defendant should never have been placed in the cell. The Defendant responded "no problem." Matthews did not tell the Defendant he had been placed in the cell because the other detectives believed he was guilty. As far as Matthews knew at this point, the Defendant was also a victim of the crime. (T. 1053-1055). The Defendant did not seem at all bothered by his short stay in the slammer, and indeed made light of it. (T. 1055).

At this point Sergeant Matthews asked the Defendant if he wanted to talk about the shooting now, and the Defendant stated that he did. They spoke for about two hours, and Matthews did not read the Defendant his Miranda rights because he was not in custody and at this time was not even a suspect. (T. 1058). The

Defendant attempted to describe the route he took prior to the shooting, and Matthews asked if he would drive around with the detectives and try to pinpoint the location, and the Defendant said "no problem," he would give it a shot. (T. 1058, 1059). During the drive-around the Defendant was cooperative and never indicated he wanted to leave. At no time during that evening did the Defendant express a desire to stop answering questions. (T. 1060, 1061).

After the drive-around they all returned to the station, and Matthews conferred with Detectives Lonergan and Trujillo. When he and Detective Hanlon arrived at the Tahiti Hotel with the Defendant, Lonergan and Trujillo were waiting with a search warrant. (T. 1061). Sergeant Matthews conversed with the Defendant while the other detectives began the search of the Defendant's room. The Defendant told Matthews he needed to sleep, and stripped to his underwear and fell asleep on the bed. Matthews had asked if they could keep the lights on while the Defendant slept, and the Defendant said "no problem." (T. 1062). During the search Matthews woke the Defendant and asked the Defendant if they could keep his clothes in order to analyze the blood stains, and the Defendant said to go ahead and take them. (T. 1063).

All of Matthews discussions with the Defendant were in English, which the Defendant seemed to understand and respond in quite adequately. (T. 1064). As the detectives left the room,

the Defendant asked them to lock the door behind them, which Matthews did. Matthews never told the Defendant he had to stay in the room until Matthews returned, and did not even tell the Defendant not to leave the Miami area. Matthews did ask the Defendant if he could return and speak with the Defendant the following night, and the Defendant stated "no problem." The Defendant said if he wasn't there to wait, because he might be having dinner. (T. 1065, 1066).

Matthews returned that evening, 10/26, and asked the Defendant if he was willing to try another search for the shooting scene, which he was. The drive-around took 1-2 hours. Matthews did not read the Defendant his Miranda rights because he was not in custody, though he was a suspect at this point. Matthews did not confront the Defendant with any of the evidence at this time. (T. 1067-1069). Matthews believes they took the Defendant back to his hotel after the drive, but they may have stopped at the station. (T. 1070).

Matthews returned to the Defendant's room the following evening, 10/27. Detectives Hanlon and Trujillo were also present. Matthews asked the Defendant if he would make another attempt to locate the shooting scene, and the Defendant again stated he would. (T. 1099). The Defendant was not able to identify any streets as ones he drove on prior to the shooting. (T. 1101). They proceeded to the station, where they made coffee and continued questioning the Defendant, again without

Miranda. It was now very early on the 28th. Matthews asked the Defendant if he would give a taped statement (which was admitted at trial, see below), and the Defendant agreed. (T. 1102-1103). There was no Miranda because the Defendant was not in custody. Detective Hanlon did most of the questioning, and again, all discussions were in English. At the conclusion of the statement, Detective Hanlon took the Defendant back to his hotel room at the Tahiti. (T. 1104). While still at the station, the Defendant was asked if he would give them his fingerprints and have his picture taken, and the Defendant said "no problem." (T. 1105).

Later that day, 10/28, the Defendant called the station and informed the detectives he was moving to the Howard Johnsons Hotel on Biscayne Blvd. Matthews and the Defendant were constantly speaking via telephone, and on one day during this period Matthews received 10-15 calls from the Defendant, though Matthews had never instructed the Defendant to call him regularly or to keep Matthews advised on his whereabouts. (T. 1106).

On 10/29 Matthews arrived at the station and learned that the Defendant had waited there earlier for several hours, and left several messages to the effect that the Defendant urgently needed to speak with Matthews. Matthews called the Defendant and agreed to pick him up at the Howard Johnsons. When he arrived at the Defendant's hotel, Matthews was carrying a rights

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waiver form. (T. 1108-1110). The Defendant invited Matthews into his room and offered him a perrier, and told Matthews he needed to talk with him. Matthews told the Defendant it was in his best interests to read the Defendant his Miranda rights before they talked any further. After the form was read, the Defendant stated "Matthews, I don't sign nothing. I don't sign any form, okay." (T. 1114). The Defendant said he understood his rights, but he still needed to talk to Matthews. When Matthews had told the Defendant he would be appointed a lawyer if he couldn't afford one, the Defendant said he didn't need a public defender because he could afford a lawyer. (T. 115, 116).

The Defendant actually became annoyed that the Miranda rights were taking so long. He stated "Yes Matthews, yes, I understand, I know what I'm doing." The Defendant insisted on speaking with Matthews. (T. 1117). During their earlier phone conversation, the Defendant told Matthews he found a lawyer who spoke perfect German and had an appointment to see him, but that he needed to talk to Matthews immediately. At the hotel, the Defendant told Matthews he had to break his appointment with the lawyer because he needed to talk with Matthews first. (T. 1119).

The Defendant agreed to talk with Matthews at the station, where they spoke for 3-4 hours (10/29/87). This conversation was secretly taped by other detectives without Matthews or the Defendant's knowledge. (T. 1121). Matthews also did not know that ATF agents arrived during his talk with the

Defendant. During this 3-4 hour period, Matthews and the Defendant visited the gym and toured the station. During one of these breaks Matthews learned that ATF agents had arrived to arrest the Defendant on federal firearms charges. (T. 1122-1124).

After his arrest, the Defendant told Detective Trujillo he wanted to talk to Matthews. The Defendant then thanked Matthews for the pizza which Matthews had ordered for the Defendant. At no time during his numerous contacts with the Defendant did the Defendant ever indicate he wanted to stop answering questions or that he desired the presence of his attorney.

The last time Matthews saw the Defendant was on 12/30/87, at the Dade County Jail. Matthews began by reading the Defendant his Miranda rights, but the Defendant interrupted and asked what evidence they had on him. Matthews insisted on completing the Miranda rights first, and the Defendant became annoyed, repeatedly stating "I know my rights." The Defendant was very anxious to question the Matthews about the evidence against him. Sergeant Matthews proceeded to give the Defendant this information, which is the first time Matthews did so.

On cross-examination by defense counsel, Matthews stated he never utilized nor needed a translator in speaking with the Defendant. Although they had obtained search warrants for both

the Defendant's car and Tahiti Hotel room, the Defendant had already told the detectives to go ahead and search, though he refused to sign the consent to search forms. (T. 1169). During his questioning of the Defendant on 10/29/87, he had suggested to the Defendant that if the shooting was an accident or suicide, the Defendant better let the police know or he might end up getting arrested himself. (T. 1186, 1187). During that 3-4 hour talk, the Defendant had refused to answer one on two questions, but had never indicated he wanted the interview to cease. (T. 1189). The Defendant was acquitted of the federal firearms charges 12/30/87, and arrested for the instant murder the same day. (T. 1190, 1198).

OFFICER JASON PSALTIDES

Psaltides is the supervisor of the Miami Beach Police Department communications bureau, and was called to the scene because he spoke some German. At the scene he was asked to question the Defendant as to how his girlfriend was shot. (T. 1202). After speaking with the Defendant he realized an interpreter was not needed because the Defendant spoke adequate English. (T. 1203). The Defendant seemed pleased to have someone who spoke German, and they conversed in a mix of German and English. (T. 1203). The Defendant said he had two drinks that evening, and although it appeared the Defendant had been drinking, he was not intoxicated. (T. 1207).

Psaltides asked the Defendant if he owned any guns, and the Defendant said he had guns at his hotel room, but couldn't remember the make and model. (T. 1208). The Defendant immediately volunteered to take them to his hotel room to see his firearms (none of which were the murder weapon, see below), stating in English "go ahead to my room, I'll take you there." (T. 1209). The Defendant extended the same invitation to search his car as well . (Id.). Detective Psaltides had not even had the opportunity to ask the Defendant's permission for the searches. (T. 1208, 1209). Psaltides definitely told the Defendant his girlfriend was dead during their discussions. (T. 1209).

The Defendant spoke more and more English as they went along. Psaltides read him the consent to search form in English, word by word, and the Defendant indicated he understood. (T. 1210-1211). Psaltides had difficulty translating the form into German. The Defendant refused to sign the form, but stated in English "I'm not signing, but go ahead and search," and "go ahead, search, go ahead." (T. 1213-1215). The Defendant appeared emotionally upset, and the detectives got him water because he was thirsty. (T. 1216). There were never any restraints placed on the Defendant at the scene. When Psaltides arrived back at the station, the Defendant was sleeping in a holding cell. (T. 1217). When Sergeant Matthews returned 20 minutes later and saw the Defendant in the cell, he was extremely upset and stated "Get him out of there, what is he

doing in there?" (T. 1218). Psaltides heard Matthews apologize to the Defendant. Psaltides had waited to see if Matthews needed his services as interpreter, but Matthews didn't need him because the Defendant's English was more than adequate. (T. 1219, 1220).

SERGEANT MATTHEWS (Recalled)

As to his interview with the Defendant on 10/29 (just prior to his arrest by ATF), the Defendant never asked for a lawyer nor stated he was tired. (T. 1238). On one question the Defendant said "Matthews, why are you asking me that question," but the Defendant never said he wanted to stop talking with Matthews. (T. 1239). Matthews never yelled at nor lost his patience with the Defendant. Matthews told the Defendant of an episode where Matthews had been arrested (it is unclear whether Matthews is speaking hypothetically) because he refused to explain to the police how his girlfriend committed suicide, but Matthews does not believe he told the Defendant the same thing would happen to him. (T. 1211-1242). He did tell the Defendant that the victim's family deserved an explanation. (Id.). During their talk the Defendant stated "Please don't stop talking, this is important." (T. 1244). Matthews did not tell the Defendant he would be arrested if he didn't reveal what happened, rather Matthews said there would be accusations. (Id.).

DETECTIVE HECTOR TRUJILLO (Recalled)

Arrived at the scene with Detective Lonergan. The Defendant was leaning against Officer Reid's car talking to Reid. Reid told him the Defendant spoke only German. (T. 1252). Detective Trujillo then spoke with the Defendant and learned that he spoke some English, and could understand what Trujillo said. (T. 1253). The Defendant gave a very sketchy account of the shooting, stating that all he could remember was the explosion in his head. (T. 1255). At this point the Defendant was a witness, not a suspect. The only time that the Defendant was restrained in any way was on two occasions when he tried to violate the crime scene. (T. 1258). Trujillo told the Defendant the victim was dead.

The Defendant was unable to give any street names or provide any information as to the location of the shooting. The Defendant said they left Bayside and got lost, and kept referring to the explosion in his head. Trujillo then asked the Defendant if they had stopped for directions, and the Defendant said "Yeah, yeah, we stopped for directions and there was an explosion." The Defendant said they had stopped on a dark street and asked a black man for directions, and then there was an explosion. (T. 1261, 1262). When the Defendant first began talking his English seemed fine, but when Trujillo tried to pinpoint the location of the shooting, the Defendant seemed to develop serious English difficulties. (T. 1263).

Due to the vagueness of the Defendant's answers, Trujillo decided that the Defendant's hands should be swabbed, which is standard procedure for everyone present during a shooting. (T. 1264). Trujillo also had noticed blood on the Defendant's hands. (T. 1265).

During the period when Psaltides was translating, the Defendant was asked if he owned a gun, and the Defendant said he did, and it was in his hotel room. When Trujillo asked if they could see the gun, the Defendant's response was "sure," or words to that effect. (T. 1268). As per routine procedure the Defendant was then read a consent to search form, which the Defendant refused to sign. At first the Defendant said he didn't understand the form, then he stated "You, the police, you don't need no permission. You have my permission, you can go in and get it. I don't need to sign no papers. (T. 1269-1273).

The search warrants for the Defendant's car and hotel room were prepared at the scene with the assistance of two Assistant State Attorneys, with Detective Lonergan as the affiant. (T. 1274). Trujillo was present during the search of the trunk of the Defendant's car and of his hotel room at the Tahiti Hotel. The Defendant showed them where the guns were, then stripped to his underwear and went to bed. No one ordered the Defendant to strip. (T. 1281). Three handguns and ammunition were seized, during which time the Defendant went to

sleep. They woke him and asked if they could take his clothes, and the Defendant consented. (T. 1282, 1283). There were no restraints on the Defendant's movements, and he was not told to remain in the room or to remain in Miami. (T. 1284).

The Defendant called the station several times on the 26th, and he was eager to help the detectives try and locate the shooting location. (T. 1291). All of the communications he had with the Defendant were in English. As far as he knows, the Defendant was not Mirandized until arrested by ATF 10/29.

On cross-examination by defense counsel, Trujillo stated that he visited the Defendant at MCC on 11/2/87. The Defendant stated he had a lawyer and did not want to talk with Trujillo or anyone else, and Trujillo said fine, he wasn't here to talk, he just wanted to make copies of documents the Defendant had with him at MCC. The Defendant agreed to allow Trujillo to look through and copy his documents, and also have his picture taken again. (T. 1307-1311).

DETECTIVE RICHARD LONERGAN

Detective Lonergan's primary task was to prepare the search warrants, with himself as affiant. It was his first search warrants. (T. 1334-1337). Assistant State Attorneys Beth Shreenan and Mari Jimenez helped him prepare the warrants, and the affidavits were based on his own observations at the scene

as well as information from the other detectives. (T. 1557). The handguns and ammunition were all contained in a suitcase in the closet of the Defendant's hotel room. (T. 1338, 1339).

On cross-examination, he stated that he was aware that Officer Psaltides was acting as an interpreter at the scene (The warrant stated the Defendant was a German tourist who couldn't communicate in English, and who was unable to provide much assistance to the detectives, see below). (T. 1346, 1347). The Defendant was a suspect in that he could not be eliminated as the murderer. (T. 1348). He obtained the keys to the Defendant's room from the desk clerk, and was relying on the authority of the warrant when he entered the Defendant's room. (T. 1351). He began working on the warrants when the Assistant State Attorneys arrived on the scene. (T. 1354). The primary purpose in obtaining the warrants was to attempt to locate the murder weapon. (T. 1357).

