IN THE SUPREME COURT OF FLORIDA

CASE NO: 73, 492

DIETER RIECHMANN,

APPELLANT,

vs.

STATE OF FLORIDA,

Appellee

/

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

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

The following symbols and abbreviations will be used: "def." for appellant; "Kersten" for deceased Kersten Kischnick; "State" or "Prosecutor" for appellee; "MBP" for Miami Beach Police Department; "MDPD" for Metro Dade Police Department; "MCC" for (Miami) Metropolitan Correctional Center, a federal prison; "ATF" for U.S. Bureau of Alcohol, Tobacco and Firearms agency; "ASA" for Assistant State Attorney; "SA" for State Attorney's office; "Indian Creek" for place where defendant hailed police; "Defense." for defense counsel; "R" for record; "T" for transcript;"SW" for search warrant; and "MB" for Miami Beach. Other abbreviations will be used which would be clearly understandable. "Station" refers to Miami Beach Police Station; "Germans" refers to German police. All references to dates refer to the year 1987, unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

Def. was charged with the premeditated 1st degree murder of Kersten with a handgun on Oct. 25, 1987, and of possession and displaying a firearm during the commission of a felony. After filing discovery motions, followed by a motion to compel production of various documents and things, the defense complained that hundreds of documents and photos "had not been given or exposed" to him until "this week" (T-6/3/88-60,61). State announced it was seeking the death penalty (T-6/3/88-71).

The court heard def's motion to suppress physical evidence, which sought suppression of: prints and swabbings of the def's hands; a gray Energizer flashlight State claims was in the trunk of the car; a paper listing possible insurance companies; bullets found in def's room at the Tahiti Motel; items seized from def's room at the Howard Johnson's; and papers, photos, insurance policies and other items seized from the def's residence and the bank safe deposit boxes in Germany (R-87-89,92; T-7/5/88-23).

At the suppression hearing, def. called MBPD Sgt. Cummings who testified: that when he arrived at "Indian Creek", the place where def. hailed MBP Officer Reid, he instructed Reid to put def. into the rear of a police vehicle and to pat him down; that MBP

Sgt. Matthews told him he wanted def. transported to the station and he was placed in the rear seat of a caged vehicle; that he told two officers to stay with def. until relieved; that although no handcuffs were placed on def. and and he was not told he was under arrest, he was patted down at Indian Creek and placed in a cell at the station; and that def. was "...nervous...upset...was shaking" (T-7/5/88-26-30).

Def. testified: he was 44 years old; that he had stopped his car, "and block the way the police car was coming.....and....jumps out of my car and asked for help"; that he tried to go back where Kersten was in the car "many times" but the police prevented this by exercising "soft force"; that an officer pulled his hand forward and said he had to submit; "and then they going with this Q-tip here back on my ring hand"; that he gave no permission to swab his hands and that no one showed him a warrant to search or arrest him; that although no one read him the Miranda rights at the scene the police asked whether he possessed any firearms and he told them he did; that no one asked whether he would give permission to be taken to the station; that he was put in a holding cell and told he was under arrest; that he remained locked up 4 to 4 1/2 hours; that when he was let out Sgt. Matthews told him he was sorry he had been put there and that it had been done because "other detectives" suspected him of killing Kersten; that Matthews wanted a detailed statement concerning what had happened and did not read him Miranda rights; that Matthews took him out of the cell at 3:00 a.m., on Oct. 26th, and questioned him for about an hour; that 3 detectives then drove him to his room at the Tahiti Motel; that he told them he had firearms there and they took 3 guns and 40 rounds of ammo; that the officers also confiscated his clothes, told him he was not allowed to leave the motel until further notice, and seized his German passport, German and Fla. driver's licenses, and other personal papers, plus his room key; that he did not give them permission to go into the trunk of his car or to take anything out of his car but Kersten; that the MBP took him driving the night of Oct. 26th "to find out where the shooting occurred" and he said they questioned him again about the details of the earlier evening, while riding around for a few

hours and thereafter at the station; and that no Miranda rights were read to him (T-7/5/88-43-56). Def. further testified: he saw the police again on Oct. 27th and 28th when Matthews picked him up at the Howard Johnson's on Biscayne Blvd. to which he had moved; that Matthews "promised to bring me to Kersten" but instead he took him to the station where they questioned him another 7 or 8 hours; that he asked Matthews many times, "what is going on with my girlfriend, is she dead or alive"; that 7 to 8 hours of questioning took place on Oct. 29th, and that he did not know that such was being taped and he was not read Miranda rights; that on October 29th, he was arrested by ATF agents; that he was placed in a cell at MCC with another inmate, W. Symkowski, whom he did not know was an informant, which occurred after he had been to a federal bond hearing where a court appointed lawyer represented him; and that he never gave anybody permission to enter his German apartment and safe deposit boxes or to enter his Howard Johnson's room (T-7/5/88-56-73).

Def. then called T.Baur, a Miami atty., who said he studied law in Germany, Switz. and Miami and that he had law degrees from all 3 countries, and who described himself as an expert in German law who was certified in translation, but the court refused to declare him an expert on Ger.crim. law (T-7/5/88-75-101-102). Def. was recalled and testified: that he told Matthews on Oct. 27th, of his interest in using Baur and that Matthews told him he didn't need a lawyer; that he couldn't get out of the police vehicle because it was surrounded by officers; and that he "was under shock .. confused .. (and) .. didn't know what was going on .. (and) it was an impossible situation" (T-7/5/88-102-104).

One of the questions put to the def. by the State was:

> "And as you told Mr. Carhart, more and more police officers began to arrive at the scene of this horrible crime." (T-7/5/88-118)(emphasis added)

Def. said he didn't know what MBP were doing when they were messing with his hands; that he had never heard of the "swab test;" and that the ownership of guns was

prohibited in Germany (T-7/5/88-119-125). State inquired whether he had any "magazines or documents which instruct one in German how to build a silencer" to which the def. answered in the negative (T-7/5/88-129,130). Def. testified: that MBP Det. Trujillo spoke to him in English at the scene, but that his responses "really didn't come out in such a fluent manner at all"; that MBP Officer Psaltides was attempting to serve as a German-English interpreter but his German was "a catastrophe"; that he refused to sign a "consent to search" form in English and German; that he never told police they could search his room; that he never gave Trujillo authority to look at his guns; and that he was confused and he had the feeling that no one was taking care of "my girlfriend....in a car critically injured"; that Matthews did not ask him to give the statement but told him to give it; that he didn't know where Kersten was killed and the only place he knew was Bayside; that he drove around with the police on the night of Oct. 26th and that then they took him to take fingerprints and photos of him, "all of this being in the early hours of the 27th of Oct. 1987"; that he called Matthews on Oct. 27th to tell him that Biscayne Blvd. between 40th and 60th Streets looked familiar to him and might have been where Kersten was shot; that Matthews deceived him into coming to the station on Oct. 28th by promising him he could see his girlfriend after the autopsy was completed, when the real purpose was for them to wait for the AFT agents to come arrest him; that Matthews did not read him the Miranda rights on the 28th and that he pretended to have a private conversation with him, but that it was recorded by a hidden mike;that he was arrested and taken to MCC on Oct. 29th; and that he was not arrested by the MBP for murder until after he was acquitted on the federal gun charges (T-7/5/88-135 and T-7/6/88-12-14,26-41).

Defense witness Psaltides testified: he communicated with the German police and advised them the def. was under investigation; he provided them reports of the MBP and they teletyped certain of their findings; he never asked the Germans to search def's apt. or property, but he did ask if such a search could be conducted without a warrant; that he thought he had given defense a copy of the involved telex but when defense

counsel disagreed the State said: "these documents" weren't discoverable; he denied he advised the Germans prior to or on Nov. 4th that MBP considered def. a prime murder suspect but that "they may have inferred...that"; he never told the Germans that def. was a "strong suspect" or a "suspect," but that on Oct. 27th he did ask them to find out information about def. and Kersten; and in response to a State leading question, Psaltides said he first referred to def. as being a "prime suspect" on Nov. 9th (T-7/6/88-56-79).

Defense next called Det. Lonergan who testified: he was at Indian Creek on Oct. 25th; that he went to Germany on Jan. 13, 1988, with ASA DiGregory; that he and DiGregory went to def's German apt. on Jan. 14, 1988, without a search warrant and without permission of def. and that they searched but did not seize anything; that two accompanying Germans removed various items from def's apartment including books entitled "In Cold Blood" and "The Perfect Murder"; and that he asked the Germans to secure insurance information on def. and Kersten (T-7/6/88-82-101).

Defense next called MBP Det. Hanlon, who testified: he interviewed Symkowski and his co-informant Stitzer at MCC; that at the time def. was arrested by ATF on Oct. 29th, he was only "a suspect" concerning the homicide but not a "prime" or "strong" suspect; that Trujillo notified ATF regarding possible federal firearms law violations; that both Symkowski and Stitzer had federal convictions and that they were informants in other cases; that def. was placed in the same cell with Symkowski and that Symkowski told Stitzer and him what def. had said; that def. was represented by counsel in the ATF case; that after def's arrest by ATF, MBP delivered custody of def's firearms, his driver's license seized from his person, hotel records, and "some gun receipts" and "probably" information from the Germans to ATF; and that he and Lonergan both testified in federal court (T-7/6/88-119-135).