On redirect by the State, he stated that the only items seized from the Defendant's Howard Johnsons room was the victim's address book and the car rental agreement for the vehicle the Defendant rented on 10/28. (T. 1359). At the scene, he heard the Defendant say he only spoke 30 words of English, and Officer Reid told him the Defendant spoke only German. (T. 1361).

DETECTIVE ROBERT HANLON (Recalled)

When Hanlon arrived at the scene the Defendant was leaning against Officer Reid's vehicle. According to Reid, the Defendant had stated that he and the victim had left Bayside, gotten lost, stopped to ask for direction, and then there had been an explosion. Detective Hanlon had requested an interpreter because Reid said the Defendant spoke only German. (T. 1365, 1366). No one pulled the Defendant's hands or otherwise forced the Defendant to allow his hands to be swabbed. (T. 1368). Gunshot residue dissipates within hours of a shooting. (T. 1369). The Defendant was seated for a time, and he occasionally got up and walked around, without any restraint whatever. (T. 1370). Detective Hanlon was present when the Defendant was read the consent to search form, and heard the Defendant say to go ahead and search, but that he wasn't going to sign any papers. (T. 1371).

Detective Hanlon was present during the first drive-around early on 10/26, and the Defendant had agreed to accompany the detectives in search of the shooting scene. (T. 1373). Hanlon was present during the search of the Defendant's Tahiti Hotel room, to which the Defendant had no objections at any point. During the search the Defendant said he was tired, and proceeded to strip to his underwear and go to sleep. No one had ordered him to strip. (T. 1375). Hanlon heard Sergeant Matthews ask the Defendant for permission to take his bloody clothes, and

the Defendant had agreed, then went to sleep. (T. 1376). The Defendant had asked Matthews to lock the door as he left, which Matthews did. No one told the Defendant to remain in his hotel room until the Detectives returned. (T. 1383).

Hanlon was present when the Defendant agreed to participate in a second drive-around the following evening, 10/27. (T. 1384). After the drive-around the Defendant agreed to give a taped statement, which occurred early on the 28th. The transcript of that tape is accurate. (T. 1388).

On cross-examination, Hanlon stated that the insurance policies located by the German police were part of the probable cause for the Defendant's arrest on 12/30/87. (T. 1401). The Miami Beach Detectives had requested that the German police obtain the Defendant's telephone records. (T. 1408).

DETECTIVE BERND SCHLEITH

Detective Schleith works for the criminal police of Lorrach County, West Germany, where the victim and Defendant resided. The Lorrach police therefore had jurisdiction over the victim's murder case even though the murder occurred in Miami. (T. 1428). The Lorrach police were ordered to conduct an investigation by the Lorrach State Attorney's Office (hereafter SAO). As part of that investigation Detective Schleith obtained a search warrant for the Defendant's and victim's Rheinfelden (a

city in Lorrach County) apartment, with the warrant being signed 11/4/87. (T. 1429). Detective Schleith had been ordered by the Lorrach SAO to obtain the warrant as part of their ongoing investigation. (T. 1430). Warrants were obtained in the same manner for the Defendant's safety deposit boxes in the Dressner bank in Lorrach and the Commerz bank in Rheinfelden. (T. 1431).

The warrants were obtained because they were necessary to their ongoing investigation, not because of a request from the Miami Beach police. (T. 1432). The Lorrach police discovered the Defendant's safety deposit boxes purely as a product of their own investigation. (T. 1433). They immediately shared this information with the Miami Beach police.

On cross-examination by defense counsel, Detective Schleith stated that the Lorrach police learned of the victim's murder on 10/28/87, at 1:00 a.m. Detective Lonergan's telex described the shooting, the Defendant's arrest by ATF agents, stated that the Defendant was a suspect, and requested a criminal check on the Defendant. (T. 1448). Also on the 28th, the Rheinfelden (city) police withdrew from the case in favor of the Lorrach (county) authorities. Detective Schleith subsequently received a request for the Defendant's telephone records. They also received an inquiry as to whether it would be possible to have the Defendant's apartment searched. (T. 1455). The Lorrach police viewed the Defendant as a suspect based on the telex received by Detective Lonergan. (T. 1456).

After finding unmarked keys to two safety deposit boxes in the Defendant's apartment, they checked with all area banks until finding the two with boxes in the Defendant's name. (T. 1457). The search warrant for the Defendant's apartment had listed insurance policies, guns and ammunition, and address books. They also ended up seizing the safety deposit box keys and numerous photographs as well. They subsequently obtained a warrant for the boxes. They returned to the Defendant's apartment several times based on the authority of the first warrant, but all documents relating to insurance policies, and the keys to the boxes, were found on the initial 11/5/87 execution of the warrant. (T. 1458-1467). In June of 1988 they obtained a second warrant for the Defendant's apartment, because during defense counsel's deposition of Detective Schleith, the Defendant (who attended all the depositions) mentioned that the German police had overlooked some slides, which were found during the execution of this second warrant. (T. 1468). Other than the slides, all items were taken from the Defendant's apartment on 11/5/87 during the initial search. (T. 1473).

OFFICER WILLIAM TURNER

Officer Turner was called as a witness by the Defendant. He was present at the scene, and Sergeant Matthews told him to transport the Defendant to the station. Matthews told him to take the Defendant to the Detective Bureau and put him in a

holding cell. (T. 1477, 1478). The Defendant was completely cooperative and did not object or question where he was being taken. (T. 1480). After placing the Defendant in the holding cell, he waited outside the cell until a Detective arrived. (T. 1482). Before he put the Defendant in his car, he had patted him down for weapons. (T. 1483).

On cross-examination by the State, Officer Turner stated it was standard procedure to pat down a witness before allowing him to ride unrestrained in the rear of his car. (Id.). Turner had not made a report on that evening's events. Turner may also have been ordered by his patrol supervisor, Sergeant Cummings, to take the Defendant to the station, but Turner nevertheless insisted that Sergeant Matthews told him to place the Defendant in a holding cell, although he doesn't remember Matthews' exact words. (T. 1485, 1486). Turner may have told bureau secretary Cindy Heidgerd, or said in her presence, that he was putting the Defendant in a hold cell because the Defendant was coked up, and he didn't want the Defendant freaking out on him. (T. 1487).

CINDY HEIDGERD

Heidgerd was called as a rebuttal witness by the State. Heidgerd was a secretary in the Detective Bureau the evening of 10/25/87. Her shift was coming to a close when Officer Turner brought the Defendant to the bureau. She saw Turner place the Defendant in a hold cell, and heard him state that he was

putting the Defendant in the cell because the Defendant was drunk and coked up, and Turner did not want the Defendant to freak out on him. (T. 1510). The Defendant did not look drunk or coked out to Heidgerd, and this incident stuck in her mind because she was a recovering cocaine addict at the time. (T. 1511).

On cross-examination by defense counsel, she stated she was right next to the Defendant before he was placed in the cell. (T. 1512). The first time she was asked about the incident was in March of 1988, when Sergeant Matthews asked her to prepare a memorandum describing what happened. (T. 1514). She was the only person present in the Detective Bureau when Officer Turner brought in the Defendant. (T. 1515).

TRIAL TESTIMONY

OFFICER KELLY REID

At 10:30 p.m., 10/25/87, Officer Reid had stopped her marked patrol car at the intersection of Indian Creek Drive and 67th Street, Miami Beach, when she observed the driver of a red thunderbird signal her to stop. The Defendant, who had stopped his car in the roadway, stated "help me, my girl, my girl." (T. 2441-2448). The victim was seated in the fully reclined front passenger seat, with her seat belt fastened, with the passenger window fully closed. (T. 2455, 2456). Reid called Fire Rescue, which arrived within 3 minutes. When Reid asked the Defendant

what happened, he shook his head, and Reid believed the Defendant couldn't understand her. (T. 2457). The Defendant was not crying, but had a very strained expression. The Defendant had dark stains on the top of his pants. (T. 2458, 2459).

On cross-examination by defense counsel, Reid revealed that the Defendant's first words were "Help me, Oh, my God, my girl, my girl." (T. 2475). The Defendant told her he did not speak English. (Id.). The stains on his pants appeared to be blood. The Defendant acted upset and concerned, consistent with someone whose girlfriend had been shot. (T. 2479-2481). She asked the Defendant to sit in the rear of her car for his comfort, and at one point the Defendant tried to return to his vehicle, but Reid stopped him. (T. 2482).

PETER CASTEN MEYER-REINACH

Reinach is a male model in Hamburg. (T. 2498). He met the Defendant in 1977, and met the victim a few weeks later. Shortly after he met the Defendant, the Defendant told him he was the victim's pimp, meaning that he lived off the victim's earnings as a prostitute. The Defendant and victim lived together in an apartment in Hamburg. (T. 2499-2503). Four or five years later, the Defendant and victim moved to a German town near the Swiss border. The Defendant told him he and the victim were moving because her prostitution business was no longer profitable in Hamburg. (T. 2519).

Reinach saw the Defendant twice after moving from Hamburg. The first time was in 1986 at a Hamburg pub, and the victim was also present. The Defendant told Reinach that the victim wanted to stop working as a prostitute, and that he would also like to try another line of work. (T. 2520, 2521). Back when the Defendant and victim had lived in Hamburg, the Defendant had told him the victim earned 1000-1500 German marks per day as a prostitute. (T. 2524). He saw the Defendant again at a pub in 1987, but did not discuss the victim or the Defendant's employment.

OFFICER RICHARD ECOTT

Officer Ecott helped process the crime scene. The victim had a gunshot wound above her right ear and there was blood on her left forearm, on her clothing, and on her purse to her left on the console area, as well as her seatbelt. (T. 2534-42). Aspirated blood from her nose had pooled on her left shoulder. (T. 2548). The vehicle had bucket seats in front with a console area between.

The Defendant's pants had what appeared to be transfer blood, which was different from the high velocity blood splatter on the victim's arms, clothes and purse. Transfer blood occurs due to contact with a blood soaked area. He did not observe any splattered blood on the Defendant. (T. 2551-2557). The

Defendant also had blood on his hands. (T. 2555). He took hand swabs from the victim's hands. (T. 2585).

On cross-examination, he stated there was a large amount of blood in the passenger compartment, including spots on the armrest and console area, as well as blood smears on the steering wheel. Most of the blood had collected on the passenger seat. (T. 2599-2604). There was no blood visible on the driver's seat or blanket contained thereon. (T. 2605-2610). There was also considerable blood behind the passenger seat, and there was a mixture of blood splatter, hair and brain material on the head liner above the passenger seat. All the evidence was consistent with the victim being shot while seated in the passenger seat. (T. 2611-2617).

OFFICER GEORGE TRAVELS

Also assisted in processing scene. He obtained the victim's clothes from the medical examiner, and he dusted the car for prints, though no latents of value were lifted. (T. 2651-2654). He recommended that a serologist inspect the driver's seat and door for blood splatter, because the car interior was maroon. No splatter was visible to the naked eye on those areas. (T. 2655).

OFFICER CHARLES SERAYDER

Officer Serayder was on uniform patrol near the scene, heard Officer Reid's call for Fire Rescue, and arrived almost immediately. (T. 2666, 2667). He opened the driver's door with one finger, then checked the victim for a pulse, obtaining none. (T. 2669). There was a blanket on the driver's seat. He instructed Fire Rescue not to touch anything but the victim, and if she was dead, not to move her body, and made certain they complied. After they confirmed she was dead, he shut the doors and roped off the area. (T. 2671-2673). No one violated the scene prior to the arrival of the crime scene technicians. When he had arrived at the scene, both doors and windows were closed, with the driver's door unlocked and the victim's door locked. (T. 2675). The Defendant appeared distraught, and was speaking German. The only English he heard was "help" and "girlfriend." The victim's head was inclined to the left, exposing the wound to the right side of her head. (T. 2681, 2682).

ERNST SIEGFRIED STEFFAN

Steffan is an insurance agent in Hamburg. In 1977 he sold the Defendant health insurance for the victim. Steffan knew the victim was a prostitute, and the Defendant had told him on several occasions that he was the victim's pimp. (T. 2685-2695). The victim used the name Yvonne when working as a prostitute. Steffan insured the Defendant's 280SL Mercedes, and

in 1983 Steffan helped the Defendant obtain a luxury apartment by verifying a certificate of earnings, which stated the Defendant made 3950 German marks a month, but did not state his occupation. (T. 2697-2702). The Defendant told Steffan he had received training as an insurance agent. (T. 2703).

In 1977, he sold the Defendant a health insurance policy on the victim. In 1981, he sold the Defendant a personal liability policy. In 1980, at a time when the Defendant and victim had temporarily separated, he sold the victim two life insurance policies naming her parents and sisters as beneficiaries. In 1985, on the Defendant's initiative, the Defendant became the sole beneficiary of these policies. The Defendant and the victim were back together at this point. (T. 2704-2705).

The Defendant told Steffan that he arranged for the victim to marry a Swiss citizen, so she could get a Swiss passport and ply her trade in Switzerland, since business was poor in Hamburg. (T. 2708, 2709).

In 1984 the Defendant and victim met with Steffan. The Defendant wanted to buy risk (term, death benefit only, no investment value) policies on them both. Steffan advised the Defendant to buy capital (whole, death benefit plus investment value), but the Defendant insisted on buying two risk/term policies. The Defendant's life was insured for 100,000 marks

with the victim as beneficiary, and the victim's life for 200,000 marks with the Defendant as beneficiary. Both policies were double indemnity, paying double the above amounts for accidental death. Under the policies, being murdered qualifies for the double payout. The premiums for these policies were always kept current (by automatic withdrawals from the Defendant's bank account, see below). (T. 2710-2716).

The Defendant and victim enjoyed a very high standard of living. The Defendant told him the victim made 1000 marks a day as a prostitute. (T. 2718, 2732). In 1983 the Defendant and victim moved to Southern Germany near the Swiss border. (T. 2736).

REGINA KISCHNICK

Regina is the younger sister of the victim. The victim first brought the Defendant home to meet her parents in 1974. She learned her sister was a prostitute in 1980. (T. 2753-2755). She never knew the Defendant to have an occupation. (T. 2756). The Defendant and victim began living together in 1975 or 1976. They moved to Rheinfelden in Southern Germany from Hamburg in 1984. The victim had seemed content in Hamburg, but became unhappy after the move to Rheinfelden. (T. 2758-2767). The victim had a Swiss passport with the married name Kuenzli.