State called Matthews as its first suppression hearing witness, who testified: he went to Indian Creek on Oct. 25th after 11 p.m.; that def. told him he didn't speak English; that

def. was not handcuffed and no guns were drawn; that he, Matthews, did most of the talking; that def. said Kersten was dead; that he explained to def. what a hand swab test is and def. agreed to submit; that def. was asked to go to the station because he was the only witness and did so; that he gave no instructions for def. to be placed in a cell; that def. was sleeping in the cell; that he told def. he felt badly about his having been put there; that he never told def. there were other detectives who suspected him and that's why he was put there; that he felt def. was a victim and not a prisoner; and that he and def. spoke in English (T-7/6/88-l56-l77).

Matthews said: he did not read def. his Miranda rights because he was not in custody and he wasn't a suspect; def. described the route he had taken and agreed to drive around with him and did so for a couple of hours; after driving back to the station Lonergan and Trujillo were at the Tahiti with a search warrant and the room was searched; that def. asked if he could go to sleep; that def. removed his clothes and they had never asked him to strip naked; that he awakened def. and told him he had blood on his pants and shoes and def. agreed he could have them examined; that they left def's room at 4:30 a.m. on Oct. 26th; that he returned to the Tahiti that night and they asked def. to drive around again; they drove to Bayside and then drove around; he did not confront def. with any evidence on Oct. 26th; and he saw def. again at the Tahiti on Oct. 27th (T-7/6/88-151-l87).

Matthews said: that on Oct. 27th, def. was taken for another "drive through"; that they drove to a video store on l63rd St., and to a K-Mart where def. had suffered an accident during a prior visit to Florida; that def. could not locate the place where the shooting occurred and said he had absolutely no recall; that they talked at the station but that no Miranda rights were read; that def. willingly submitted to being fingerprinted; that def. was not in custody; that a statement was taken from def. on Oct. 28th, over a 3 to 4 hour period after he was Mirandized; that def. told him he had a lawyer who spoke fluent German; that unknown to him, i.e., Matthews, their conversation was being taped;

that ATF agents arrived at the station and he was told that when they completed their paperwork, he should stop the interview with def.; and that he had no further contact with def. after he was taken into custody on Oct. 29th by the ATF until Dec. 30th at MCC where MBP arrested him (T-7/7/88-22-59).

On cross Matthews said: he did not utilize an interpreter to talk to def. at Indian Creek; that if def. hadn't agreed to submit to hand swabbing that night he would have consulted with "our legal counsel....the State Attorney's office"; that he first advised def. regarding his Miranda rights on Oct.29th and that he didn't know if anyone else did so sooner; that during the Oct. 29th interview, def. wanted to know why he was being asked all the questions; that he told def. "a make believe story," to-wit: that he had had a girlfriend who had fallen off a balcony and who was killed but that the police had thought that he had done it, and that he told this lie to def. because he thought def. would relate to it;that regarding the early morning interview of def. on Oct. 28th, he didn't know of any mention of def. having a lawyer; that def. was hiding behind the language barrier; that he didn't deny that def. was tired and he ageed he told def. he owed an explanation to Kersten's family; that he didn't recall telling def. that if he didn't answer the questions, he'd be arrested but admitted that was "the theme" of what he told def.; that def. objected to the same questions being asked repeatedly; that when he saw def. on Dec.30th, the federal trial was over and he knew def. had counsel there and no one had told him that such counsel had been discharged; that def. signed no rights form on Dec. 30th, or at any other time; and that there was nothing in his Dec. 30th, notes saying def. knew what his rights were (T-7/7/88-68-120).

The next State witness was Psaltides, who was called to Indian Creek on Oct. 25th to assist as interpreter; that def. told him what had happened in German and English combined; that def. "had the appearance of....a smell of alcohol on his breath...(H)e was not overly intoxicated, but he had been drinking...;" that def. said there was a pistol in his room but he didn't know the model and he volunteered to take them to the gun; that def.

said Kersten was dead and "he was quite disturbed about that;" that def. said they could search his car; that def. said "you're the police, you can go ahead and search"; that def. was upset at Indian Creek; that he was not a suspect at the time; that the holding cell was the only place def. could sleep and he told def. that was why he was placed there; that when he got to the station that night, two officers were there but not guarding def.; and that he didn't remember relieving them but that they left the room after he arrived (T-7/7/88-I34-I48).

The next State witness, Trujillo, testified: he secured def's rental car because it was part of the scene and he didn't allow def. to re-enter it; Kersten had a wound to the head and there were blood spatters and brain material scattered in the car indicating a gunshot wound; that he spoke to def. solely in English; that def. said he didn't know what happened and he described "an explosion in his head"; he did not read the Miranda rights to def. because he was a witness; that def. described getting lost after he left Bayside; that the explosion occurred after he stopped and asked a black male for directions; that def. spoke in English and German and that he had no difficulty understanding him in English; that he decided to run a hand swab test on def. to determine "whether he had any form of element that is consistent with firing of a firearm" and he did not discuss the scientific aspects of this test with def.; that he saw blood on def's hands and on his clothing; that he initiated the conversation with def. wherein def. said there was a firearm in his room; that SW proceedings were started on Oct. 25th at Indian Creek by police and a SA's representative; that he went with Lonergan to sign the warrant; and that thereafter executed the warrant on the trunk of the car because nobody had previously looked in the trunk, because "maybe we'll find another body or whatever," and because he wanted to be on the safe side; that the car was secured at the station before they searched the trunk; that they found a video tape camera in the trunk which "was of interest to us"; that he said he saw def. on Oct. 27th, for another drive around, and he said the def. "kept indicating he wanted to help us find this location and who did

it"; that he never read Miranda to him before he was arrested by the ATF; and he said he never heard def. request an attorney until after the ATF arrest (T-7/8/88-25-64).

On cross Trujillo testified: he began to suspect def. at Indian Creek because of his body English; that they opened the trunk of the rental car with the key thereto which Lonergan got from the case file and that he made no list of items found there, including a large flashlight; that "we" went to MCC after def's ATF arrest and he told him he didn't want to talk to them; that he then sat next to def. and told him, "...listen to what I have to say first..."; that he then told def. he wanted the key to def's locker (at MCC) so he, i.e., Trujillo, could make copies of papers in there; that def. said "he didn't want to talk because he had an attorney"; that def. didn't open up his locker but he took papers out of his wallet and they went through the papers together with copies were being made of his credit cards, which were furnished to the Germans (T-7/8/88-71-80).

Following argument relative to discovery, the court ruled that State would have to produce the typed findings of the State's serologist, but not have his handwritten notes or the sketch of the inside of the car (T-7/8/88-88-94), and State had to produce suspended MBP Officer Veshi's notes containing an inventory of items taken from def's car, if such could be found. In this regard, the State contended that it didn't know where the notes were while defense pointed out that Veshi delivered the notes to Hanlon and the court said: "If he can't find them, he can't find them" (T-7/8/88-95-98).

The next State witness was Lonergan who testified: that "I was the affiant at the scene on the SW's that were obtained for the rental car and the Tahiti; that ASA Sreenan assisted him at the scene in preparing the SW affidavits; that he executed both SW's; that he made an inventory of items found in the car; that when he went to Germany in Jan. 1988, he viewed the evidence seized by the Germans and that photos thereof were made for him; and that magazines were found in the apartment. Said photos were introduced in evidence (T-7/8/88-111-113).

On cross Lonergan testified: that he set forth in the SW affidavit that def. didn't speak

English and that the efforts to find out what had occurred were mostly unsuccessful because of the language barrier; that he did not tell the judge who issued the search warrants that def. was speaking German at Indian Creek; that he made up an inventory regarding the car after the "thorough or complete" inventory of the vehicle had been given him by Veshi; that he could not find Veshi's notes and that he made no notes himself as to what he found in the car; and that he saw in the trunk, in pertinent part, a large flashlight which was given to Rhodes for (serology) analysis; that a second flashlight was found in the passenger's compartment; that he was also the SW affiant as to def's Howard Johnson's room which warrant was executed on Nov. 3rd or 4th, even though the judge hadn't signed it (which he said he found out later); that it was his intention to search def's room "to find any possible evidence in this case" and specifically that they were looking for the homicide gun; that def. was a "possible suspect" at the time; that he found a black address book and the rental agreement covering the second car rented by def. (after the first one was seized); that he was made aware at Indian Creek that the def. claimed to speak only 30 words of English; and that between his suppression hearing testimony and his deposition testimony, he referred to def's status at the Indian Creek scene as being both that of "a witness" and of a "suspect" (T-7/8/88-113-13).

The next State witness was Hanlon, who said he arrived at Indian Creek between 10:30 and 11:00 p.m., on Oct. 25th. He testified: that def. said "you're the police, you can go to my place....I'm not going to sign any papers"; that he confiscated no property while in def's room and that the property there included a swinger's magazine, books or guns and ammunition; that he searched def's trunk; that his conversation with def. that began sometime after midnight on Oct. 27-28 was taped (at this juncture the State showed defense a 24-page transcript he had not seen before); that def. was not Mirandized before the Oct. 28th statement and that "to my knowledge" def. was first Mirandized on Oct. 29th; that another detective had a transmitter during the making of the Oct. 28th statement; that there was "bleeding in" of a conversation involving other detectives with

the making of the statement, which was discovered subsequently; that he was monitoring Matthews' taking of the statement from def. but that they couldn't know this; that the probable cause for def's arrest were the blood stains found on the driver's side of the car, coupled with the fact that the projectile removed from Kersten's head was consistent with the ammo found in def's room; that the blood spatters found in the driver's seat were inconsistent with someone having been in that seat when Kersten was shot in the head; that all descriptions he had of the incident had def. out of the driver's seat when the shooting occurred; that the projectile found in Kersten's head and the bullets found in the room were both from 38-calibre guns; and that both projectiles and bullets were silver tipped with hollow point and that the grains matched (T-7/8/88-I67). Hanlon testified: another basis for the arrest were the insurance policies in excess of a million dollars; that he was not able to duplicate the conditions that existed in the vehicle at the time of the shooting; that the involved ammo was of a popular type; that def's hands were swabbed not because he was a suspect but because he was in the car; and that the didn't tell def. of the existence of the SW's and doesn't know if anybody else did (T-7/8/88-I68-I80).