Regina visited the victim 4 times in Rheinfelden between 1984 and 1987, during which the victim and Defendant were living together. The Defendant did not have any occupation during this period as well. (T. 2768). The Defendant was always making derogatory comments to the victim concerning her age and figure, and he would compare her unfavorably with Regina, who was considerably younger. (T. 2769, 70). The victim had told Regina that her sisters and parents were the beneficiaries on her two life insurance policies, and Regina was not aware the Defendant had replaced her family as beneficiary. (T. 2771, 2772).

On cross-examination, Regina stated that all the expensive jewelry and furniture the Defendant and victim owned was paid for by the victim's earnings. (T. 2785). She does believe that these earnings were probably supplemented somehow by the Defendant, who was a very shrewd man. (T. 2791).

DETECTIVE EWE WENK

Detective Wenk is a member of the Lorrach police, and became involved in their investigation of the victim's murder on 10/28/87. (T. 2798). During the search of the Defendant's Rheinfelden apartment he recovered the business cards of two Saudi businessmen. (T. 2855). He also seized reciprocal wills of the Defendant and victim and the clerk's receipts for those wills, which shows the wills were filed 6/9/87. (T. 2865-68). He seized a notebook belonging to the victim (T. 2869), and

obtained a letter the Defendant wrote to the court clerk on 11/22/87. (T. 2872, 73). He located two safety deposit box keys in the apartment, one of which led to a safety deposit box at the Commerz bank in Rheinfelden, which box was searched 12/23/87. (T. 2875, 76). The box contained, among other items, 2 boxes of .38 cal. Winchester ammunition. (T. 2878).

At this point the parties stipulated that the Defendant purchased the Commerz bank safety deposit box 10/1/87, and that the Defendant was the only person authorized to access the box. (T. 2879, 80). On cross-examination, Detective Wenk stated the Defendant is subject to prosecution for the murder in Germany. (T. 2882).

DOCTOR RAUL VILA (M.E.)

Doctor Vila arrived at the scene at 1:00 a.m., 10/26/87, where he removed and collected the victim's clothing. The autopsy later that morning revealed petechiae, which are tiny hemorrhages beneath the skin, throughout the body. (T. 2908). The bullet entered the victim's head 2 1/2 inches above and 1/2 inch behind the right ear. (T. 2912). The wound had soot and stippling, indicating close range, but it was not a contact wound. (T. 2916-18). The bullet travelled from right to left, front to back, and slightly downward, and lodged in the brain. (T. 2919-21). The victim's cervix had an erosion, which is a small superficial laceration. Her heart blood registered .06

and her ocular blood .07 alcohol content, and was negative for drugs. (T. 2923). The cause of death was a gunshot wound to the head. On cross-examination, he stated the soot and stippling were consistent with the gun firing from a distance of 4-24 inches. (T. 2932).

DETECTIVE RICHARD LONERGAN

During the search of the Defendant's Tahiti Hotel room, the police seized two .38 cal. revolvers and a .38 cal. Derringer, which were admitted in evidence. (T. 2938, 39). He also recovered a box of .38 cal. Winchester Super-X, 110 grain silver tipped ammunition, with 40 cartridges remaining in the 50 cartridge box. (T. 2941, 42). He also recovered the Defendant's clothing from the hotel room. (T. 2944). On cross-examination, he stated that upon arriving at the hotel room, the Defendant had told them the guns were in the closet, which they were. (T. 2948).

THOMAS QUIRK

Quirk is a firearms examiner. There was no gunpowder residue on either the Defendant's or victim's clothing. (T. 2956, 57). He would not expect to find any on a shooters' clothing because the gun is usually held away from shooters' body. (T. 2959, 60). Gunpowder residue (a.k.a. stippling) usually travels only 5 feet, and if a weapon were fired into a

car through a window open only 3 3/4 inches, the window and roof of the car could block most of the gunpowder residue from entering the car. (T. 2961).

Quirk examined the .38 cal. Colt revolver, .38 cal. Taurus revolver, and .38 cal. F.I.E. Derringer found in the Defendant's hotel room. He examined the bullet fragments removed from the victim's head. (T. 2961-2964). The projectile which killed the victim was a 110 grain, .38 special Winchester Western silver tip bullet. (T. 2965). This is identical to the bullets found in the Defendant's hotel room. (T. 2971). Three types of firearms could have fired the fatal projectile; a .38 cal. Astra revolver, a .38 cal. Taurus revolver, or a .38 cal. F.I.E. Derringer. (T. 2968). None of the firearms in the Defendant's hotel room fired the fatal shot. (T. 2970).

DETECTIVE BERND SCHLEITH

The partner of Detective Wenk with the Lorrach police, he received notice of the murder and request for background information from the Miami Beach police on 10/28/87, and immediately began own his investigation. (T. 3009). He searched the Defendant's Rheinfelden apartment 11/5/87, and seized bank documents relating to the Dresdner, Luebeck and Commerz banks, and keys to safety deposit boxes in the Commerz and Dresdner banks. He obtained search warrants for both, and searched the Dresdner box 1/22/88. (T. 3011, 12).

At this point the parties stipulated that the Defendant purchased the Dresdner box in 1985, that both he and the victim were authorized to access the box, but that only the Defendant had done so. (T. 3015). Detective Schleith then presented the victim's marriage certificate, showing her marriage to Swiss citizen Bernhardt Kuenzli in Hamburg in 1982. (T. 3016). He then presented the Defendant's Diners Club documents, including an insurance policy with INA Insurance Company, which the Defendant had purchased through Diners Club. (T. 3017-19). He presented 3 insurance policies with Cosmos Insurance Company, and 4 policies with Continental Insurance Company (T. 3020-22), and a Change of Beneficiary form executed 1/15/86 by the Defendant and victim, as to the two policies the victim purchased from Steffan in 1980 (which are described above). (T. 3024).

PETER KOSCHATE

Koschate is an insurance agent for Alteleipziger Insurance Company in Germany, and is in charge of the Auto and Accident Division. (T. 3038). He handles his firm's contracts for automatic coverage of Diner's Club members and their immediate family members. This policy automatically covers death and disability during travel as long as transportation is paid for with Diners Club card. (T. 3039, 40). If a covered person is killed while in a car, plane, train, etc., which is

rented with a Diners Club card, their legal heir, usually as determined by their will, gets 500,000 marks. (T. 3041). The Defendant was a Diners Club member in 1987, and the victim was listed as his spouse in his Diners Club membership. Therefore if she were killed in a car rented with the Defendant's Diners Club card, her heir would receive 500,000 marks. (T. 3043). The firm's files contain a letter from the Defendant which specifically designates the victim as his legal heir under the policy, and which designates himself as the victim's heir. (T. 3044).

On 5/10/88, the firm received a letter from the Defendant claiming entitlement to the 500,000 marks due to the victim's death, with the Diners Club receipt for rental of the Thunderbird attached (T. 3045), which receipt was admitted in evidence along with the letter.

On cross-examination he stated that life companions are considered spouses under the policy, and that the policy also carries 500,000 mark disability coverage. (T. 3036, 37).

NORBERT MULLER

Muller works for Cosmos Insurance Company which issued the Defendant two life insurance policies. The Defendant's life was insured under one policy for 100,000 marks, with the victim as beneficiary, and the victim's life was insured for 200,000

marks under the other policy, with the Defendant as beneficiary. Neither policy are double indemnity. Death by murder qualifies for coverage as long as the murderer is not the beneficiary. (T. 3069-73). The Defendant paid the premiums for both policies, and in June, 1988, the firm received a letter claiming entitlement to 200,000 marks from the victim's death. (T. 3073, 74).

PETER WEIGAND

Weigand works for Continental Insurance Company in Munich, Germany. Continental issued the two whole life policies which Ernst Steffan sold the victim in 1980, while she and the Defendant were separated. Continental also issued the two double indemnity risk policies Steffan sold the Defendant and victim in 1984, whereby the Defendant's life was insured for 100,000 and the victim's for 200,000, with each other as beneficiary, with a double payment in the event of accidental death, and murder qualifying as accidental as long as the murderer is not the beneficiary. (T. 3081-85).

The first whole life policy Steffan sold the victim was worth 29,227 marks at the time of her death, and the second 29,437. Both were double indemnity, with murder qualifying for double coverage as long as the murderer isn't the beneficiary. The victim's parents were the original beneficiaries on both policies. On 9/13/83 the company received Change of Beneficiary forms signed by the victim and Defendant, which changed the

beneficiary of both policies to the Defendant. (T. 3086-89). The Defendant paid the premiums on both policies. (Id.). As for the two double indemnity policies sold by Steffan in 1984, the Defendant paid the premiums on them as well. (T. 3090). In June, 1988, the firm received a letter dated May 10th, 1988, from the Defendant claiming entitlement to all three Continental policies insuring the victim's life. (T. 3092, 93).

On cross-examination Weigand revealed that on 11/15/87 the Defendant had written a letter to the victim's parents which purported to assign them the Defendant's rights to the proceeds of the policies. The victim's parents then attempted to use the letter to collect the proceeds, but Continental rejected their claim because the Defendant's letter was not a valid assignment. In May of 1988 they received a letter from the Defendant cancelling the purported assignment to the victim's parents. (T. 3101-3104).

GERHARD BITTNER

Bittner works for Cigna-INA Insurance Company, in the claims department. Cigna-INA handles the policies purchased by Diners Club members. These are not the automatic policies the Diners Club members receive through the Alteleipziger Insurance Company when they use their Diners Club card to purchase transportation and lodging (which automatic coverage was described by Peter Koschate above). Rather, Diners Club members

must apply for and pay separate premiums on the policies issued by Cigna-INA. (T. 3108, 09).

Bittner presented the Defendant's application for the Cigna-INA accidental death and disability policy. Under the policy, both the Defendant and victim were insured for 500,000 marks, with each the beneficiary in the event of the other's death. This was not a double indemnity policy. It covered death, disability and medical expenses anywhere in the world, 24 hours a day. (T. 3109-11). The Defendant paid the monthly premiums on the policy, and stood to gain 500,000 marks in the event of her death. The Defendant applied for the policy 11/21/85. On cross-examination Bittner stated the victim would also have received 500,000 if the Defendant died, the premiums were charged to the Defendant's Diners Club card, and the total disability payment was 1,000,000 marks. (T. 3115, 16).

THE WILLS

The Defendant and victim's reciprocal wills were published to the jury, with each being listed as the sole heir of the other. (T. 3141).

DINA MOEHLER

Dina works as a prostitute in Basil, Switzerland, which is a legal activity there. (T. 3146-48). She met the victim in

June or July of 1987, when the victim replied to an add for a roommate to share her apartment for prostitution purposes. (T. 3149). The victim, who used the trade name Yvonne, was supposed to pay Dina 1000 Swiss francs per month to use the apartment Monday-Thursday, 1:00 p.m. - 11:00 p.m. (T. 3151). The victim could not pay the rent in full because she was physically ill as well as depressed during this period. (T. 3161). During the first two weeks at Dina's the victim could not have sex with her customers because of severe gynecological problems. She recovered briefly but had a relapse which was so severe she was often doubled over in pain. (T. 3162-64). Dina took some of the victim's clients when the victim was in too much pain to receive them. The victim had a severe ovarian infection, and the antibiotic medication created a severe skin rash. (T. 3165, 66).

The victim worked at Dina's 3 months before departing for the United States 10/1/87. The victim was never able to meet the 1000 francs rent. (T. 3167). Dina then identified the victim's red leather appointment book, which the victim had shown her in August 1987 when they compared past earnings. The victim made only 300-400 francs a day when at Dina's, which the victim stated was way below what she had averaged the previous year. (T. 3167-75).

On cross-examination Dina stated that the victim called the Defendant her boyfriend, and that the victim denied supporting the Defendant. (T. 3175, 3181). The Defendant loved

the victim, but not as much as the victim loved the Defendant. She never saw the Defendant physically abuse the victim. (Id.). Just prior to departing for the States, the victim was not in pain but was depressed, and was looking forward to the trip. (T. 3182). The victim had a red earnings book for 1986 and a black one for 1987. The victim had worked very hard and made a lot of money in 1986. (T. 3183). Although she told the German police the Defendant and victim loved each other, she also told them they had a difficult relationship and fought often. (T. 3194). The Defendant bought the victim an expensive diamond ring for her 30th birthday. (T. 3203). The Defendant and victim's dog Hercules had a leg operation in the summer of 1987. (T. 3207).

On redirect Dina stated that prostitutes often refer to their pimps as boyfriends, and never admit that they are supporting their pimp/boyfriends. (T. 3210). The victim constantly stated she wanted to stop being a prostitute. (T. 3211). The Defendant did verbally abuse the victim, but never hit her. The Defendant was her intellectual superior and would act disdainfully toward her. (T. 3213). When Dina asked the victim how the Defendant supported himself, the victim would avoid answering. (T. 3216). The victim told her she needed a will so that if something happened to her and the Defendant, his family would get nothing. (T. 3225).

DETECTIVE ROBERT HANLON

After his arrival at the scene, Hanlon removed a blanket from the driver's seat. (T. 3235). Sometime before dawn 10/26/87, he asked the Defendant (in English) if he would drive with the detectives in an attempt to retrace his route prior to the shooting, and the Defendant agreed. He had no trouble understanding the Defendant and vice-versa. (T. 3239-42). From Bayside the Defendant directed them right onto Biscayne Blvd., then 10 miles north on Biscayne to 163rd Street, where the Defendant said he had turned left (west), then left (south) again shortly thereafter, onto West Dixie Highway. (T. 3252, 43). The Defendant had described this same route prior to the drive-around. The Defendant had stated that after the left onto West Dixie, he had gotten lost and stopped to ask for directions. (T. 3244). After the turn onto West Dixie they drove throughout the area, but the Defendant could not find a familiar area and did not even seem to be looking out the windows, which Hanlon thought might be due to fatigue. (T. 3245, 46).

After identifying various items found in the Defendant's car, including receipts from Bayside that evening, numerous maps, and the car rental agreement (T. 3250-57), Hanlon stated he called the Defendant 10/27 and asked if the Defendant would attempt another drive-around, and the Defendant agreed. The trip was fruitless, as the Defendant kept repeating that nothing looked familiar. (T. 3257-62).

They then returned to the station, where the Defendant agreed to give a taped statement, with the tape recorder on the desk in front of him. (T. 3262). Hanlon was then asked to describe the version of events the Defendant gave the night of the shooting: the Defendant had gotten lost and stopped in a darkened area and asked a black man for directions. He had used the button to partially lower the victim's window to speak to the man. The man asked "are you tourists?," and the Defendant said "Yes, we are from Germany, we're lost." The man turned and walked several steps, then returned with something in his hand. The Defendant heard an explosion and hit the accelerator. He heard the victim wheezing so he closed her window, then touched the back of her neck, which felt "soapy." He then reclined her seat. (T. 3290, 3291).

The State then introduced the taped statement, which was recorded at 1:10 a.m. 10/28/87, as well as a transcript thereof. (T. 411-434). In this statement the Defendant gave a very sketchy account which was basically the same as he gave the night of the shooting (R. 420), with the Defendant unable to provide virtually any details of what occurred after he left Bayside, even details which he had provided in his earlier accounts.

Hanlon found a Miami Street map in the driver's door compartment of the Defendant's car, along with other Florida maps, and out-of-state maps in the trunk. (T. 3313-3315).

On cross-examination Hanlon stated that the video camera in the back seat had scenes from Bayside, and the police verified the Defendant and victim's visit to Bayside that evening. Hanlon could not tell the Defendant had been drinking when he spoke with him at the scene, though the Defendant said he had some drinks at Bayside. (T. 3347, 3363, 3364, 3416).

On redirect Hanlon stated he did not need Detective Psaltides to interpret because they could communicate in English adequately. (T. 3445). In order to release the lever on the victim's seat, the Defendant would have to lie prone, almost underneath the dashboard. (T. 3449).

TECHNICIAN FLEITA DOUGLAS

Took hand swabs of the Defendant at the scene and related the technique she employed. (T. 3476-88). On cross-examination she stated the Defendant was crying and upset at the scene. The Defendant voluntarily agreed to the test and was cooperative throughout. The Defendant appeared to have been drinking. (T. 3496-3500).

GOPINATH RAO

Mr. Rao is a Metro-Dade Police Department chemist specializing in the analysis of gunshot residue particles. (T.

3508). He analyzed the hand swabs taken from the Defendant and the victim. He found a total of 8 particles on the victim's hand, and based on his analysis, the victim definitely had not fired a gun. (T. 2534-39).

Rao found 43 gunshot residue (a.k.a. primer) particles on the Defendant's left hand and 49 particles on his right hand, and in his opinion, to a reasonable degree of scientific probability, the Defendant had fired a gun, (T. 3540-46).

Rao then explains that gunshot residue is created when the barium, antimony and lead, which together form the cartridge primer, ignites at the rear of the cartridge (and in turn ignites the main gunpowder charge). The barium, antimony and lead vaporizes, exits the casing of the cartridge along with the projectile and gunpowder residue, then escapes sideways out the breech of the gun. The breech is the open space between the revolving cylinder, containing the cartridges, and the gun barrel. Without this small space the cylinder could not rotate. As the vaporized barium, antimony and lead escapes sideways out the breech, it solidifies upon contact with the air, forming particles which settle on the shooter's hand. (T. 3549-51).

The particles will begin to fall off as the shooter's hand contacts other surfaces. (T. 3551-53). If Rao had located a unique primer particle (one containing all 3 primer elements) he could have conclusively determined the Defendant had fired a gun. (Id.).

On cross-examination, Rao again explained the source of primer residue. (T. 3606). The victim probably had her right hand near her head when shot, which would account for the particles in her right hand. (T. 3613). If the victim was shot from 2-24 inches, some residue should reach her head, as the portion of the primer particles which exit the barrel continue forward for approximately 3 feet. (T. 3616-18). Assuming the Defendant fired the gun with only one hand, particles could collect on the opposite hand from handling the gun or rubbing his hands together. (T. 3624). The test doesn't prove the Defendant is a shooter, rather only that his hand was in close proximity to a firearm discharge, or that he handled a recently fired gun. (T. 3625).

On redirect Rao stated that most of the primer particles which exit the breech are round, whereas those exiting the barrel are primarily irregular shaped, and most of the particles on the Defendant's hands were round. (T. 3665-3670). Assuming the Defendant is in the driver's seat when the victim was shot with the gun held outside her window, he would not have the number of particles he had on his hands, nor could he have received that number from touching the victim's wound. (T. 3677-79).

DAVID RHODES

Rhodes is a Metro-Dade Police Department serologist. He explained the distinction between blood stains and blood splatter, which is differentiated by the amount of energy applied to the blood. High velocity blood splatter is very unique, and only occurs where a bullet impacts the body with such velocity that it "atomizes" the blood into a fine mist, which creates a specific splatter effect when it impacts a surface. (T. 3704-09).

There were five specks of presumptive blood on the inside of the passenger window and door. Presumptive means that when certain chemicals are applied to it, the specks reacted consistently with their being blood. (T. 3717-22). These specks were consistent with high velocity splatter. Using the lowest speck on the window, it appears to have been rolled down 3 3/4 inches when the shot was fired. (T. 3723-3728). The window could not have been open more than 3 3/4 inches, but could have been open less than that figure. (Id.).

There was blood and brain matter on the passenger seat head rest and back rest, and on the right of the headliner (interior roof) near the top of the passenger window. (T. 3730, 31). Blood on the left shoulder of the victim's blouse is consistent with aspirated blood dripping from the victim's nose after being shot but still breathing. (T. 3734). Stains on the

front of the victim's pants are consistent with either high velocity splatter or aspirated blood, or both. (T. 3738).

Rhodes examined the Defendant's clothing. There was no visible blood on his shirt or shoes, and the blood on his pants was not high velocity splatter, but rather appeared to be from brief contact with a bloody surface. (T. 3744-49).

There was presumptive blood specks on the driver's door and window similar to that found on the passenger's door and window, and was consistent with high velocity splatter. (T. 3750-54, 3763). Using the estimated position of the victim's head when shot as a starting point, and assuming the driver's seat is empty, the seat itself would have to have been upright and almost all the way back on its runner, to allow an open corridor for the blood to travel in a straight line from the victim's head to the specks on driver's door and window. (T. 3765).

Rhodes tested the blanket found on the driver's seat and found 21 specks of presumptive blood on the portion of the blanket which was facing up. Rhodes knows it was the face up portion of the blanket because of the unique pattern of the blanket, which he then compared to photographs of the crime scene. (T. 3766-84). These 21 specks are consistent with either high velocity splatter or aspirated blood. (Id.).

The high velocity blood splatters on the driver's door and window are consistent with the passenger being shot in the right side of the head, with the passenger seat upright, and the blood splatter then travelling across the vehicle and hitting the driver's door and window. (T. 3795, 96). As the splatter mist travels across the car, part of it is continually falling off and hitting the surfaces below. It would dry within seconds because the individual particles are extremely fine. Assuming that the specks on the blanket were from the falling high velocity mist, they would have dried within seconds, and a person who was on the blanket after that period would not get splatter stains on the seat of his pants, and in fact the Defendant had none on the seat of his pants. (T. 3796-98).

On cross-examination, Rhodes stated there was no blood on the back of the driver's seat or the dashboard, though there was blood on the steering wheel. (T. 3807-12). He was asked how the blood travelled to the left if the victim was shot in the right side of the head, and Rhodes stated that one explanation was it deflected off the headliner, the victim's upraised hand, or other surface (T. 3819-22) (on redirect the Prosecutor asked if a bullet striking the right side of the victim's head might cause it to jerk violently to the left, and Rhodes stated he had no way of estimating what the force of the projectile would do to the position of the head, (T. 3899, 3900). From all indications, the victim's head was either straight ahead or slightly to the left when shot. (T. 3829).

Wind can create high velocity splatter, as does aspirating (breathing out) blood, because it mixes air with the blood, creating a mist similar to high velocity splatter. (T. 3834-37). The blood on the blanket was consistent with both high velocity splatter and aspirated blood. (T. 3840). A violent jerking back of the passenger seat could have dispersed aspirated blood from the victim's nose. (T. 3842). Rhodes found 3 presumptive blood specks on the surface of the blanket facing the seat. (T. 3877). The presumptive blood test does not differentiate between human and animal blood. (T. 3881). One of the specks on the driver's window had front to rear directionality, indicating it impacted while travelling from the direction of the air-conditioner vent on the driver's left. (T. 3891).

On redirect Rhodes testified he conducted a string test, in which he used as a source point the position of the victim's head, which he determined by having the passenger seat placed in an upright position, in the same spot on the runner as found at the scene, and then having a woman the victim's height sit in the passenger seat. Using the woman's head as the starting point, he ran strings to the specks on the driver's door and window.

The string test revealed the following: 1) The location of the splatters on the driver's door and window, and those on

the blanket, are consistent with blood splatter leaving the victim's head, travelling across the vehicle with some settling on the blanket, while some continued on to strike the driver's window and door. (T. 3897, 98). 2) A person seated in the driver's seat, in an upright position, would have obstructed the path of the 3 spots on the driver's door regardless of where the driver's seat was on its runner, and the father the driver's seat was forward, the greater would be the obstruction. (T. 3902-3906). This is true whether the 3 spots are blood splatter from the victim's wound or aspirated blood from her nose. (T. 3914). 3) Once the victim's seat was fully reclined, there is no way aspirated blood could get from the victim's nose to the driver's door, window or seat, because the back of the driver's seat would be in the way. (T. 3917, 23). 4) Assuming that the blood on the blanket, driver's door and window all came from the impact of the bullet, this evidence is consistent with the victim being shot in the right side of the head while seated upright in the passenger seat, at a time when the driver's seat was vacant. (T. 3930).

On re-cross Rhodes stated that if the Defendant had lurched forward into the steering wheel just prior to the shot, the blood on his door and window would have had a pathway from the victim's head. (T. 3931). Rhodes can't measure the effects of the air conditioning or wind through the victim's window. (T. 3932). The single speck with directionality appeared to be affected by the air conditioning flow. (T. 3934, 35). The

string test assumes blood splatter travelled in a straight line. (T. 3943). If the victim's head had not bent to the left when the bullet struck, but rather had remained upright, the blood splatter on the driver's door and window would have had to be deflected blood. (T. 3944, 45).

On re-direct, Rhodes stated that if the victim's head had inclined to the left upon impact, the splatters on the driver's door and window would line up with the position of the victim's head. (T. 3946). Only one of the specks on the driver's door and window had directionality. All the others were perfectly round, indicating they had travelled in a straight line from the position of the victim's head. (T. 3941).

WALTER SYMKOWSKI

Symkowski has 3 Florida felony worthless check convictions and was convicted of 17 Federal counts of mail fraud stemming from a single indictment, and has been a Federal informant on two occasions. (T. 4095, 96). He is hopeful that the prosecutor will write a letter on his behalf, but has not been offered anything for his testimony. (T. 4997).

He met the Defendant at the Federal MCC facility 10/31/87. He was playing chess, and the Defendant joined the game. Two days later Symkowski's roommate departed, so Symkowski requested the Defendant as his roommate because the

Defendant played chess well. (T. 4098, 99). They were together two months.

The Defendant told him his girlfriend had just died, and that she was a high priced prostitute who had paid a Swiss man 15,000 francs so she could obtain a Swiss passport. The Defendant had initially claimed to be a salesman, but later showed Symkowski his hands, and said he never had to work because his girlfriend supported him. (T. 4100-4102). The Defendant said he and the victim had huge insurance policies and they were reciprocal beneficiaries. The Defendant described the shooting incident, saying he and the victim got lost, rolled down the window to ask a black man directions, and that the man had a gun and must have seen the Defendant's Rolex watch. The man started shooting and the Defendant hit the gas. The victim was shot in the head, and the Defendant flagged down a female cop for help. (T. 4103-05).

On many occasions the Defendant expressed his extreme happiness at the prospect of becoming a millionaire from the insurance money, and that he planned to give 300,000 marks to the victim's family, and start a business and by a Corvette, which in Germany are only driven by rich people, pimps and hookers. (T. 4106, 07). The Defendant spoke very good English, better than Symkowski's. The first day with the Defendant, the Defendant had literally danced with joy at his chance of being a millionaire. (T. 4108). The Defendant said he was mad at the

Miami Beach Police Department for searching his hotel room, and that he planned to sue them. (T. 4109).

The Defendant said he had other guns the police didn't find, and when Symkowski asked the Defendant why he needed so many guns, the Defendant replied he liked to shoot guns just like Symkowski liked to drink Vodka and smoke cigarettes. (T. 4109). The Defendant said the German police had searched his apartment several times, but that they wouldn't find anything because all his papers were in a safety deposit box. (T. 4110).

The Defendant and Symkowski would stay up all night playing chess. After a month together, Symkowski asked the Defendant point blank why he shot his girlfriend, saying "You tell me many things good for your girlfriend, very pretty, very nice, younger than you, help to you, support to you. I tell you why Dieter you kill this girlfriend." The Defendant turned very pale and said nothing for 20-30 seconds, then said "Walter, you old guy forget everything, better go to play chess, I never more different questions." (T. 4111, 12).

On cross-examination he stated the Defendant was happy the entire two months about becoming a millionaire. (T. 4131). The Defendant had said he wasn't crazy enough to leave his important papers in his apartment, and that's why they were in a safety deposit box. (T. 4133). Symkowski told Lieutenant Foster at MCC about the Defendant's statements in January of 1988, and

Detective Matthews and Hanlon came to talk to him right afterwards, and again in March of 1988. (T. 4137-41). He hasn't talked to anyone since March, except yesterday, when he talked to Prosecutor Digregory for 20 minutes. On redirect he stated that the police and prosecutors never told him what to say, rather they always said to tell the truth. (T. 4143-45).

DEFENSE CASE

The defense began its case by playing videotapes the Defendant and victim took of their United States vacation 10/2-10/25/87, culminating in shots taken 10/25 at Bayside the night of the murder (T. 4232-46), which included audio as well.

DIETER REICHMANN (THE DEFENDANT)

The Defendant met the victim in 1985. When defense counsel asked the Defendant how the victim became involved in prostitution, the Defendant replied she got involved in prostitution when he was in jail for perjury. (T. 4289-92). The victim was not supporting the Defendant, but rather was in the clutches of a ruthless gang of pimps. (T. 4293). In 1978 the Defendant bought the victim's freedom from the pimp gang by paying them 6 months worth of her earnings. (T. 4294). He got along well with the victim's family. He denied telling Myer Reinach that he was the victim's pimp, stating he has never been her pimp. (T. 4297).

The Defendant bought health, life, and disability from Steffan in 1979 or 1980 because the Defendant and victim lived together and needed insurance. He paid for his own Mercedes and other expenses by selling commodities, especially oil, and through foreign exchange. He bought oil at $2.00 a barrel less than the Opec price and resold it in Europe for a profit. (T. 4300-02). He received a commission of 10 cents per barrel. (T. 4303). He made lots of money doing this, from 1978 on, and could afford a lavish life-style. (T. 4303, 04).