The next State witness was German Officer H. B. Schleith of Lorrach who said the Germans obtained a SW on Nov. 4th, to search the two involved safe deposit boxes; and that this request was only in connection with their investigation but that the information obtained was shared with MBP; (the several involved German orders to search were introduced in evidence over defense's objection) (T-7/II/88-1I-20).

On cross, Schleith testified: that the Germans were first informed of Kersten's death on Oct. 28th; that they were told both that she was shot in a car and in a hotel; that her "life companion" was a suspect and had been arrested and had 3 pistols; that they were requested by MBP to ascertain if def's apt. in Rheinfelden could be searched; that they learned of the existence of the safe deposit boxes from documents found in the search of apt. on Nov. 5th; that there were two SW's issued with respect to the said apt., the first

of which authorized them to search for address books, weapons, ammo, insurance policies and photographs; that after the initial search of the apt. on Nov. 5th, they came back; that they took address books and insurance correspondence during the initial search and they found the insurance policies later in a safe deposit box; that no insurance policies were taken from the apartment during any of 4 or 5 return visits because they were all seized the first time and before a new SW was obtained; that the additional SW for the apt. was obtained in June of 1988 because def. had referred to slides being there during Schleith's deposition and they went back and seized the slides, plus work files that had been prepared by a Mrs. Mohler; that def. never gave him permission to search the apt.; that they reentered the said apt. in Jan. 1988, accompanied by ASA DiGregory and Lonergan on the basis of the Nov. 4th, SW, and again in April, 1988, accompanied by ASA Screenan (T-7/11/88-8-55).

Def. then called MBP O. Turner who said that at Indian Creek Matthews asked him to transport def. to the station and to put him in a cell; that he sat down outside the cell until relieved by Psaltides; that he did not recall telling "Andy Hergerd" that he was to put def. in the cell because he might be on "coke" (T-7/11/88-69). Next testifying was Andy Hergerd, a secretary for MBP Detective Bureau, who testified: that Turner placed def. inside the cell and Turner told her def. "was drunk and...coked out and he, Turner, didn't want him "to freak out on him"; that def. didn't seem drunk and freaked out to her; and that Matthews asked her to write a memo regarding the case 5 months later (T-7/12/88-3-13).

State next conceded the illegality of the search of the Howard Johnson's room because the judge didn't sign the SW and the court suppressed all evidence found during that search (T-7/12/88-16). Relative to the motion to suppress items found in the Tahiti room, Defense argued the SW was misleading and untruthful in attesting that the def. did not speak English; that the police were limited in that search to the items specified by the magistrate; and that the SW affidavit stated no probable cause (T-

7/12/88-17,21). He also argued that since the search was not limited to the 4 classes of items set forth in the affidavit, it became a prohibited "general warrant" and that the police went beyond their constitutional authority in seizing "a flashlight or a piece of paper or chains or adapter for camera equipment or sunglasses, and the other 39 items that they seized in the search of the warrant (sic) in addition to what they seized in the room..." (T-7/12/88-21-23).

The court upheld the searches of and seizures from the car, including the trunk, and from the Tahiti room and, further, it upheld the constitutional validity of the involved SW's (T-7/12/88-49-51). State announced it would only seek admittance of evidence "obtained by German authorities during their initial search or searches," (T-7/12/88-55-57). The court upheld the involved German SW's and denied the motion to suppress the documents and things seized in Germany (T-7/12/88-76).

The next issue to be argued was, "the swabbing and the seizure...of the def's hands," after which the court found the def. consented thereto (T-7/12/88-76,87).

Thereafter argument was held on the motion to suppress all statements made by the def. The court denied the motion to suppress the def's statements made prior to his arrest by the ATF agents upon a finding that the def. did not feel he was under arrest and "there was no custody" and because the police took the statements from him "trying to track down the one who might have shot the lady" (T-7/12/88-88-116). The court ruled the defense failed to prove that "after Dec. 30th the time of his (federal) acquittal," the def. was (still) represented by the Fed. Public Defender (T-7/12/88-130). The court next ruled that Symkowski and Stitzer were not MB agents and denied the motion to suppress their statements relative to what the def. allegedly told Symkowski (T-7/12/88-130,131).

The court deferred ruling until trial on the admissibility of prior convictions "to see where we are at trial and see if there is anything that has to be impeached, and see whether or not the def. takes the stand" (T-7/12/88-136). Defense responded that def. was entitled to a pre-trial ruling on the issue before he would take the stand, and "there

may be a witness that he would want to call to explain the convictions or violations" (T-7/12/88-136,137). Defense next argued that any reference to prostitution should be excluded but this was denied (T-7/12/88-137-144).

The State announced it would be seeking the death penalty (T-7/12/88-159,160).

On voir dire State asked prospective jurors regarding circumstantial evidence and despite a ruling that it would not be allowed to use as an example to the jury of a fictitious case involving someone charged with stealing a car, State immediately thereafter starting using this example again (T-7/13/88-262-271). State said to one of the prospective jurors:

> "You understand that every person, even people that are now serving time for crime, every single person starts out with that presumption of innocence and do you understand that once the state proves it's case beyond a reasonable doubt, then the presumption disappears?
> Do you understand that?" (The juror answered "yes")
> (Emphasis added)(T-7/13/88-286).

In opening statement State told the jurors that "up until this point, the story told by def. to the police, "was that he and his girlfriend left Bayside and they had travelled north on Biscayne Blvd...." (T-7/18/88-15). Immediately thereafter State told the jurors, in pertinent part: "So the version to the police is the def. is sitting in the driver's seat, etc." (T-7/18/88-17). After its further recitation to the jurors of alleged additional circumstances its evidence would show the jury, the State told them: "After this arrest this case went to a grand jury and twenty-three grand jurors..." (T-7/18/88-25).

Defense moved for a mistrial arguing that State's reference to the 23 grand jurors was patently improper, but that motion was denied (T-7/18/88-29-32). Defense unsuccessfully argued that State's argument in opening statement that the def. was "pimping" was unfairly prejudicial (T-7/18/88-33).

State called MPB Officer K. Reid as its first trial witness. Reid testified: she noticed a vehicle driving south on Indian Creek Drive with the driver thereof making a signal with his hands for her to stop; that def. walked over to her; that she saw "the victim" lying on

the front seat; that she made no notes as to the positions of the seats but remembered that the passenger seat was reclining (she was not sure it was fully reclined) and the car window was up; that def. did not respond to any of her questions; that she believed he didn't speak any English; that she didn't think the def. was crying but that "his face had a very strained expression on it;" that she didn't have total recall of what def. said at Indian Creek; that def. never said anything directly to her; and that "I don't remember him saying precisely or unprecisely that he didn't speak English" but that nevertheless def. "managed to get across that he wasn't understanding what I was saying..." (T-7/18/88-86-93).

Reid testified: that dark stains on def's pants looked like blood; that she didn't remember if there was blood on def's hands; and that "there was a lot of blood on the victim and some of it was on one of the seats, the passenger seat" but that she "really didn't get a good look at the driver's seat"; and that she didn't believe the def. was in shock but "he appeared to be strained" and concerned and he could have been upset (T-7/18/88-93-96,99-100).

At this juncture there was a sidebar conference between respective counsel outside the hearing of the court reporter (T-7/18/88-110).

The next State witness was P. Reinach, an alleged real estate broker living in Hamburg who testified as follows: that he modeled for soft porn magazine 9 years earlier; that Kersten was a "prostitute" and def. was her "pimp", and that they were living together; that he visited def. in 1978 or 1979 and that they watched an American film, "murder for insurance purposes" (T-7/18/88-123,124). State then said its evidence would show that beginning in 1980, def. began accumulating life insurance policies (T-7/18/88-125,126).

State then said:

> "Of course, the state's theory in this case is that he killed her for the money" (T-7/18/88-120).

MDPD Crime Scene Tech. Ecott testified that when he arrived at 11:45 p.m. he couldn't tell if Kersten's body had originally been in the same position in which he found it. He pointed out "blood spatters" in a photo, which said came from the wound in her head (T-7/18/88-161-163). Ecott then testified:

> "...on the defendant's trousers there appeared to be blood on the trousers...when an object has touched the clothing that was saturated or had blood on it which would cause a transfer pattern versus the other type of blood that was on the victim's dress and forearm and purse was a different type of blood, what we refer to as, a high velocity blood spatter" (T-7/18/88-169).