During their six month separation in 1979, the victim fell back in with the pimp gang, and the Defendant paid them off with 50,000 marks for her return. (T. 4306). In 1983, when they were back together, the victim changed the beneficiary of her two policies (purchased from Steffan in 1980) from her parents to the Defendant, and she did so of her own free will. (T. 4309). He became a Diners Club member in 1983 for the convenience, not the insurance. (T. 4310, 11). He did not need the insurance. (T. 4310, 11). He did not need the victim's income to qualify for the card, and bought her expensive jewelry with his own money. (T. 4314).

After two years together they decided to be life companions, so they purchased various life insurance policies to protect their future. (T. 4316). The victim was more heavily insured because her premiums were cheaper. (T. 4320). He

carried a list of his policies in the trunk, including his health and hospitalization coverage, because on a prior visit he had been injured and hospitalized, and not having the policy names and numbers had created a hassle. (T. 4322-27). The Defendant then described his prior trips to the U.S., and how people were always helpful in giving directions. He had stayed at a hotel on Collins Avenue in Miami Beach for a week in 1986. (T. 4331-38).

The Defendant bought the Taurus and Colt revolvers in 1986, one from a gun store and one from an individual. He loves to shoot and collect guns, which he can't do in Germany. (T. 4340-43). (The State admitted in evidence, through Detective Schleith, the 43 .38 cal. cartridges found in his German safety deposit box, see below). During the 1986 trip both the Defendant and victim shot these guns often, and then left them with personal injury attorney Harold Curtis when they returned to Germany. (T. 4345-47).

The Defendant and victim returned to Miami 10/2/87. They stayed several days at the same Holiday Inn on Collins Avenue in Miami Beach. In referring to the Hotel, he stated "I don't know the number but I know how to get there." (T. 4349). They picked up the guns from Harold Curtis, who took them to Bayside. On 10/9/87 they embarked on a sight-seeing tour of Georgia and Florida. (T. 4353-55).

The Defendant and victim wanted to open a designer clothing store in Miami near the 163rd Street Mall, which is why they stayed at the Tahiti Hotel. They had bought the video camera at that mall 10/2/87-10/9/87. (T. 4556-57). They arrived at the Tahiti 10/21/87, and had return tickets to Germany for 10/31/87.

The Defendant bought the F.I.E. .38 cal. Derringer in Miami 10/2/87-10/9/87, because the victim had seen it in a magazine and liked it. During this period they went shooting. They bought two 50 round boxes of .38 cal. ammunition, fired the whole first box and two loads of five from the second box, leaving 40 rounds in the box. (T. 4358-65). All rounds were fired in the Taurus, as they had to special order the Derringer, which they picked up a few days later. (T. 4364-70).

Defense counsel then asked the Defendant how many felony convictions he had, and the Defendant replied four. Defense counsel then asked about his solicitation of perjury conviction, and the Defendant explained he had asked 3 people to testify at his trial for speeding that he wasn't behind the wheel at the time of the offense. (T. 4370, 71).

Defense counsel then asked the Defendant why, when he purchased the Derringer, he checked "No" on the form where it asked if he had been convicted of a felony. The Defendant explained that he put no because he thought his convictions were

all misdemeanors. (T. 4372, 75). The Colt, Taurus and F.I.E. Derringer, and the 40 rounds of ammunition described above were those found in his hotel room. (T. 4376, 76).

The Defendant purchased the Special Diners Club insurance package because it had a full range of health, disability and life insurance. (T. 4384). This policy had reaped big dividends when hospitalized on his U.S. trip in 1986. (T. 4386, 87). He usually kept all his policies in his apartment, but when travelling he kept them in a safety deposit box. The Defendant has two policies on his life, with the victim as beneficiary, which the State did not introduce, one for 100,000 marks (Sekolotos Insurance Company) and one for 20,000 marks (Sekolotos Insurance Company). (T. 4390). The victim was the one who wanted to file reciprocal wills, because life companions get zip under German inheritance law. The Defendant also wanted to make sure the victim, not his family, got his estate. (T. 4392-94).

When defense counsel asked the Defendant if he owned any real estate when they executed the wills in June 87, the Defendant refused to answer. (Id.).

The Defendant saved the victim from drowning, and has saved it many times by not letting her use the blowdrier in the tub. He also saved her from falling off a cliff while skiing. (T. 4442-45).

Defense counsel then questioned the Defendant about his other three convictions. In 1966, when he was 22 years old, he stole a car, but it wasn't really stealing because he just drove it around awhile then left it. He was convicted of the theft in 1967. In 1973 the Defendant was convicted of involuntary manslaughter by negligent bodily injury, stemming for a six car pileup in which two people died. The Defendant believes this charge is a misdemeanor in Germany. (T. 4449-52). In 1973 the Defendant was charged with banking fraud, specifically document forgery, and in 1976 he received 6 months probation. (T. 4453-55). Defense counsel again asked the Defendant about his solicitation of perjury charge. The Defendant stressed that he personally did not commit perjury, but rather had only asked others to commit perjury for him. This offense occurred in 1974 and the conviction in 1977. (T. 4455-58).

In 1984 the Defendant signed a contract to buy a Mercedes 500 SL, with delivery in 18 months. During the 18 months the devaluation of the dollar vs. the mark caused a glut of Mercedes on the German "gray" market, and when the time for delivery came the Defendant could buy his Mercedes for 25% less on the "gray" market. So, in order to weasel out of his contract, he wrote Mercedes a "humble" letter saying he had just broken up with his life companion, who had promised to pay for the car, that he was broke and had no income because his life companion had supported him, so could Mercedes please pretty please let him out of his

contract, which they did. But this story was just a deliberate lie to rip off Mercedes, not a true picture of his financial relationship vis-a-vis the victim. (T. 4459-69).

The Defendant then described how the shooting occurred. On Sunday, 10/25/87, the Defendant and victim were in their room at the Tahiti Hotel, and decided they would go shooting, as they wanted to try out the F.I.E. Derringer before returning to Germany. The Defendant laid out the guns and ammunition on the bed, and then demonstrated to the victim the proper way to hold the weapons, as the victim had been experiencing pain when firing because she held the weapons improperly. (T. 4470, 71). They then changed their minds and decided to shoot pictures at Bayside instead. (T. 4472). They had dinner at Bayside and several drinks each, then departed at 10:00 p.m. The Defendant had told Detective Hanlon he didn't drink, and indeed he hadn't drank in the past 5 years because he was always crossing borders and didn't want to get detained at the border. However it was such a beautiful day, and they were in such a great mood the Defendant decided to terminate his five year abstinence, and he and the victim each had a few cocktails. (T. 4479-82).

After leaving Bayside they intended to stop at the "Welcome to Miami Beach" sign on I195 (Julia Tuttle Causeway) to take their pictures in front of the sign. The Defendant knew that after heading north on Biscayne Blvd. from Bayside, they had to take a right (east) turn on I195 to reach the sign, but

he missed the exit and got lost, and his maps were no help. (T. 4484, 85).

The Defendant saw someone on the side of the road, and he stopped, lowered the victim's window halfway, said hello, and asked for directions to Biscayne Blvd. or Miami Beach. The man was very friendly, and asked where they were from. He then told them to wait a minute, and walked away. The Defendant thought the man was being so helpful that he reached into the back seat for the video-camera, to take the man's picture. (T. 4485-87). The Defendant put the empty camera case on the back seat, and had the camera in his lap. The victim reached into her purse to get a few dollars tip for the man, who at that point reappeared at the window holding something in his hand. The Defendant instinctively sensed danger, and raised his right hand, palm out, while simultaneously hitting the accelerator. At the same instant, the Defendant heard an explosion. (T. 4488-90).

The victim's head was facing away, and the Defendant heard her heavy breathing, but he kept driving. He heard the wind coming in her window and closed it. He did not know she was hurt, and when he asked her if something was wrong, she did not reply. (T. 4491). Her lips moved but she said nothing, and had "terrible heavy breathing." The Defendant nudged her, thinking she might be unconscious, then reached over and released her seat, which fell back "with a bang," because he didn't want her head to hit the dashboard if he had to stop

suddenly. He also wanted to make her more comfortable. He touched the back of her head and it felt soapy. (T. 4492, 93). He turned her head toward him but couldn't see what was wrong because the inside light bulb was loose. He grabbed the flashlight from the back seat and shined it on the victim, but saw no blood on her. He did see blood and white stuff on his hand. He then threw the flashlight and camera, which was on the victim's lap, into the back seat and continued driving. (T. 4 494-96).

The Defendant was in a panic and couldn't think straight. He knew he needed help for the victim, and when he saw a police car he jumped out and told the officer his girlfriend needed help. He believes she was still alive at this point (T. 4497, 98), and later states she was still breathing when he exited the car. (T. 4549). Many officers appeared and started asking him questions, but none tried to help the victim. When he tried to go to her they stopped him. He did not understand many of their questions because his English wasn't as good back then. They did something with his hands, which he didn't understand. They asked him if he owned a gun, and he replied yes, and it was in his hotel room at the Tahiti Hotel. (T. 4499-5006).

The Defendant was driven to the police station and put in a cell for 3-4 hours, and then Sergeant Matthews came and released him, saying it was all a mistake. Matthews took the Defendant's statement, and wanted the Defendant to show them

where the shooting occurred. The Defendant told him it was futile because he didn't know. (T. 4507-10). The Detectives took him to his hotel room, showed him a piece of paper he didn't understand, and told him they wanted his guns, so the Defendant told them where they were. They ordered him to undress, then seized his clothing, passport, driver's license and plane tickets, then left. (T. 4511-14).

The Defendant did not tell the police he left Bayside, took a right on Biscayne, then left on 163rd Street, took another quick left, then got lost. He might have said he intended to take that route, and he mixed up his English tenses. (T. 4515). The Defendant tried another drive-around the evening of 10/26, but couldn't recognize anything, then the police questioned him again until 4:00 a.m. 10/27, then returned him to his room. (T. 4516-18). During the day of 10/27, he took a bus ride and saw an area that looked familiar, so he called Matthews, who took him on another fruitless drive-around that evening. (T. 4520). Afterwards they took him back to the station and took a taped statement (the transcript of which is located R. 410-434), 1:00 a.m., 10/28.

During the day of the 28th he called Matthews because he wanted to see the victim's body and make arrangements for her body to be flown back to Germany. Unknown to him the call was taped, and defense counsel entered the tape into evidence. (T. 4525-27). Also on the 28th the Defendant rented a car and drove

around for six hours trying to locate the shooting scene. He had a car, money and credit cards, but did not try and flee Miami. (T. 4528-31).

The Defendant purchased the blanket (found on the driver's seat of the murder vehicle) in June 87 in Germany, intending to use it as a beach blanket in U.S. The blood could be from his chi hua hua Hercules, whom they laid on the blanket on the ride home after a leg operation at the end of June. (T. 4546-48).

On 10/29 Matthews picked him up at 2:00 p.m., and he talked with Matthews at the station until 8:00 p.m., during which their talk was secretly taped. At 8:00 p.m. he was arrested. (T. 4558-60).

The Defendant met Walter Symkowski in jail, and he had a reputation as an informant. The Defendant kept papers in his cell, and Symkowski could have read them while the Defendant was at English class. He never danced for joy in his cell because of the insurance money, and indeed the Defendant wrote a letter to the victim's parents listing all the policies and assigning them his interest in the proceeds. (T. 4587-92). At that point the Defendant thought the victim's life was only insured for 440,000 marks not the 1.7 million marks it actually was. The Defendant did not know that murder qualified as an accident, did not know about the Diners Club automatic coverage due to the

victim's death in a car rented with Diners Club card, and did not know murder qualified for double indemnity. (T. 4592-99). On 5/10/88 the Defendant cancelled his assignment to the victim's parents. (Id.), because he had read the statements they gave to the German police. (T. 4915).

The Defendant heard Symkowski testify that the Defendant told him that he owned another gun which the police did not find in his hotel room. The Defendant denied telling this to Symkowski. He also denied that Symkowski ever asked him why he shot his girlfriend. (T. 4614). The victim was his true love, and he did not shoot her. (T. 4615).

CROSS-EXAMINATION OF DEFENDANT

Concerning the blanket, their dog Hercules was bleeding from his stitches when they laid him on the blanket to transport him home from the veterinarian. The Defendant didn't wash the blanket prior to bringing it to U.S. because they planned on discarding it here. (T. 4620, 21). The Defendant didn't tell the police about handling the guns at the hotel room because he didn't know he was going to be accused of the murder. (T. 4626). He did not tell the police, in his 10/28 taped statement, many of the details of the shooting he described on direct, because on 10/28 he was still shocked and confused. He has had a lot of time to calmly reflect since 10/28. (T. 4628-35). When he said in his 10/28 statement that he didn't notice blood on his hands

until at the police station, he made a mistake because he was still in shock (Defendant stopped Officer Reid 10:32 p.m. 10/25, taped statement given 1:10 a.m. 10/28). (T. 4640).

When asked why he didn't tell the police on 10/28 about handling the camera just prior and just after the shooting, he again pleads shock. (T. 4641, 42). The Defendant again states he didn't provide the details on 10/28 that he provided on direct because he had "aftershock" on 10/28 and couldn't remember anything. (T. 4645-47).

When asked about his solicitation of perjury charge, the Defendant claimed he is innocent, but admitted he was convicted. The Defendant admitted he got Ernst Steffan to lie for him on his proof of earnings certificate so he could get an apartment, then volunteered "Not only that, we also cheated the tax authorities." (T. 4654, 55). When the prosecutor asked the Defendant about his oil dealings, from which he allegedly earned his living, the Defendant refused to answer because he could be prosecuted in Germany for tax evasion. (T. 4661).

The Defendant states that he never worked for Continental Insurance Company. He was not having financial problems in 1984 or at any time in the past 15 years. (T. 3663-65). The prosecutor then showed the Defendant 3 loan applications found in his safety deposit box, dated 2/27/84, 1/2/86 and 6/19/87, and bearing his signature. The prosecutor asked if the

Defendant falsely "told" these banks on the forms that he worked for Continental Insurance Company, and the Defendant adroitly responded "I did not tell them anything. I send that by mail." (T. 4665-70).

As for the letter to the Mercedes dealer, the Defendant stated his story to the dealer was a "white lie." It was a lie, but it was the only way to get out of the contract. Portions of the letter state "as a result of a separation from my life companion, I am hurting financially," and "so for that reason and because of uncollectible outstanding debts, my financial ruin is imminent". (T. 4678-81). The Defendant denies arranging the victim's marriage to a Swiss citizen, or that the purpose was to get the victim a Swiss passport for prostitution in Switzerland. The Defendant states the marriage was arranged so that after the victim's divorce, he and the victim would marry and he in turn could become a Swiss citizen. (T. 4684).

The Defendant was then asked about his "no" response to the "Ever been convicted of a felony" question on the purchase form for the Derringer. The Defendant now states he did not understand the questions on the form, and put "No" because the salesman said to do so. (On direct he had said he put "No" because he thought all his convictions were misdemeanors, not felonies, see above). (T. 4696-4700). It was not a lie to put "No" on the form because he didn't understand the question. (T. 4705).

As for the man who shot his girlfriend, the Defendant could not remember what he looked like when talking to the police 10/28, but does now: 25, 26 years old, medium build, oval face, Defendant's height, and if he saw him again, he would recognize him. Couldn't remember what he looked like during his 10/28 statement because "I was totally confused." (T. 1714-17).

VINCENT GUINN

Guinn is a professor of chemistry at the University of California at Irvine, and was qualified as a gunshot residue expert. The correct term is "primer gunshot residue." Most of this residue is expelled out the barrel, 95%, and most of the rest remains in the barrel, with only .01% likely to exit the cylinder gap (breech) and deposit on the shooter's hand. (T. 4799-4863). There is no difference between the particles which exit the barrel and the cylinder gap. If a gun is fired into a car from a few feet away, very few particles would enter the vehicle, as they begin falling after leaving barrel, and none travel more than 5 feet from a .38 cal. discharge. (T. 4812-16). The primer produces 10 million particles, and on average 1000 reach the shooter's hand. (T. 4819, 20).

Based on photo's of the victim's wound, the gun was probably within 12 inches of her head, and from this distance he would expect considerable residue throughout the car, though unevenly distributed. (T. 4829, 30).

Primer gunshot residue analysis can never disclose if a person fired a gun because it only detects particles, not how they got there (T. 4850-79), thus the conclusions of the State's expert, Rao, are erroneous. If the gun was 12 inches from the window and the window was 3 3/4 inches down, most but not all would enter the vehicle. (T. 4883). The tests performed on the victim's blouse and Defendant's shirt are not very sensitive, and cannot rule out the presence of primer residue particles. (T. 4885).

ISSUES PRESENTED

I

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS.

II

WHETHER THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

III

WHETHER THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO ALLEGED STATE DISCOVERY VIOLATIONS.

IV

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS TO SUPPRESS VARIOUS PHYSICAL EVIDENCE.

V

WHETHER THE TRIAL COURT ERRED IN ALLOWING HIS GERMAN CONVICTIONS AS IMPEACHMENT EVIDENCE AND IN DENYING A REQUESTED INSTRUCTION REGARDING SAME.

VI

WHETHER "IN THE INTEREST OF JUSTICE" THE CONVICTION AND SENTENCE SHOULD BE REVERSED.

VII

WHETHER THE EVIDENCE OF GUILT WAS LEGALLY SUFFICIENT.

SUMMARY OF ARGUMENT

There was no Miranda violation because the statements the Defendant made at the scene, and at the police station two days later, were noncustodial in nature, and there is no evidence that the statements were coerced or in any way involuntary. As for the alleged instances of prosecutorial misconduct, there were indeed several questions and comments by the prosecutor that were objectionable, and to each an objection was sustained and, when appropriate, motions to strike or disregard were granted. None of the objectionable questions or comments cited by the Defendant were followed by a motion for mistrial, and that is understandable given that none of the cited incidents in this hard fought 4 week trial come remotely close to vitiating the fairness of the entire proceeding. Any relief on this claim is thus totally unwarranted.

There was no discovery violations by the State because, as the trial court found at the Richardson hearing, all the documents that defense counsel claimed not to have seen had in fact been presented for his inspection on two occasions, and additionally the documents were hardly a surprise to the Defendant since they were his documents, removed from his safety deposit box in Germany.

All of the physical evidence was properly admitted into evidence. The search of the Defendant's Tahiti Hotel room was

with the Defendant's full consent, as the trial court found, and in addition was supported by a warrant which, even if arguably not containing probable cause, was nevertheless acted upon in good faith by the officers. The Defendant also consented to the search of his vehicle, a proper warrant was obtained, and in any event it was part of the crime scene. The hand swabs were taken with the Defendant's consent and could have been taken without his consent had the need arisen. Finally, the contents of the Defendant's apartment and safety deposit box in Germany, seized during searches by the German police as part of their own investigation, are not subject to the exclusionary rule absent extraordinary circumstances not present herein.

The trial court properly allowed in the Defendant's 10 year old German felony convictions as impeachment, as their probative value was not substantially outweighed by the danger of unfair prejudice. As for the proposed defense instruction concerning how the jury should evaluate the Defendant's prior convictions, it was a completing misleading and inaccurate instruction and hence was properly rejected.

The circumstantial evidence of the Defendant's guilt was overwhelming, and more than sufficient to dispel any reasonable hypothesis of innocence. Finally, the two aggravating factors of pecuniary gain and cold, calculated and premeditated were proven beyond a reasonable doubt, there were no mitigating factors of any sort present, and the death sentence was not

disportionate: unlike the domestic dispute cases where this Court has found the death penalty disportionate, this case involved a deliberately planned execution to obtain a fortune in insurance proceeds.

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS.

The State limited its trial presentation of the Defendant's statements to the police to the following: His initial utterance to Officer Reid, heard also by Officer Serayder, to the effect of "Help me, Oh, my God, my girl, my girl." (T.2475, 2681, 82). The only other police officer to present testimony concerning the Defendant's statements was Detective Hanlon. He related the version of the shooting the Defendant told him at the scene (T.3290, 3291), and the route the Defendant described during their first drive-around the morning of 10/26/87, which was the same route the Defendant had related at the scene. (T.3239-45). Detective Hanlon further testified that during the subsequent drive-around the evening of 10/27/87, the Defendant kept repeating that nothing looked familiar. Finally, the State admitted through Detective Hanlon the tape and transcript of the statement the Defendant gave at the station 1:10 a.m., 10/28/87. (R. 411-434).

At argument on the motion to suppress the Defendant's statements, the State argued (T.1603-1619), and the trial court agreed (T.1620), that the Defendant was not in custody, for Miranda purposes, until arrested by ATF agents 10/29/87, which obviously covers the relevant period herein. It is interesting

that during his argument defense counsel did not seek suppression of the initial version of the shooting (got lost, asked for directions, saw man with something in hand, heard explosion, drove off) the Defendant gave at the scene, but rather argued that after hearing this version from the Defendant, the detectives should have Mirandized him immediately. (T.1599, 1600). Defense counsel also conceded that, as to the statement the Defendant gave the morning of the 28th, counsel "doubt[ed] seriously" if the restraints on the Defendant amounted to custody within the framework of Miranda, although he did not abandon his legal challenge thereto. (T.1600).

The bottom line here is that the Fifth Amendment protections of Miranda v. Arizona, 384 U.S. 436 (1966), do not attach until the Defendant is in police custody, and the Defendant herein was most definitely not in police custody at any time 10/25/87-10/28/87, with the exception of the brief time he was mistakenly placed in the holding cell, courtesy of Officer Turner, and during which the Defendant was not questioned but rather went to sleep.

As to the time the Defendant spent at the scene, the testimony from all the officers present, which is set forth in detail above, shows that the Defendant was questioned and treated as any eyewitness to a murder would be; they tried to make him as comfortable as possible while at the same time

trying to obtain as much information from him as possible. The only time the Defendant was restrained in any manner was when he tried to violate the crime scene.

Sergeant Matthews testified that the Defendant voluntarily agreed to come to the station to give a detailed statement, after Matthews had explained why such a statement was crucial to their investigation. After Sergeant Matthews returned to the station and released the Defendant from the holding cell, and apologized for the mistake, he asked the Defendant if he wanted to go ahead with the statement at that time, and the Defendant stated that he did. Each of the detectives that were present during the 3 drive-arounds stated that the Defendant readily agreed to participate, and indeed the final drive-around occurred because the Defendant called Matthews and told him he had seen an area that looked familiar, and the Defendant wanted to give it another shot.

Up until the time of his arrest by ATF agents, 8:00 p.m., 10/29/87, the Defendant had complete freedom of movement, during which he changed hotels, rented a car, and made dozens of calls to Sergeant Matthews, and indeed on 10/29/87 the Defendant waited several hours at the station due to his intense desire to speak with Matthews about the case. As noted above, even defense counsel could not argue with a straight face that the Defendant was in custody at the time of his 1:10 a.m. 10/28/87

statement,[1] which is understandable given that the defendant's last words, after being told the interview was over, were "Time for bed. Go home my bed" (R. 434).

When asked why the defendant was not mirandized during the period 10/25/87 - 10/28/87, the relevant period herein, the Detectives all responded that the reason was that the defendant was not in custody, and the trial court's finding that the defendant was indeed not in custody was overwhelmingly supported by the testimony at the suppression hearing. As this Court stated in Roman v. State:

> Appellant's arguments on this issue presuppose that he was in custody during the time he was interrogated. In determining whether a suspect is in custody, "the ultimate inquiry is simply 'whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" *California v. Beheler,* 463 U.S. 1121, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983)(quoting *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 714 50 L.Ed.2d 714 (1977). This inquiry is approached from the perspective of how a reasonable person would have perceived the situation.
>
> Id. at 1231

This Court further stated:

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[1] This statement was the source of the "inconsistencies" which the Defendant refers to in his brief, but the prosecutor was not referring to inconsistencies between the Defendant's statements at the scene and those in the 10/28 statement, but rather between his 10/28 statement and his testimony on direct examination at trial. (T. 4626, 4628-35, 4640, 4641, 42, 45-47, 4714-17). The Defendant's brief account of the shooting to Detective Hanlon at the scene was consistent with his account on 10/28. (T. 3290, 91; R. 420).

> Appellant's situation was that he was being questioned in an investigation room at the sheriff's department, having voluntarily complied with a deputy's request to go there. That an interrogation takes place at a station house does not by itself transform an otherwise noncustodial interrogation into a custodial one. *Mathiason.*

See also Correll v. State, 523 So.2d 562 at 564, 565, wherein this Court held:

> The record indicates that a sheriff's department investigator asked Correll to go to the sheriff's office so that elimination fingerprints could be taken. Correll agreed to this and was taken to the sheriff's office by his brother and sister-in-law. After his arrival, a detective interviewed Correll for approximately half an hour to one hour because he was a family member of the victims and had information which might have been useful in solving the crime. Correll was not under arrest and was free to leave the station at anytime. He never objected to any of the questions and did not refuse to talk. When the interview was over, Correll left the station the same way he arrived, with his brother and sister-in-law. Therefore, we conclude that Correll was not in custody for the purposes of *Miranda* and the police were not required to advise him of his constitutional rights. *See Roman v. State*, 475 So.2d 1228 (Fla. 1985).
>
> Id. at 565

II.

THE DEFENDANT WAS NOT DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

The State has no alternative but to address each instance of alleged misconduct raised by the defendant under POINT II of his brief, although in each case it will reveal that either

there was no objection, or the objection was not followed by a motion for mistrial.[2]

As for the prosecutor's "horrible crime" reference at the motion to suppress, there was no objection (T.851). As to the prosecutor's "even people that are now serving time...", question during voir dire, there was no objection (T.2328). As to the prosecutor's "up until this point, the story the defendant told the police was that..." (T.2397, 98), there was no objection, and additionally the sentence is cited out of context, and is clearly not a comment on the defendant's right not to testify at trial. The same is true of the prosecutor's "so the version to the police..." (T.2399): no objection, and the comment was part of a chronology of what the defendant told the police at various times.

As for the prosecutor's "after this arrest this case went to a grand jury and 23 grand jurors...", the objection was sustained, and the prosecutor went on to read the indictment without objection (T.2407). As for the prosecutor's description of the defendant's pimping" activities vis-a-vis the victim, these activities were directly relevant to the motive for the murder, i.e., his gravytrain was getting ready to pullout of

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[2] The State had to waste a considerable amount of time finding these alleged instances of prosecutorial misconduct, since the defendant has not used the proper record cites.

town (see Point VII below), and the trial court properly denied the defendant's objections (T.2401-02).

The defendant next refers to comments, during a bench conference, in which the prosecutor described pieces of metal found in the defendant's german safety box as being parts of a silencer. The defendant gives no record cite whatever, which is indicative of how trivial his presentation is on this point (T.2828-2831). The prosecutor had no intention of introducing those pieces of metal, whether they were pieces of a silencer or not, and the only reason they came to the Court's attention was defense counsel's claim that he had not seen the entire contents of the box in which the metal pieces were contained.

As to the fact that Det. Lonergan and prosecutor Digregory were shown the defendant's apartment by Ofc. Wenk of the Lorrach police, the fact is that even if a fresh warrant had been required under german law (Det. Schlieth testified the Lorrach police relied on the authority of the first warrant for their subsequent searches, T. 1467), nothing was seized after the initial search (T.1462-73), and the defendant has not even attempted to link this allegedly illegal search with any evidence presented at trial.

Also at p. 76 of his brief, the defendant alleges that the State told the trial court that the defense had seen documents from the defendant's apartment which the defense

represented it hadn't seen. What actually occurred (T.3026), as will be developed under issue III below, is that the documents were in boxes which the german police brought here on two occasions, and which defense counsel had the opportunity to inspect both times.

As for the prosecutor's question to Ofc. Schlieth concerning whether the documents seized from the defendant were admissible in a german court, the defendant has again graciously omitted any record cite, and the State could not locate this question. The State would add that Mr. Baur was not qualified as an expert in german law (T.809-834) because he had absolutely no qualifications in that regard.

As to the prosecutor's questioning of the State's gunshot residue expert, Mr. Rao, the prosecutor did have the abominable nerve of asking Mr. Rao a leading question on redirect, and defense counsel's objection was sustained (T.3664). The prosecutor stooped so low as to ask his expert another leading question further on (T.3675), to which an objection was sustained. The prosecutor also asked an argumentative question (T.3665), and sin of sins, a repetitious one (T.3677), to which objections were sustained. There were no other objections during redirect examination.

As to the first segment of Mr. Rhodes testimony cited at p.77 of the defendant's brief (T.3763), there was no defense

objection. 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.