Ecott further testified he did not see a "speck of blood" on def's clothing or his arms and the only blood he saw was on def's hands and pants; that he and his colleague, O. Travers, did not do an extensive search for blood specs throughout the red interior of the car; that he did hand swabs on the def... "to detect the possibility of gunshot residue on the victim's hand"; that "as was the case in Feb. " he still couldn't find the photos he took on Oct. 26th, which included photos of the car and the trunk and the contents of "the passenger compartment of the car"; that on that date "we" photographed the vehicle and various items were taken out of the trunk and photos. were taken of those; that there was a great deal of blood in the interior of the car; that the armrest that moves up and down contained many blood spots on the armrest but he didn't do any tests to determine if such spots were blood; that without his missing photos he couldn't tell the extent or location of the alleged blood on the steering wheel but that "...presumably the major portion of the blood was on the headrest after we removed the victim from the vehicle; that he observed blood on the rear of the right front seat and the "blood had run down;" that he did not recall seeing any blood on any other part of the seats, which could have been because the seats were red; that he recalled seeing no blood on the plaid robe in the driver's seat, which he said he would have noted; that he didn't recall seeing blood on a blanket in the driver's seat; that he made no note of blood on the back of the driver's seat that he thought warranted investigation by a serologist; that there was blood

spatter on the right front passenger seat and across Kersten's dress; that he didn't recall seeing blood spatter on the right side of the driver's seat and that he would have photographed it if he had seen it; that there was a "heavy concentration" of blood in the back seat consistent with dripping coming from the head wound; and that the towels and video camera in the back seat had blood on them; that there was "some spray"...and "some hair and suspect brain matter" on the headlining, which he said he took photos of but either no longer had them or at least didn't have same with him and he believed the MBP had them; and that some of the dots in the photo marked in as State's Exhibit 8 were not blood spatter but, rather, were "Petechia," which he described as "primarily the erupting of the capillaries of...the small blood vessels and is usually found in such areas as the eyes" ...and... "sometimes caused by strangulation" (T-7/18/88-175-190; T-7/19/88-24-39).

Ecott further testified that "the heavier concentration (of blood) on the pants are consistent with transfer blood", which would be consistent with somebody having wiped blood on their right hand and then wiping it on their pants, and that if someone in the driver's seat of the car had reached up in a darkened auto and put their hand to the back of the victim's head, then such person would have become blood stained; that he only swabbed Kersten's hands and not def's hands; that he didn't swab the car; that gunshot residue is made up of lead, antimony and barium but that he didn't know how long they lasted; that there were some transfers of blood on the towels and robes in the car and some spatters of blood on Kersten's clothing, millimeters in diameter and perhaps smaller; and that it would be possible to wipe off tiny spots of blood on his arm if he rubbed his arm against the car seat (T-7/19/88-42-56).

MBPD Crime Scene Tech. Travers testified he dusted the car for fingerprints but that he found no latents of value.

Next MBP O. Seroyder testified: that he checked Kersten for a pulse after entering the vehicle through the driver's door and he got no blood on his hands from doing such;

that her head was arched to the left and her face was facing the mirror; he said he noticed a blanket on the driver's seat; that when he arrived the driver's window was up, the passenger door was locked, the driver's door unlocked, both doors were closed, and the engine was running; that def. was distraught; that def. was "just speaking German" when he arrived and that the "only words I could articulate in English" were "girlfriend" and "help"; and that def. was apparently trying to get Reid to help Kersten (T-7/19/88-86-103).

The State's next witness was E. Steffen, an insurance agent from Hamburg. Defense objected to this witness being allowed to testify because knowledge of his existence was the fruit of the illegal searches conducted by the Germans. This was overruled (T-7/19/88-108,109). He testified: def. first purchased insurance from him in May, 1977; Kersten was a prostitute and def. had told him he was "the pimp" (immediately thereafter a defense objection to the eliciting of this "pimp" testimony was overruled); that def. had several cars including a Mercedes 280SL and he lived off Kersten; that they moved to a more expensive apartment in 1983; that he assisted def. by preparing a certificate of earnings that def. was earning 3,950 marks a month in 1984; that def. told him he had been trained to be an insurance salesman; and that he wrote a health insurance policy for def. in Dec. of 1977, "a private liability" policy for def. in November of 1980, and another for him in April of 1981, and he said that he wrote two small "capital life" policies for Kersten in 1980, at which time def. and Kersten were not living together, but that he did not know who her beneficiary was (T-7/19/88-100-126).

He further testified: def. was not the beneficiary of such 1980 policies, but he added that in 1981 and 1982 the beneficiaries were changed to def. upon def's initiation and the parties were living together; that the earlier beneficiaries were parents and sisters of Kersten; that said parties separated in 1980 and that he had heard that Kersten was to be married and that it was def's idea (Defense's hearsay objection to this testimony was sustained but the jury had already heard the answer); that Kersten's prostitution business

was bad in Hamburg, and that def. wanted to move to Switz. and he said he knew they moved but not in the 1970's; that he assisted them in securing other insurance policies; that def. wanted to cancel an accident policy to be replaced by 2 term policies and that he wrote the 2 policies in 1984, one covering def. for 100,000 marks from 1984-1994, and one covering Kersten for 200,000 marks; that if def. were to be killed he would be insured for 100,000 marks and if the death was an accident, he'd be covered for 200,000 marks; that if Kersten should die by accidental means, def. would be entitled to 400,000 marks; and that the parties enjoyed a high standard of living in Hamburg (T-7/19/88-100-139).

When Defense objected to a photo from a German sex magazine showing Kersten "in a one piece bathing suit covering all the CK genitalia" [sic]), but with her face obliterated, the court ruled it would allow a photo in evidence without the face obliterated and he allowed State to have admitted the entire magazine (7/19/88-149-151). Defense's objection to State using the word "hustling," as to what def. was supposed to do, was sustained but the jury had already heard it (T-7/19/88-152,153). Steffen said def. tried to cancel the whole life policy in May of 1984 (T-7/19/88-158-166).

Next State called R. Kischnick, Kersten's younger sister, who testified: she knew Kersten was a prostitute in 1980; that she had never known def. to work and had heard him talking to Arabs at the parties' apartment; that Kersten started living with def. in 1985; that Kersten was "not happy" but was "content" before they moved to Lorrach but "not content" when they lived in Rheinfelden; that she knew Kersten had gotten married and her married name was "Kuenzil"; that she visited Kersten 4 times in Rheinfelden most recently in mid-1987, and that she telephoned Kersten and would talk with def. on the phone; that he "always attacked her age, figure, the way she looked and, "for example, me, my person, that I looked younger"; and that Kersten had told her she had "one insurance in the name of my parents and one in my name" concerning which she didn't learn that the beneficiaries were changed until after Kersten's death (T-7/19/88-174-193).

Regina testified on cross that she had said in her statement to the Germans that def.

led a lavish lifestyle, but that she did not know where his money came from and that it could not have only come from hustling; that when she had testified on direct that def. didn't work, she meant that he didn't go to work at a regular job; that she didn't know what else he may have done; and that she knew one Frank Seemans although she wouldn't admit that def. had rescued Kersten from such person, who was her pimp (T-7/19/88-204-211).

The next State witness was H. Uwe Wenk of the criminal police of Lorrach, who said he received a report from the Rheinfelden police on Oct. 28th that Kischnick had been shot in America (T-7/20/88-2-4).

When State next produced certified copies of the parties' German address and defense counsel objected that it had not previously seen same, the court stated:

> "We're getting close to a discovery violation..." (T-7/20/88-5-11).

Thereafter the State proffered the documents, which had been allegedly available for inspection by Defense but which weren't turned over to him (T-7/20/88-11,12). State argued that it must show residency in order to show that the searches in Germany were valid (T-7/20/88-12,13). It also argued that all German documents were made available to defense including the wills of the parties (T-7/20/88-14,15). The court then declared "this is a Richardson Hearing" (T-7/20/88-16). Defense argued that during the taking of the deposition of Mr. Weisbol, State had hedged on furnishing him documents, and State argued that the court had previously ruled that the State didn't have to turn over all the German documents it had from the 37 German witnesses, but only the one's the State deemed to be relevant and, in addition, that the court had denied Defense's request for an in camera inspection of all such documents based upon State's representation that "the other 32....witnesses had nothing to do with the case" (T-7/20/88-16-18).

Then an obviously frustrated defense exclaimed:

> "I fought for everything I've got out of Ms. Sreenan" (T-7/20/88-19).

Defense then said he'd never seen a statement in German, and that nobody brought in from Germany by State had mentioned such document and State's response was that such document was "....the statement of where they live" and that the substance of this had been furnished to Defense (T-7/19/88-19-21). Defense objected to introduction of the business cards of a doctor and a Saudi Arabian "representative" as "being fruits of the search of the defendant...." (T-7/20/88-3l). After Defense remonstrated State for referring to an item found in def's German safe deposit box as "a silencer" when "it ain't a silencer," State advised it would only seek to offer bullets found in the safe deposit box (T-7/20/88-35-7). Defense restated its "fruits of the search" objection to all items found in the German apt. and safe deposit box, but the court affirmed its prior ruling upholding the German searches (T-7/20/88-43). The court ruled the German bullets (from the safe deposit box) relevant although they were of a different weight than the one's seized at the Tahiti, and "the receipt to the victim and deceased of the wills from the clerk's office relevant" because "it states his address."

Wenk then further testified that he and Schleith searched the apt. on Nov. 5th, under the authority of an order or warrant secured on Nov. 4th (T-7/20/88-65-67). Wenk then identified items found in the apt., which included def's briefcase, a flight confirmation from Zurich to the U. S., from Oct. 3rd to Oct. 30th, which was then admitted in evidence over Defense objections (2/2-20/88-69-7l). The wills were admitted in evidence over objections, as were other items, including receipts in envelopes found in Def's briefcase found in his apartment; certified documents from the County Court of Lorrach identifying letters "apparently written" by def. to that office on Nov. 22nd, along with the letters itself (T-7/20/88-7l-78). Wenk also testified that he found and identified the following items he said he found in Def's and Kersten's apt., to-wit: Continental Ins. Co. papers, 2 cigarette packs containing ammo; a leather notebook; a copy of Treplunk Magazine; and the keys to def's safe deposit box at the Commerz Bank in Rheinfelden. He said he gained entry to that box on Dec. 23rd. after inquiring at said bank whether it had a safe deposit box

for def. and Kersten and then getting a SW (T-7/20/88-78-81). State offered in evidence the items found in the said safe deposit box as a composite exhibit, which items included a cigarette pack and hollow tip bullets (T-7/20/88-82-86). Wenk testified that West Germany does not have the death penalty for the offense of murder and that he found keys to the safe deposit boxes and the names of the banks while searching the apartment (T-7/20/86-95).

State next called former Assoc. Dade Med. Examiner Dr. Vila (M.D.) who said he performed an autopsy (T-7/20/88-102-114). He testified:

> "The deceased had...petechiae, which are small under the surface hemorrhages both in the lens of the eyes, of the lids of the eyes and in the arms and forearms and bilaterally, on both sides of the body" (T-7/20/88-114).

Photos of Kersten showing the petechiae on her were then introduced in evidence (T-7/20/88-115). Vila testified that the presence of the petechiae were not causally related to Kersten's death and he added that petechiae are "sometimes found in asphyxial type depths (sic) or strangulations...but in this case there was no evidence of any type of strangulation whatsoever;" that he did not have an explanation for the presence of the petechiae; that the gunshot wound was two and a half inches behind the right ear, and a photo showing this were moved in evidence, along with a photo of Kersten's head taken during the autopsy (T-7/20/88-116-121). Vila then demonstrated to the jury "stipplings" shown in the blood samples (T-7/20/88-122). Vila's said:

> "Only thing I can say is that it was a close-range shot. It was not a contact wound and it was not a distant gunshot wound" (T-7/20/88-124)

He further testified: that "close range" means 18 to 24 inches; the bullet moved into Kersten's head right to left and slightly downward; that in addition "to petechiae in some organs of the body, and the cervix of the deceased, had what we call an erosion, small superficial lacerations in the cervix of the individual;" the deceased had "an alcohol level of .06 in heart blood and .07 in the ocular fluid" which is below "legal limit of intoxication"

in Florida; that the cause of Kersten's death was a gunshot wound to the head (T-7/20/88-l27-l30).

On cross Vila testified: that he found a day old or less scratch on Kersten's finger; that he found evidence of soot around the wound and that stippling and soot were caused by the discharge of the bullet; the bullet would have passed through Kersten's brain "before contacting the skull"; a "cloud of particles and powder came out the muzzle of the gun," but because there was so much blood "in this wound" he didn't know how much particles of soot were deposited there; "there was brain matter from this wound to the right side of her head in the car and to back of headrest on passenger seat;" he did not recall whether there was any brain matter on the headliner; that the evidence was consistent with Kersten having been shot in the right side of her head by a person standing outside the passenger door of the car; and that the gun could have been held anywhere from two inches to twenty-four inches from her head (T-7/20/88-131-l38).

The next State trial witness was Det. Lonergan, who substantially repeated his suppression hearing testimony regarding the search of def,'s Tahiti room at 7:20 a.m., Oct. 26. The 3 firearms and ammo found in the room were admitted in evidence over defense objections (T-7/20/88-l42-l49).

State next called MBP Crime Lab Bureau Firearms Examiner T. Quirk who testified as follows: that he examined the clothing of both def. and Kersten for gun powder residue and for burnt nitrates; that the Greiss Test was negative for both with respect to the blouse and the blue tank top, and neither had bullet holes in them; both types of residue can come from parts of a gun other than the muzzle, including around the cylinder; that one would "not particularly" expect to find gunshot residue on the tank top of someone who had fired a gun; residue could or could not have been expected to be on the car window; that he examined the bullet fragments which purportedly came from Kersten's brain and he said the weight of said bullet was a .38 Special Winchester silver tip bullet, ll0 grain; that there were seven grains missing from the said bullet, the

fragments of which were taken from Kersten's brain, and that the next bullet weight down from 110 is 95; that when a bullet is fired it loses one or two grains and that when it hits it disintegrates and that this left four or five grains unaccounted for; that he tested the three guns seized from def's Tahiti room; 3 types of weapons could have fired the bullet and that 2 of these types were found in the Tahiti room, i.e., the Special Taurus revolver and the F.B.I. .38 Special, but not the Colt .38 Special six left; that he test fired all three guns taken from the Tahiti room into a "water bullet recovery water tank;" he recovered the bullets and compared them to "the bullet base that I had to work with here;" that "based on class characteristics "....none of these weapons could have fired the bullet into the victim's head"...(but) "....six right Taurus can do it" and an FIE Derringer could do it; that the bullets taken from the Tahiti room were silver tip bullets made by Winchester ...weight 110" ....and that this was the type of bullet that killed Kischnick; and that Winchesters are popular bullets and that all three of the types of guns seized from the Tahiti room are popular guns; and that he believed it might be the FIE Derringer that killed Kersten but that he couldn't be sure (T-7/20/88-107-179).

He said:

> "...a led (sic) cloud and other matter will extend anywhere from fresh to the target out as far as, perhaps, five feet before it tapers off to almost nothing and disappears." ...."up to five feet"...."surely, 10 inches, 20 inches..."(T-7/20/88-185).

Quirk was asked the following hypothetical question and he gave the following answer:

> "....to assume someone.....a young woman seated in that seat...and somebody approaches from the right side of a car....with the window lowered and holds up a gun and discharges the gun and a bullet and unburnt powder, strippling,....soot fly from the muzzle of the gun to the head, that would indicate to you, would it not, sir, if you found soot and stippling in such a wound that the gun muzzle was fairly close to the head....at least within five feet...?".
> Answer: "yes sir" (T-7/20/88-187).

Quirk said that he looked at the Def's blue tank top shirt under a relatively weak microscope and didn't see any gunshot grains; that he found no gunshot residue on the right shoulder of Kersten's blouse; and that he didn't check the pants of either and he added that it would have been better if the pants had been checked for gunshot residue at l0:30 or ll:00 p.m. (T-7/20/88-188-l92). He further testified: that after the microscope test and, as well, the Greiss Test, he found no ledazine or led on either the tank top or the blouse; that if one held a gun away from one's body, one might not necessarily get powder on the shirt because about 95% of the explosion comes out the muzzle of the gun and, following in the direction of the bullet, a cloud of invisible particles; that an FIE Derringer, being hardly big enough to hold in one hand, wouldn't be held with two hands; that if one fired an FIE Derringer by holding it out, "I would expect to find some (gunpowder residue) from the muzzle blast, and you will receive some residue in this area, but as you say, it won't really come back".... and that it would would not be expected to find residue in the palm of the hand but "you may find it in the strip area between the gun and the finger" ...."the web"...."there's no blow back of a Derringer" and it's possible gunshot residue from firing a FIE Derringer would only be in the web and not in the palm of the hand" (T-7/20/88-l93-l98). Answering a very unclear State hypothetical question, which included the driver's window being down 3 3/4 inches, Quirk said that the explosion could go anywhere from 20 inches to five feet, but he added that he didn't know how far the explosion of the gun went in this case, nor how far the muzzle of the gun was from the victim's head and that if the muzzle is outside the window and the bullet travels through the 3 3/4 inches opening and soot and stippling were found in the wound, that would mean that part of the cloud entered the car, but that if the bullet passed into the car and the window was up, every part of the cloud would enter the car (T-7/20/88-201-205).

The next State witness was German O. Schleith, who testified as follows: he became involved in the case on Oct. 28th; that they obtained a SW on Nov. 5th for the apt. and

found papers concerning the two safe deposit boxes; that they thereafter went and located the safe deposit boxes and searched same; that they found the marriage papers of Kersten showing she was married in Jan. 1982 in Hamburg; that the insurance papers he found in the safe deposit boxes include all the policies heretofore mentioned in this brief, and all of the allegedly pertinent ones were moved into evidence at this point over Defense's search and seizure objections, etc. (T-7/21/88-15-25).

Defense then objected to what he described as the tactics of the State in saying in front of the jury that Defense had seen documents that he contended he had not seen, which specifically included a photo of Kersten in the same bathing suit she was wearing in the dirty magazine photos but without her face covered up (T-7/21/88-25,26). State said that when Schleith had been in Miami earlier for his deposition, Def. had asked him if he had seen the slides in his apartment and that based on this, he got a new SW for the apt. and went back there and found the photo of Kersten in the bathing suit (T-7/21/88-26-28). Defense repeated that he had never seen the bathing suit photo before even though ASA Screenan had said a week ago that she had known about the photo for several weeks (T-7/21/88-28,29).