The defendant's next point raised was the prosecutor's "I don't know that we need to go any further ..." (T.4133, 34). In terms of background, prior to Sykowski's testimony the prosecutor informed the trial court that Sykowski's life would be at risk if it was revealed that he was an informant in an ongoing federal investigation (T.3968-71), so the trial court instructed defense counsel not to question Sykowski about assistance he is providing in ongoing cases. During cross-examination defense counsel asked, "And this information you're giving the federal government in hopes of helping yourself, where did you get the information from" (T.4133), and this triggered the prosecutor's objection.

The prosecutor obviously should not have added "... because it may endanger Mr. Symkowski," which is why the defendant's objection and motion to strike were granted. However defense counsel did not move for mistrial. Also, there is absolutely no way in the context of this case that the jury would infer that the danger to Symkowski came from the defendant, and indeed the defendant does not even try to make that argument. Whether the jury would have thought that defense counsel was indifferent to Symkowski's fate is unknown, though

the jury was certainly aware from the tenor of his cross examination that defense counsel was not going to be inviting Symkoski over for dinner anytime soon.

On p.78 of his brief the defendant first raises an incident in which the prosecutor asked the interpreter to repeat the last word of the defendant's answer, which was the word "perjury" (T.4292,93). Perhaps the interpreter, who had lost her voice at one point during the trial (T.3022), had trailed off a bit or perhaps the prosecutor was trying to start his cross-examination a bit prematurely. Whatever the case, there was no objection.

The defendant next cites an episode during the direct examination of the defendant (T.4372, 73), where the defendant was in the process of explaining why his "no" answer (to the "ever been convicted of a felony" question on the gun purchase form) was not a lie. Defense counsel apparently detected disbelieving looks from the State's table, and the court admonished the State to stop "any show of emotion or any facial expressions." There was no request for a mistrial, nor was there any elaboration by defense counsel as to the nature of his complaint.

Finally, the fact that the trial court referred in its admonishment to facial expressions and shows of emotion does not suggest, as the defendant implies, that he actually saw

anything. During an earlier portion of the defendant's direct (T.4302, 03), defense counsel had made the same objection when the defendant was describing how he got oil from his Nigerian connection at $2.00 a barrel under the OPEC price. The trial court said he didn't see anything, but as a precaution he added "and no facial expressions." Obviously the trial court assumed defense counsel was referring to facial expression on both occasions, which is about all defense counsel could be referring to. What is most interesting is that neither objection states what the prosecutor was actually doing.

At the top of p.79 of his brief, the defendant refers to the State's cross of the defendant relative to the blood on the blanket, which Mr. Rhodes had testified was either aspirated or high velocity blood splatter. Since the defendant testified on direct that the blood was from Hercule's bleeding stitches, and since bleeding stiches produce stains, not aspirated or high velocity splatter, the prosecutor was attempting, via a facitious question, to highlight this inconsistancy. In any event there was no objection. (T.4620, 21). As to the following question, concerning why the defendant would carry a bloody dog in a blanket, then bring it on vacation to the United States to use as a beach blanket without washing it during the three month interim, the State will plead "reductio ad absurdium," at least as far as the defendant's version of events is concerned. Again, no objection.

The defendant's next beef is the prosecutor asking a repetitious question, and then responding to defense counsel's objection with "If I could get a straight answer, I wouldn't have to" (T.4656, 57). First of all, as to the prosecutor's "straight answer" response, there was no objection nor motion to strike. As to the repetitious nature of the question, the objection was sustained. Finally, as to the prosecutor's "You a little warm, sir?" quip, there was no objection from defense counsel.

On p.80 the defendant relates an "I didn't think so" comment that the prosecutor improperly tacked on to one of the defendant's anwers (T.4689). This comment was clearly improper, the objection was sustained, and a motion to strike was granted. There was no motion for mistrial, which is completely understandable given the minor nature of the impropriety especially when viewed in the context of a hotly disputed four week trial.

As for the prosecutor being "in the witness box," Mr. Digregory may be small, but he's not <u>that</u> small. (T.4694).

As to the prosecutor's "Judge if he wouldn't keep coming up with these answers ..." comment, which was in response to a defense objection, such comment was improper, a motion to strike was granted, and there was no motion for mistrial, which again is understandable given the minor nature of this violation. (T.4704).

As for the prosecutor asking the defendant about his dinner invitation to Ms. Shreenan, apart from the fact that it appeared to be one of the lighter moments in the trial, there was no objection. (T.4707).

The prosecutor did ask a compound question, to which an objection was sustained (T.4712-14), but there was no objection to his "suddenly remembered" question (T.4719).

The prosecutor ended his cross-examination by stating "I have no further use for this witness." (T.4734), which was certainly an improper thing to say, which is why defense counsel's objection was sustained and a motion to strike granted. There was no motion for mistrial, which again is understandable given the minor nature of the impropriety, and that the instant rebuke by the trial court was sufficient.

During recross the prosecutor asked two argumentative questions, including the "You seem to have no trouble with Mr. Carhart when he went through those lines" question, (T.4764-4766) and the objections were sustained, however "those lines" were referring to the passages in Sgt. Matthews report which defense counsel had questioned the defendant about on redirect (T.4747-4751), and was <u>absolutely</u> not an attempt to portray the defendant's testimony as rehearsed lines.

Near the end of his recross, the prosecutor stated "Do you think this is funny, Mr. Reichmann" (T.4777). There was no objection from defense counsel, but the trial court called time. out, excused the jury and stated:

> **THE COURT:** Gentlemen, this is breaking down and becoming a shouting match now and I will have no more of it. I will have no more smart remarks. I know you're tired. We've been at this for four weeks. We haven't got far to go. Both of you are competent talented lawyers.
>
> I don't want to get rough with anybody in this courtroom, but I expect good competent lawyers to act like good competent lawyers. Let's get ahold of ourselves.
>
> If we need a rest, we'll take a short break and then we'll proceed, but I don't want anymore remarks from Mr. Carhart or from the State, remarks or each other mimicking one another or talking sharp to one another. I hope that is understood.
>
> Bring in the jury.
>
> (T.4777, 78).

Defense counsel had certainly gotten his own licks in during this heated contest, stating:

> **MR. CARHART:** They moved too quickly, wrecklessly, in violation of rights and law and of common sense. This case is an absolute disgrace. It rests on --
>
> **THE COURT:** Mr. Carhart, it is of no consequence to argue a motion like that to me because it is only part of record and if there is a conviction, the appellate court wouldn't pay attention to that at all.
>
> (T.4575, 76).

Maybe so, but it certainly is indicative of the heated nature of this proceeding.

As his final point, the defendant challenges the State's argument, during closing, that the jury had two alternatives, the defendant's version or State's version. (T.5006). There was no defense objection, and those were indeed the jury's choices.

The State asserts that the following are the only instances cited by the defendant which clearly involved improper conduct, and to which an objection was made:

> 1). The prosecutor's objection during cross-examination, which included a reference to possible dangers to Symkowski if forced to discuss his current activities as a Federal informant. (T.4133).
>
> 2). After one of the defendant's answers, the prosecutor stated "I didn't think so." (T.4689).
>
> 3). In response to a defense objection, the prosecutor stated "... Judge, if he wouldn't keep coming up with these answers. ..." (T.4704).
>
> 4). The prosecutor ending his cross-examination of the defendant with "I have no further use for this witness." (T.4734).

As to each of these, an objection was sustained and a motion to strike granted. That is all counsel asked for, and he cannot now seek reversal because he did not move for mistrial. Clark v. State, 363 So.2d 331, 335 (Fla. 1978), Brown v. State,

550 So.2d 527 (Fla. 1st DCA 1989), Wilson v. State, 549 So.2d 702 (Fla. 1st DCA 1989). Obviously, trial counsel felt that the trial court's rebuke of the prosecutor was sufficient, and indeed this Court has repeatedly held curative instructions sufficient in circumstances far more egregious than occurred here: Buenoano v. State, 527 So.2d 194 (Fla. 1988), (references to defendant having torched the victim's home to collect insurance money, a crime not charged in indictment, cured by instruction to strike and disregard), Staten v. State, 500 So.2d 297 (Fla. 2d DCA 1986), (comment that defendant had been in jail for another offense cured by instruction), Johnson v. State, 486 So.2d 22 (Fla. 1st DCA 1986), (comment that witness thought defendant had pled guilt to crime charged could have been cured by instruction), Irizarry v. State, 496 So.2d 822 (Fla. 1986), (reference to defendant's polygraph test cured by instruction), and Davis v. State, 461 So.2d 67 (Fla. 1984), (same).

Finally, the case of Gonzalez v. State, 450 So.2d 585 (Fla. 3d DCA 1984), cited by the defendant, involved gross misconduct, including asking the defendant in a robbery prosecution how his children felt about his cocaine habit, which is nowhere present herein. What the defendant has in fact done here is scan four weeks of trial and thrown together ever conceivable instance where the prosecutor asked an objectionable question or otherwise committed a faux pas, however slight, regardless of whether there was an objection, in the hopes of convincing this Court that some great injustice has occurred.

The State respectfully submits that in any hard fought four week trial the prosecutor, a human being, will inevitably make mistakes, ask some improper questions, maybe let slip a few snide comments in the heat of battle. In this case, in each instance where this occurred and an objection was made, the prosecutor was appropriately rebuffed by the trial court. That is where the matter should end.

III.

THE DEFENDANT WAS NOT DENIED A FAIR TRIAL DUE TO ALLEGED STATE DISCOVERY VIOLATIONS.

There was no discovery violations by the State. What the record shows is that the german police collected a large box of evidence from the defendant's apartment and safety deposit boxes. Because the german police were conducting their own investigation, they would not relinquish physical control of the contents of the box, and because the defendant forbid defense counsel from travelling to Germany, he could not examine this evidence until the German police arrived for depositions, when he and the defendant were allowed full opportunity to inspect the contents. Defense counsel then had a second opportunity when the german officers came over for the initial trial date, which was postponed. The German police had found photos of thirty-seven people in the defendant's apartment, tracked down and interviewed all thirty-seven, and provided the State (which in turn provided the defendant) with reports of interviews with ten of them, the

German police having determined that the other twenty-seven had no useful knowledge. (T.651-667, 687, 694, 698-706, 747, 751-753, 755, 1086).

During the trial testimony of Detective Wenk of the Lorrach police, defense counsel complained he had not seen some of the documents in Wenk's possession. (T.2100-2800). The trial court decided to settle the matter with a Richardson hearing. (T.2810). The court heard from defense counsel (T.2810-14), and the prosecutor responded (T.2814-17), stating that defense counsel had access to all the documents on two occasions (T.2817). After lengthy discussion about individual items (T.2818-2839), the trial court ruled that there was no discovery violation because the defendant had full access to all the documents (T.2840-42), a ruling which was totally supported by the evidence.

In short, the defendant's meritless argument is just another attempt to portray the prosecution of the defendant as a ruthless juggernaut bent on smashing the bastions of due process in an all-out effort to convict an innocent man. That is simply not the case.

IV.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE.

The first article of evidence discussed in the defendant's brief is the hand swab evidence. The trial court ruled that the

defendant consented to the swabs (T.1591), and that ruling is supported by overwhelming evidence. It may be true that the defendant testified the Detectives physically grabbed his hands and forced him to take the test (T.778-80), but this version of events is directly contradicted by all the Detectives.

Sgt. Matthews testified that he explained to the defendant what the test consisted of and its purpose, and that when he finished the defendant put out his hands and said "go ahead, do it, no problem," or words to that effect. (T.1047-1049). Detective Hanlon observed the test and stated that no one pulled the defendant's hands or otherwise forced the defendant to take the test. (T.1368). The trial court as trier of fact believed the officers and disbelieved the defendant, and that ruling carries with it a presumption of correctness. Wasko v. State, 505 So.2d 1314, 1316 (Fla. 1987), and cases cited therein. Additionally, contrary to the defendant's contention, the standard of proof is preponderance of the evidence. Deneby v. State, 400 So.2d 1216 (Fla. 1980), State v. Angel, 547 So.2d 1294 (Fla. 5th 1989), and Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA 1987). Under either standard, the trial court's finding was proper.

The defendant next cites the three firearms and ammunition seized from the defendant's Tahiti Hotel room. The trial court held that the defendant consented to the search of his Tahiti room. (T.1553). This factual finding was, again, overwhelmingly

supported by the evidence. The defendant testified the police never asked him for permission to search his Tahiti Hotel room for his firearms. (T.871). However Det. Pslatides, who spoke german and was summoned as interpreter until it became clear the defendant spoke adequate English, stated that when he asked the defendant if he owned a gun, the defendant said in English he did, it was in his hotel room, and then immediately volunteered to take them to his room to see the guns; "go ahead to my room, I'll take you there." (T.1208, 1209). The defendant was then presented with a consent to search form, and although the defendant would have none of the form he stated "I'm not signing, but go ahead and search," and "go ahead, search, go ahead. (T.1213-15).

Detective Trujillo said that when he asked the defendant if he could see the gun, the defendant said "sure," and then later when shown the form stated "You have my permission, you can go in and get it. I don't need to sign no papers." (T.1268-1273). Detective Hanlon was present when the defendant was shown the consent to search form, and heard the defendant say to go ahead and search, but he wasn't signing any papers. (T.1371). Detective Matthews stated that although they went ahead with the warrants anyway, the defendant had already told them to go ahead and search his room, but he wasn't signing anything. (T.1169).

In sum, there exists a wealth of evidence supporting the trial court's finding of consent. As far as the warrant to

search the room, the court found it was supported by probable cause. (T.1553). The warrant (R.170) recites that the defendant flagged down Ofc. Reid, had his dead girlfriend in the car, that he was a German tourist who spoke no English, that communication had been difficult, but that he said he had a firearm in his room at the Tahiti Hotel. The State asserts that these facts are just barely enough to establish probable cause. After all, they're together in the car, she's dead of a gunshot wound, and he has a gun in a hotel room a few miles away, and due to a language barrier, cannot provide a coherent explanation of what happened.

Assuming arguendo that the warrant lacked probable cause, Detective Lonergan, the affiant, definitely acted in good faith. Lonergan testified his primary function that night was to prepare the warrants. They were his first warrants, and he sought the help of the on duty Assistant State Attorney in preparing them. (T.1334-37). At the scene he heard the defendant say he only spoke thirty words of English, and Ofc. Reid, the first officer to speak with the defendant, told him the defendant only spoke German. (T.1361). There is absolutely nothing in this record to suggest any bad faith on Lonergan's part, and hence the good faith exception of United States v. Leon, 468 U.S. 897 (1984), should apply. This Court need not reach this point, however, due to the trial court's amply supported findings on consent.