State next called P. Koschate, legal rep. in charge of the Alteleipzigi Ins. Co., who testified: that he wrote the Diner's Club auto policy, which covers people making journeys and which provided life insurance benefits of 500,000 Deutsche marks (DM) for accidental deaths, including death by murder; that Def. would be covered thereunder if he paid for his rental car by his Diner's Club Card, as would Kersten, who was supposed to be his spouse; that Def. and Kersten designated each other their respective heirs; Def's claim was received on May 10, 1988; Def's request to change beneficiaries to himself from Kersten's parents, to whom he had earlier assigned his interest in the said insurance, was contained in a letter found in Def's safe deposit box but that his company never received that letter. Defense's objection to the introduction of the letter was overruled (T-7/21/88-44-47). On cross, Koschote testified: that every one of Diner's Club's 240,000 members

have the same insurance coverage because it comes automatically if car rental is made with a Diner's Club card; that "spouse" means "life companion;" that the policy also provides 500,000 DM coverage for "disability" and "rescue" per day benefit (T-7/2l/88-49-57). On redirect examination by the State the State asked Koschote the following question: "Q....if none of those 242,245 people say otherwise, then death benefits go to their legal heir, correct?" (T-7/2l/88-59) Then the State asked this witness: "...how many of 242,245 members elected to designate an heir" (T-7/2l/88-59,60) A Defense objection thereto was sustained, but immediately thereafter the State asked essentially the same question again to which a Defense objection was again sustained (T-7/2l/88-59,60).

The State next called N. Muller, with Cosmos Ins. Co. who testified Def. was insured for l00,000 DM and that such was valid on Oct. 25th, but became invalid at the end of Jan. l988; Kersten was insured for 200,000 DM, plus there was an accidental death benefit which would cover death by murder, except the murderer could not collect; that def. paid the premiums on both policies; "we" received a claim letter from def. in June of l988 (which letter was introduced in evidence over Defense's search and seizure objection); neither of his files contained a letter (from Def.) requesting a change of beneficiaries; and the current beneficiary on Kersten's policy was Def.(T-7/2l/88-6-79).

State next called Mr. Weigard of Continental who testified: the "risk insurance" on def. had a death benefit of l00,000 DM, plus double indemnity coverage, which covered murder, but excludes a murderer as a beneficiary; Kersten had 3 policies including 2 term policies and a whole life policy, altogether worth 29,277 DM upon her death, with def. as beneficiary; Kersten took out that policy on Oct. l0, l980; that he received a letter from def. dated Nov. l5th, changing the beneficiary from himself to the Kischnick family (with a letter from lawyers dated Mar. 4, l988); after that the Kischnick family claimed the benefits; that "we" received a letter from def. in May of l988, cancelling the earlier assignment to the Kischnick family; and that the beneficiaries were not changed after the receipt of def's second letter because "there were no signature with def. remaining the

beneficiary" but with the proviso that if he could not collect, the Kischnick family could (T-7/2l/88-80-105).

State then called Mr. Bittner of CIGNA-INA, who testified: that Def. and Kersten came to be insured by his company through being Diner's Club members but that the involved coverage was not automatic and that def. made an application for the coverage; this coverage included disability and death and was in the amount of 500,000 DM for accidental death; that the policy covered the entire world; that def. was Kersten's beneficiary but that def, couldn't collect if he murdered her; that def. paid the premiums on Kersten's policy and the policy was valid on the date of Kersten's death; that on June 3, l988, def. sent a letter to Diner's Club claiming the benefits of the policy; that letter referred to a previous letter requesting a change of beneficiaries but that previous letter had never been received; def. covered himself as well as Kersten; and that the premiums were paid for through the Diner's Club card (T-7/21/88-l05-ll5).

State next recalled Schleith for the purpose of having him identify photos, and then based thereupon to have them introduced in evidence, found in def's apartment after the second SW was secured after def. had asked Schleith if he had found the slides. No slides were introduced in evidence. Def's search and seizure objections to the photos were overruled. He then testified that he "brought in" all insurance policies found in def's safe deposit boxes including a policy of l00,000 DM on def's life for the benefit of Kersten, which policy he said he gave to ASA DiGregory along with Kersten's divorce papers. He said that Wenk searched the second box (T-7/2l/88-117-128).

On redirect examination the State said the following occurred:

> "Q. Are these records as they exist right now admissible (sic) in a German court of law?
> A. These records would in this country, they should be used by a German court and would be read into court" (T-7/21/88-133).

The State next recalled Mr. Weigand of Continental, who testified that all of the insurance policies insuring def. had double indemnity clauses and that the amount of

58,874 DM was payable to beneficiaries on one policy and 400,000 DM on the other. He said that def. paid the premiums on his policy through deductions from his checking account each month (T-7/22/88-5-8).

The State next called Dina Moeller, a Swiss prostitute. She testified: that prostitution is legal in Switz. and that "we also pay the tax"; that she met Kersten in June, July or Aug. 1987, through an advertisement she ran in Treplunk (magazine) seeking a colleague; that she had an agreement with Kersten to work at her (i.e., Moeller's) house; that Kersten was unable to make the 1000 FR. per month payments because she was depressed and had gynecological problems, including pain, and couldn't keep her appointments; Kersten then didn't make as much money with her as she used to make; and that she worked with Moeller for about 3 months until Oct. 1, 1987; she never heard Kersten refer to Def. as her "pimp;" Kersten "did not say to me directly" that def. lived off of her earnings; that in her earlier statements to police she had said under oath that def. had his own money and did not take her fee money; that she saw no evidence that Kersten had been abused; that Kersten was really looking forward to her vacation, but that she was not happy the last time she saw her; that she said in a sworn police statement that the parties loved each other but not that they got along well; that Def. didn't love Kersten in the way that she loved him and that he was disdainful of her; and that she did not lie to the police "directly" in her Nov. 17, 1987, statement, but that she didn't want to incriminate the two of them, and that she knew something that would incriminate Def. (T-7/22/88-8-65).

Moeller admitted that she said in her Nov. 17th, statement: "Personally, I don't think that Dieter did something to his girlfriend. He was indeed very jealous, but in my opinion he truly loved Kersten". She admitted that def. bought Kersten an expensive diamond for her 30th birthday. Defense next questioned Moeller as to whether the parties had a dog named "Hercules," but the court sustained State's objection to any questions relative to "Hercules." Moeller further testified: that Kersten told her many times she wanted to

quit being a prostitute; that she told police in her statement that Kersten wouldn't allow any man to beat her, including the def.; that she, Moeller, never socialized with Def. and only spoke with him when the phone was answered; and that Kersten told her she had wanted to draw up wills so that if something happened to both of them "her money and his money wouldn't go to his family" (T-7/22/88-65-88).

Hanlon was the next State trial witness and he testified as follows: that one of the photos accurately depicted the location of a blanket on the driver's seat of the car; in the early morning hours of Oct. 26th, Def. agreed to help him look for "the shooting place"; they drove to Bayside and that Def. told them to turn right on Biscayne Blvd., after coming out of Bayside; they drove up Biscayne Blvd. to I63rd St. where they turned left at Def's request; Def. said this was the exact route he took the night of the shooting; and that after the three of them drove onto W. Dixie Highway, Def. said he couldn't remember exactly where it had happened and that, "(H)e started going in and out of streets" (T-7/22/88-94,96-I08). Hanlon then said:

> "We kept asking him...do you recognize anything, do you know this...do you know this...and...I said he's not even looking, you know, in the area, maybe he's tired. Let's go back to the station, which we did" (T-7/22/88-I08,I09).

Hanlon described going for another drive-around on Oct. 27th, and he said that Def. still couldn't remember the area where the shooting occurred (after they turned off of I63rd St. and onto W. Dixie (T-7/22/88-I20-I24). He said: the Def. told him that the parties had drinks at Bayside but he said he could not tell that Def. had been drinking although he admitted that in the fed. firearms violation trial he stated that Def. smelled like he had been drinking; and that he reenacted Def's description of the shooting and subsequent events and that when he released the passenger seat and placed weight on it, it moved into the reclining position with a violent gesture (T-7/26/88-4I-42). With reference to one of them, Defense objected to one of State's photo's because it showed Kersten's brain hanging out, but such objection was overruled (T-7/26/88-56). Hanlon further said: an

interpreter was not needed after Psaltides arrived at Indian Creek; he only taped the first conversation of Oct. 28, 1987, but that details of his other conversations were included in his report of Nov. 12, 1987; that notes covering these other conversations had been destroyed which was done pursuant to standard procedures; he didn't know if Kersten's seat was all the way back when she got shot; that Def. had told him both he and Kersten were wearing their seat belts but he then amended his statement to say that Def. only told him the parties always wore their seat belts; and that a recorded statement was taken from Def. on Oct. 28th but "the date on the report itself might not reflect the same date as on the bottom of the report when the report is typed up" and he could not state under oath the date on which he wrote the report (7/26/88-77-86). He repeated that once a report is typed up, the handwritten notes are thrown away; he said that in all he prepared eight handwritten reports; and he at first simply sidestepped saying whether he had thrown away his underlying notes, but with specific reference to the report dated Oct. 29th, he said both that he might have used notes to write that report and that these were the notes he had told ASA Screenan he had destroyed (T-7/26/88-88-91).

The next State witness was MBP Crime Scene Invest. Ms. Douglas who testified: she took hand swabs of both of Def's hands at Indian Creek on Oct. 25th; she noted blood on Def's right thumb area, his hand, and his right pants leg; Def. was hysterical and crying; Def. agreed to have his hands swabbed because they told him they were doing it for elimination; and that "sometime after Oct. 26th .... after Nov." and after things had been cleared out of the car, she took photos but "only of the measurements;" that "the pictures came out, but by shining a light on it, it blinded the number on the tape measure....;" and that she smelled alcohol on Def's breath (T-7/26/88-93-124).

State then called Mr. Rao, a MDPD Crime Lab gunshot residue and analysis expert who testified: he conducted a "particle analysis" on the hand swabs of Kersten and said he could have done a "neuron activation analysis" and "atomic absorption spectroscopy"; that Kersten did not fire a weapon because he didn't find enough particles on the back

of her hand and none on the palm; that the person who fired the FIE Derringer would have had gunshot residue on the palm; that he found 22 particles, including 22 led, one antimony and three barium on def.; that within reasonable scientific probability def. fired a gun; that he would not expect to find the number of particles he found on def's right hand on a person who fired through a window; that if a person had touched Kersten's neck or head, and such person had wiped his hands off, such person wouldn't have had as many gunshot particles as def. had; and that as between round lead particles and irregular particles, the latter "are mostly from the shavings of the bullet" and "normally" come out from the gun barrel and not the breech, and that the irregular particles were consistent with everything else he had found in indicating that someone fired the gun and thereafter handled it to dispose of it (T-7/26/88-I44,I70).

In response to a hypothetical question, Rao said that immediately after firing the gun there would have been more gunshot residue particles on def's hands than he found on the swabs of def's hands, and he said that while this conclusion was based on reasonable scientific certainty, he couldn't call it "scientifically positive" because he didn't find "one major unique particle on the def. which contained all three elements in one" (T-7/26/88-I70-I72). Rao said the gun that killed Kersten could have been an FIE Derringer. He said: "It is more likely that the defendant might have used the rifle---I'm sorry, the revolver than the Derringer." (T-7/26/88-I73) He then said: "A single bullet alone within a certain time would present as many particles as I found in his hands by just firing one single bullet..." (T-7/26/88-I74)

Rao then went on to testify that assuming a single bullet was fired, to-wit:

> "the number of particles that was present are indicative to me it is unlikely he just fired the weapon and he had no other activity after that. He probably could have handled the weapon after firing the shot. (T-7/26/88-I75,I76).

On cross Rao testified as follows: that he prepared a written report on Nov. 6, I987, and recited therein that the swabs from def. and his examination conducted (on item No.

6) revealed gunshot residue particles, but in an insufficient number to clearly establish that Def. fired a gun; that he couldn't state with reasonable scientific certainty that Def. fired a gun on Oct. 25th, but that in his Nov. 6th report, he wrote: "I said he did fire a weapon within reasonable scientific probability"; and that he didn't agree with Quirk that 90 to 95% of the gases come out of the muzzle (T-7/26/88-177-185). He then said:

> "The fact is this, most of the coming out, the less of it coming in the sides doesn't have any----doesn't change anything here because it may be less but is coming____, but what counts is the particles that are present on the hands." (T-7/26/88-184,185).."..because you say so, I say yes (i.e., that most of the residue comes out from the muzzle)..."because I haven't done any kind of tests on that." (T-7/26/88-185)

He said he was not a firearms expert; that he had not read the literature in the field of firearm identification; "...and that my study is mainly the deposit on the hands of the shooter" and that even though he didn't have the facts, he was going to give Defense an answer (T-7/26/88-186-88).

Rao further testified: "we have conducted studies" as to whether most of the residue comes out of the end of the barrel as opposed to the cylinder, but that he could give no percentages and that "as far as I know" there is nc literature giving such percentages, the "primer" was composed of antimony, barium and lead and he said that "Winchester" wouldn't put in lead without a reason, but that the lead could be produced as a by-product of the mixing in the ammo; he used a scanning microscope to look at the particles and that his magnification of 100,000 times is more powerful than the stereomicroscope; he found (8) or (9) particles on Kischnick's right hand and that he found 34 particles on def's right hand; that the "unique particles" have all three aforedescribed elements; that antimony could be found on electricians' hands and may be from other sources; that barium has many sources; and that lead could come from handling acid batteries; "unique" particles could only come from firing a gun and "characteristic" particles are not necessarily limited to coming from firing a gun, and that two of the three elements could be found in "characteristic" particles; he only found

"unique" particles on Kersten but that he would not tell the jury that she fired a gun if he had found particles on her palm; he found no "unique" particles on Def., but he had a lot more "characteristic" particles, and that Def. is not a mechanic and that, in addition, he was given "circumstances input" (T-7/26/88-188-209). Rao said:

> "I do not contend any of these analysis (sic) on the basis of the information that I got here neither do any results in any way have any influence on the story or the information that is given to me on the laboratory form" (T-7/26/88-2ll).

With reference to the facts that were given to him which he said he didn't need, Rao said: "Accused in automobile...they say they found the gun in an automobile...location of body in automobile." (T-7/26/88-2l7,2l8)

He further testified he didn't ask if any other part of Def's body, including his hair, was swabbed; that he did not agree that gunshot residue would fly, i.e., become a cloud, if the gun was fired from 2 to 24 inches into a piece of paper and he said he did not agree such a cloud would travel up to five feet as defense contended Quirk had testified; that he and Defense differed as to the definition of gunshot residue and primer particle residue, claiming that what Defense called "gunshot residue," he called "bullet particles"; that he didn't know how far primer residue travels from a Winchester, but that the residue from a revolver doesn't travel more than 3 feet; if an FIE Derringer was used to shoot Kischnick from under 3 feet away, he would expect to have found primer particles, gunshot particles and lead shavings; he found lead particles in analyzing hand swabs of both Def. and Kersten; Kersten was neither a shooter or a handler of a gun after it was fired, and of the Def. he said, "...the possibilities are he could have fired one more shot or he could have got (sic) it by handling the weapon after it was fired; that a cloud of vaporized gunshot residue was fired into the air and that it was possible Def. shot while holding the gun with both hands because he had residue on both hands, but that normally one would hold an FIE Derringer with one hand; if a gun is fired with one hand, residue wouldn't necessarily get onto the palm of the other hand and that one can get

residue from being in close proximity to where a gun is fired (T-7/26/88-220-243).

The court granted the State's request to have a plastic sheet, a "template" received in evidence over objection. This template was an overlay of a blanket found in the car which has been found to contain tiny pinpoints of presumptive blood and it consisted of ink pattern of where Rhodes claimed he found the specks. Defense's objections included that the circles around the specks were far larger than the actual size of the found specks and were thus confusing to the jury (T-7/27/88-II-I4). Rao further testified: he did not examine Kersten's blouse and slacks; he found no burnt gunpowder on the swabs of Def's hands; he found 26 gunshot residue particles on the web of Def's left hand; that he didn't remember testifying on deposition that he had said he found I8 residue particles on Def's left web, but that if he did say such, it was a mistake; regarding Def's right palm, he admitted he had testified on direct at the trial that he found I5 residue particles and he said if he said 9 particles on deposition, that, too, was a mistake; that further regarding Def's left palm, he admitted he said II particles on deposition, but he said that was also a mistake and that he found I7 particles; and that he couldn't say that beyond and to the exclusion of every reasonable doubt, Def. fired a gun on Oct. 25, I987, but that he could say that such occurred within reasonable scientific probability (T-7/27/88-14-25).

On redirect Rao said he hadn't made a mistake in his testimony on cross because he thought defense "was asking for the irregular parts, regular spheroidal parts and the barium parts and antimony parts separately....I meant to say spheroidal particles. I didn't give the whole out of what I had" (T-7/27/88-27). Thereafter Rao rambled on about how he hadn't been mistaken in his testimony "yesterday", and in order to rehabilitate him, State asked a leading question and objection thereto was sustained. State asked another leading question. This was followed by another State leading question, which elicited an answer from Rao that although most irregular particles come out the barrel, it is still possible for irregular lead parts to come out the breech. And in response to still another State leading question, Rao stated that particles that come off the breech of a gun are

very small (T-7/27/88-30-34).

He then testified 80% to 90% of the lead particles that come out of the primer are round; he vaguely and obviously hesitantly said that the majority of lead particles on def's right web were round; he said both that round primer parts come out of the barrel and out of the breech; and that the majority of particles on his left palm were also round; and he found nothing to suggest that the "characteristic" particles on def. were from sources other than gunshot (T-7/27/88-34-39).

State then asked a vague hypothetical question as to whether a cloud would have entered the car if the victim had been seated in the passenger seat, the passenger window was 3 3/4" down from the top, and the muzzle was fired from outside the window, etc., and Rao's answer was equally vapid, starting out with, "It depends upon a lot of circumstances, sir...", and then followed with an enumeration of those circumstances, including whether the air conditioning was on, whether the atmosphere was similar to the atmosphere outside the car, etc." and ending with the conclusion, to-wit:; "...probably the particles would drift inside" (T-7/27/88-39-40). He next testified that he found eight particles on Kersten's right web in response to a State question that included a recitation that this was the only place on Kersten that Rao found particles. Rao further said that the 8 particles, included 3 that were lead and were all round, 2 particles that were barium and lead together, and one "unique" particle (T-2/27/88-40,41).