The defendant expends a single sentence on the search of the trunk of the murder vehicle, which is appropriate, given that

the search was justified on four grounds: first, as found by the trial court (T.1553), the car was part of the crime scene and subject to immediate impoundment and search. For all the officers knew, the truck could have contained another dead body, a live body, the infamous "smoking gun," another projectile, etc.

Secondly, as also found by the trial court (Id.), the search warrant clearly set forth probable cause (R.161-164), as it attested to the fact that the victim's bloodied body was found in the passenger seat of the car. The car couldn't help but contain evidence of a crime.

Thirdly, the search was a valid inventory search subsequent to the impoundment of the vehicle. Finally, the defendant consented to the search, as Det. Psaltides testified that the defendant not only consented but actually volunteered to allow the search even before being asked. (T.1209).

As for the Howard Johnson's search, the State conceded the judge had not signed the warrant where needed, and nothing from that search was admitted at trial. (T.1520). In addition no relevant items were seized, except of course the "ideas" to which the defendant keeps referring.

As the defendant correctly notes, most of the physical evidence was seized by the german police, from the defendant's german apartment and german safety deposit boxes based on

warrants from a german magistrate, all of which occurred during the murder investigation by the german police, with the subject of the investigation, the defendant, being a german citizen. The exclusionary rule simply does not apply to the seizures by the german police. United States v. Verdugo-Urquides, 494 U.S. ___ 108 L.Ed.2d 222, 110 S.Ct. ___ (1990), which was one basis for the trial court's ruling below, the second being that the defendant failed to show the german police acted improperly under german law. (T.1579). For prior Federal cases holding the exclusionary rule inapplicable in similar situations, see the State's argument at the suppression hearing. (T.1564-1574).

V.

THE TRIAL COURT DID NOT ERR IN ALLOWING HIS GERMAN CONVICTIONS AS IMPEACHMENT EVIDENCE AND IN DENYING A REQUESTED INSTRUCTION REGARDING SAME.

As to the proposed jury instruction, which was never presented to the trial court in written form, the defendant does not reveal in his brief the content or location of the orally proposed instruction, and with good reason. The proposed instruction reads as follows:

> **MR. CARHART:** If the Court is going to let that in, prior convictions in, I would ask for limiting instruction at the time such evidence is introduced. That is, that the jury may not use such convictions as evidence against Mr. Reichmann as to his guilt or innocence in this case.
>
> It's being admitted solely on the issue of credibility and no other purpose, and they are not to use it to make any

inference that he committed the crime he is charged with in this case.

(T.4275, 76).

The above proposed instruction is a massively inaccurate statement of the law. Had the instruction stated, as the defendant implies it did at p.91 of his brief, that the jury should not consider the prior convictions as proof that the defendant had a propensity to commit crimes, or something similar, the defendant might have a point. That is not how the proposed instruction reads. Rather it states that the prior convictions cannot in any way affect the jury's determination of guilt, and that is pure rubbish. If the jury finds the defendant not to be credible, based in whole or in part on his prior convictions, and they therefore elect to disbelieve his denial of involvement in the crime, the natural probable and absolutely permissible inference is that the defendant committed the crime. The proposed instruction would in effect negate the use of prior convictions to impeach criminal defendants who elect to testify. It was a totally inaccurate instruction which was properly denied by the trial court.

As for the prior convictions themselves, the defendant was convicted of car theft in 1967, manslaughter by negligent bodily injury in 1973, document forgery in 1976 (6 months probation) and solicitation of perjury in 1977 (T.4449-58), and he received a 2 1/2 year sentence, part of which he spent in prison and part on probation. (T.4696).

The first point worthy of mention is that even under Fed.R.Evid. 609(b), the convictions would be within the ten year limit, as the ten years does not begin to run until the most recent sentence has expired. The second point is that three of the defendant's prior convictions, and in particular the forgery and perjury convictions in 1976 and 1977 respectively, are extremely germane to the issue of the defendant's credibility. The third point is that there was abundant evidence, including the three loan applications listing a false occupation which the defendant executed 2/27/84, 1/2/86, and 6/19/87 (T.4663-67), his obtaining a false earnings certificate from Ernest Steffan (T.4655), his arranging a bogus marriage so that the victim could obtain a Swiss passport (T.2708, 2709), etc. See Braswell v. State, 306 So.2d 609 (Fla. 1st DCA 1975). The State's final point is that the issue is one entrusted to the trial court's discretion, Taylor v. State, 190 So. 691, 694 (Fla. 1939), and see Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965), and the trial court here acted well within its discretion.

VI.

THE DEFENDANT'S CONVICTIONS AND SENTENCE SHOULD NOT BE REVERSED "IN THE INTEREST OF JUSTICE."

The State is not quite sure what this claim is all about, but will address each of the new matters raised therein.

Juror Sabatino was dismissed by the trial court because the trial court determined, after an evidentiary hearing, that he had discussed the facts of the case, and his opinion as to guilt/innocence, with a spectator during the State's case in chief. (T.3993-4092, 4189-4210). The court heard extensive testimony from two witnesses, Mr. Benyunes and Mr. Van Neusan, that juror Sabtino violated his oath in major fashion, and the court acted appropriately and totally within its discretion in dismissing Sabatino.

As for the fact that defense counsel had suffered a leg injury, such was certainly unfortunate for Mr. Cahart, but the defendant has not shown or alleged how this affected his representation of the defendant in any manner whatsoever.

As to the mysterious bench conference (T.2492), the prosecutor asked the trial court for a brief bench conference while the jury examined a photograph. Defense counsel was present, and did not request a reporter, and obviously the discussion concerned scheduling or other housekeeping matters. This point is so trivial the State finds itself at a complete loss for words.

As to the clicking cameras, the State cannot locate where this occurred, although in its initial reading of the transcript there were approximately two occasions (click, click) where defense counsel complained. Perhaps if the defendant were kind

enough to provide record cites the State would be in a better position to respond. In any event, as the State remembers, the trial court took corrective measures on both occasions, and that was all the situation required.

As for the federal firearm form, that was presented by defense counsel on direct examination (T.4372), and the defendant's firearms charges and aquittal in federal court thereon were totally irrelevant.

As for the filthy magazine, the defendant again provides no record cites, and the State cannot now locate where the issue arose, however the State distinctly remembers that the magazine contained an advertisement of the victim listing the name Yvonne and a phone number, with a picture of her in a bathing suit with her face blacked out, which was identical to a picture of the victim in the defendant's apartment. The State's purpose in admitting (or attempting to admit) the magazine was to verify the victim worked as a prositute, which was relevant to their theory of motive, see below under Point VII.

As for the defendant's claim under Caldwell v. Mississippi, 472 U.S. 320 (1985), the court read the standard instructions, which this Court has repeatedly held do not violate Caldwell, but rather express an accurate statement of Florida Law.

In sum, none of the new matters raised under Point VI have any merit whatsoever.

VII.

THE EVIDENCE OF GUILT WAS LEGALLY SUFFICIENT.

This Court recently revisited the issue of circumstantial evidence in Duckett v. State, 15 FLW S439 (Fla. September 6, 1990), reaffirming the longstanding rule that where evidence of guilt is circumstantial, the State must demonstrate that the evidence presented is inconsistant with any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629, 631 (Fla. 1956). In Duckett this Court weighed six factors indicating guilt and contrasted it with three factors the defendant argued represented a reasonable hypothesis of innocence, and concluded that the factors relied on by the defendant did not raise any hypothesis of innocence "given the total circumstances in this case," Id. at 441. And therein lies the key to the instant case, because it is by a close examination of the total circumstances of this case, that the nonexistence of a reasonable hypothesis of innocence becomes apparent.

Before discussing the facts, it is important to emphasize that in any sufficiency of the evidence claim, the reviewing court must assume the trier of fact resolved all factual conflicts against the defendant:

> As we stated in *E.Y. v. State,* 390 So.2d 776, 778 (Fla. 3d DCA 1980):

> In our appellate posture, we must assume that the trier of fact "believed that credible testimony most damaging to the defendant and drew from the facts established those reasonable conclusions most unfavorable to the defendant." *Parrish v. State,* 97 So.2d 356, 358 (Fla. 1st DCA 1957), *cert, denied,* 101 So.2d 817 (Fla. 1958). See also, *Jefferson v. State,* 298 So.2d 465 (Fla. 3d DCA 1974). Consequently, this court will not substitute its judgment for that of the trier of fact nor pit its judgment against those determinations of fact properly rendered by the trier of fact. *State v. Smith,* 249 So.2d 16 (Fla. 1971). All conflicts and reasonable inferences therefrom are resolved to support the judgment of conviction. *Wooten v. State,* 361 So.2d 167 (Fla. 3d DCA 1978); *Dawson v. State,* 338 So.2d 242 (Fla. 3d DCA 1976); *Starling v. State,* 263 So.2d 645 (Fla. 3d DCA), *cert. denied,* 268 So.2d 905 (Fla. 1972).
>
> Way v. State, 418 So.2d 1227 (Fla. 3d DCA 1982).

As this Court stated in McArthur v. State, 351 So.2d 972, 976 n.12 (Fla. 1977), the version of events presented by the defense need not be believed where the circumstances show it to be false.

In this case the State presented a wealth of physical, documentary and testimonial evidence, and the State has taken great pains to set out this evidence above, and implores this Court to review that recitation, and 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. The State will now review the evidence as succiently as possible.

In terms of physical evidence, the State presented forty .38 cal., 110 grain, silver tipped bullets taken from the defendant's hotel room, which were identical to the bullet that shot the victim. Only three types of weapons, a.38 astra, .38 tauras, or .38 F.I.E. derringer could have fired the fatal shot, and the defendant had two of these in his possession, and although neither was the murder weapon, it shows a distinct preference for those weapons, and the defendant told Symkowski that he had another weapon that the police never found.

The defendant had numerous gunshot residue particles on his hands, and the State's expert testified the number and type of particles was consistent with firing a gun or handling a gun, and equally important, that the defendant's hands would not have that many particles if he had been seated in the car while a gun was fired into the vehicle through the passenger window.

The State's serologist testified that the blood evidence was inconsistent with the drivers 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 wound) on the driver's door could not have gotten there if the driver's seat

was occupied. The defendant himself had no blood splatter on his clothing, but rather only blood stains. And obviously, the 23 specks of blood splatter/aspirated blood (but definitely not blood stain, which is the type bleeding stiches on a dog would leave) could not have gotten on the face-up portion of the blanket had the defendant been sitting thereon.

As for motive, the defendant had amassed over 1.7 marks of life insurance on the victim's life. The defendant claimed he only thought the victim was insured for 440,000 marks, yet the defendant purchased all but the victim's two small policies, payed the premiums, had a handwritten list of the policies in the trunk of his car, and claimed the proceeds as to each and everyone. At his initiative the victim changed the beneficiary of her two 20,000 mark policies from her parents to the defendant. The defendant had told Ernst Steffan he received training as an insurance agent. Symkowski testified during their two months together the defendant was overjoyed at the prospect of becoming a millionaire. And when Symkowski asked the defendant why he killed his girlfriend, the defendant turned white as a ghost and never answered. The defendant and victim executed recipricol wills just prior to departing for the United States. Again, the State urges this Court to review this evidence with a fine tooth comb.

The State presented witnesses establishing that the defendant was the victim's pimp who lived off the victim's

earnings as a prostitute, and maintained an expensive lifestyle thereon. When the victim's earnings tapered off in Hamburg, the defendant arranged a bogus marriage to a Swiss citizen so the victim could work in Switzerland. But something happened. In 1986, the victim decided she didn't want to be a prostitute anymore. From June of 1987 until they departed for the United States 10/1/87, the victim's earnings plummetted because she was too sick to work. She missed countless appointments and could not even meet the rent. She constantly repeated her desire to quit. During that three month period, Dina Mochler testfied that defendant and victim had a difficult relationship and fought often, with the defendant verbally abusing the victim and acting disdainfully toward her. It is a large picture, but it must be painted in full.

It is now time to turn to the reasonable hypothesis of innocence propounded by the defendant, that a mysterious black man shot his girlfriend when they got lost, while he was seated in the driver's seat. As stated above, this is inconsistant with the physical evidence. Secondly, the version the defendant gave the police at the scene, and at the station two days later (10/28) is totally devoid of virtually any detail, and indeed on 10/28 he could not remember facts he had given the police at the scene. Yet at trial the defendant remembered his activities prior to the shooting like it was yesterday, going so far as to say he could recognize the man if he saw him. The defendant describes a totally different route from bayside than he told the

officers at the scene and during their first drive-around, and adds a million facts he couldn't remember 10/18 because on 10/28 he was in "aftershock."

The State could outline all the points during the defendant's testimony where he claimed various state witnesses were lying, and provided an alternative description of events. One of the jury's primary tasks was to evaluate the defendant's credibility, and it is absolutely necessary to review the defendant's entire testimony to experience how a reasonable juror would feel about the defendant's version of events. The State is certain of one thing, however; the jurors were absolutely entitled to disbelieve the defendant, because not only was his testimony at odds with the state's physical, testimonial and documtary evidence, it spewed from the mouth of a man with the credibility and moral turpitude of a snake, as demonstrated on both direct and cross-examination.

In sum, a review of all the circumstances in this case reveals the glaring absence of any reasonable hypothesis of innocence, and the defendant's sufficiency of evidence claim should thus be denied.

SENTENCE

The defendant is so confident of victory in the guilt phase, he has not raised any sentencing issues. There was no

evidence presented at the sentencing phase. (T.5250). The trial court found two aggravating factors, pecuniary gain and cold, calculated and premeditated, and that no statutory or nonstatutory mitigating factors existed. (R.592-601). The State submits that this execution for big-time profit qualifies for the two aggravating factors found, and that the murder is not disportionate, as in such cases as Blakely v. State, 15 FLW S276 (Fla. May 3, 1990), and cases cited therein. Those cases involved heated domestic disputes, with emotions run amok providing the impetus for murder. Here, the impetus was the impending loss of a free lunch, combined with the prospect of dinner at the Ritz.

CONCLUSION

The conviction and sentence are proper, and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **LEE WEISSENBORN**, Oldhouse, 235 N. E. 26th Street, Miami, Florida 33137 on this 10 day of October, 1990.

RALPH BARREIRA
Assistant Attorney General

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