There followed another leading State hypothetical question containing the assumption that "the victim" was holding her right hand up against the side of her head when she was shot, and asking if in that event, Rao would have expected to find a deposit of gunshot residue on her hand where he found it. This was followed by another State leading question as to whether, assuming that the breech of the gun was close to her when the gun was fired, it was unusual that a unique particle was found on her hand. Rao answered "no". Then there followed a series of very leading State hypothetical questions obviously designed to rehabilitate Rao's cross testimony, such questions based, in part,

on no evidence before the court, and/or on matters State neglected to cover on direct examination, the answers to which were all helpful to the State and harmful to the Def., culminating in Rao testifying that based upon unspecified studies and experiments, he would "absolutely not" expect to find gunshot residue particles on Def's hands "from having handled a recently fired gun before the day in which he conducted all this activity." (The quote is from the question)(T-7/27/88-42-46).

On further cross, Rao testified that even though there was primer residue on Kersten's right hand, he wasn't saying she fired a gun. Specifically, he said: "...This is not first case I've testified in where we have a firearm residue on the gunshot residue on the primer residue parts on the hands of the victim who didn't fire the weapon." (T-7/27/88-48,49)

Rao testified that his previous stated opinions (given in response to the State's aforedescribed leading hypothetical questions) included no assumption as to the vent (inside the car) blowing either to the right towards the window or the left, but that he did assume that the driver's window was up because "I obviously assumed that when you put the fan on, normally you keep the windows up." He added that he was assuming that the air conditioning was on (T-7/27/88-50,52).

Defense then asked Rao a question and the following was said:

> "A. No sir, they are not millions of parts...Tests have proved, whatever, that there are in particular firearms anywhere from 7600 particles to about 75.
> Q. 75,000 particles?
> A. No, sir, 7600 I said to 75...(T-7/27/88-54-56).

He said that less than 100,000 particles come out of the muzzle of a Derringer and this was based on his "experience of doing the analysis of the surrounding area of a gunshot wound" and not upon any scientific research or experiments that he did as to how many particles came out the muzzle of a revolver and he was not saying that unique particles come only from the breech of a gun but that he was saying that Kersten was within three feet of the gun when she was shot because she had the unique particle on

her (T-7/27/88-56-62).

In its last parting "further redirect" question to Rao, State elicited an answer from him that assuming the air conditioning was off, that the shot was fired through the window, and that the whole cloud went into the car, he wouldn't have found the number of particles he did on Def. "if he were just sitting behind the driver's seat" (T-7/27/88-62).

Rhodes was the next State witness and he explained the different kinds of blood spatters, differentiating between blood falling to the ground and blood coming from a gunshot wound. He further testified: that gunshot wound blood spatters cause extremely small drops, less than a millimeter in size, which is not the case with dripping blood; that gunshot wound blood is "atomized"; that he was asked to go to the station on November 3rd, where he examined a maroon Thunderbird for the presence of bloodstains; that he saw something on the passenger's side window that looks like blood, which he described as being "small drops, less than a millimeter in size"....some of which were round but that he didn't know if he could classify them "taken one at a time as any type of splatter..."; that there were 5 specks on the said passenger's window and he applied the "Presumptive Test" to such specks and concluded that they were "presumptively blood", but he added that this test doesn't distinguish between human blood and animal blood; that the entire samples of blood were used to conduct the "Presumptive Blood Test", so he couldn't perform any other test to determine the substance making up the specks (This answer was elicited by another State leading question of its own witness); that on the passenger door he found 4 stains, ranging from half a millimeter up to "point eight millimeters", which were "round droplets"; and that the "Presumptive Test" applied to these droplets "was positive for the possible presence of blood" (T-7/27/88-75-88).

Thereafter the following questions by the State and answers by Rhodes follow, to-wit:

> "Q. And what results did you get from the presumptive test?
> A. It was positive for the possible presence of blood.
> Q. So that we have presumptive blood on the window and presumptive blood on the door?

A. That's correct." (T-7/27/88-88)

In response to another State leading question, Rhodes testified that if the pattern of the above-described passenger side window and door specks and drops were taken as a whole, that pattern would be consistent with "what would come from a gunshot" (T-7/27/88-89).

The following State question and Rhodes' answer followed immediately next:

"Q. High velocity?
A. Yes." (T-7/27/88-89)

Then there immediately follows these questions and answers, to-wit:

Q. If you take the pattern as a whole, is the pattern consistent with a woman being in the passenger's seat and being shot in the right side of the head with a gun?
A. Yes.
Q. Is it consistent with blood from her head coming off the right side of her head and hitting the window?
A. Yes, it is." (T-7/27/88-89,90)

Rhodes testified that he could make a determination of how far the passenger side window could have been down by looking at the spot closest to the bottom of the window, but he added that he couldn't determine whether that window was closed "because I can only tell you how far open it could have been from the stains." In this regard he said the window could have been 3 3/4 inches open (T-7/27/88-90,91-94).

The following question and answer then immediately followed:

"Q. That's based upon the specks that you found on the window."
A. That's correct." (T-7/27/88-90,91)

He further testified: no presumptive blood was found on the lever used to recline the passenger's seat back; that he saw "what could be called brain material, plus blood, by appearance" on the (passenger side) headrest and back and on the passenger side headliner, "approximately three or four inches or an inch or two above (my) head" and that in one of the photos, the specks on Kersten's arm----"quite a number"----appeared to be blood; that he only did a visual exam of Kersten's clothing and he was concerned

only with the patterns of the stains and "not for the serology aspects"; and that the stain on the left shoulder of Kersten's blouse appeared to be blood (T-7/27/88-96-99). Thereafter State asked, relative to the said pattern, "(W)hat kind of blood stain is that consistent with?" Rhodes' answer was that it could be consistent with blood aspirating out of a person's nose or mouth and that it would also be consistent with stains from a gunshot (T-7/27/88-100,101).

Rhodes said there was what appeared to be blood on the front, back, and on the waistband of a pair of pants which he identified.

The following question and answer followed:

> "Q. ....As you said, it appeared to be blood. What type of bloodstain did it appear to be?
> A. It's the kind of stain that you get if you have either the back of the pants contacting an amount of blood that's present on an object or blood that is drained into and then soaking into the back.
> Q. Were there similar kinds of stains on the blouse?
> A. Yes." (T-7/27/88-102)

With reference to the blood specks on the front of the pants, and in response to the State's question as to what they were consistent with, Rhodes said both that the type of pattern involved would be consistent with the aspirating of blood and not with the dripping of blood, but that "basically I could not tell the difference" (T-7/27/88-103,194). He described a concentration of blood on the left leg and toward the top of the leg of the pants and a stain on the left side of the blouse (T-7/27/88-164).

He said he examined Def's clothes on Nov. 12th, and found blood on his pants but not on his shoes or shirt. With reference to the pants, he said he didn't test to determine that the stains were not blood but, rather, he cut holes in the pants---where each stain was---and made marks to determine the pattern. He said the cut-out stains were sent to the lab (T-7/27/88-105-109).

Rhodes then testified relative to the right leg of the pants:

> "That's consistent with a large quantity of blood, a few drops of blood being placed on there. It is not a symmetrical stain. So it therefore doesn't look as if it was dropped necessarily on there.....it looks like it was transferred on there...from a bloody

object....that stain is more consistent with someone having dabbed blood on them with someone having wiped their hands, etc....I would expect to see more smear." (T-7/27/88-l10,lll)

There followed a series of State leading and "consistency" questions, obviously intended to elicit from Rhodes testimony that the said stains on the right leg were not "high velocity" stains, but while conceding that taken by themselves when a high velocity event occurs this size stain is produced, he said that the pattern of the involved stains was generally not consistent with "transfer stains." However he added that "the one, two, three, say, four, five smaller round stains do not relate to the transfer in that way" (T-7/27/88-l12-l15).

The following questions and answers followed:

"Q. Are they consistent with high velocity blood splatter, that's my question?
A....I would say generally no, it would not be consistent with the overall pattern because of the amount present. The size is in the range but the amount is not.
Q. (By Mr. DiGregory) And you also said the size is in the range of aspirated blood?
A. You can get the same bloodstains with blood being aspirated.
Q. Thank you." (T-7/27/88-l14-l15)

Thereafter State asked Rhodes two leading questions relative to blood spots found on the driver's door------Rhodes said he found six stains that were presumptively blood----followed by a summarizing State question and then another leading question (T-7/27/88-l15-l19).

Rhodes testified that some of the stains on the driver's side door tested negatively for blood (T-7/27/88-l2l-l25).

Thereafter the following questions were asked and answered:

"Q. (By Mr. DiGregory) Thank you. Mr. Rhodes, these stains that tested presumptively for blood, are you able to tell this jury, based upon your examination of those stains, whether or not those stains that are on the driver side door ....can you tell us what type of bloodstain those stains are consistent with?
A. Okay. They are round stains. They are----they were less than a millimeter in size and they would be consistent with something that you would find from a gunshot.
Q. With high velocity blood splatter?

A. Yes, if you want to call it that."
(Emphasis added)(T-7/27/88-I28-I29)

The following State hypothetical question had to do with the relationship between the location of the driver's seat and the blood stains on the driver's side door, and were based upon the prosecutor's premise that Rhodes had just testified that "the presumptive blood....is consistent with high velocity blood splatter on the driver's side door" (T-7/27/88-I30). Specifically State asked Rhodes whether "if someone" were driving the car with the "seat back as if it is in an upright position," the seat back would have in any way interfered with any of the blood spots found on the driver's door having reached the door, and that if the seat were then moved forward-----"assuming that you've got high velocity blood splatter from a gunshot wound as you said that is consistent with"-----would it have reached a point where the seat would interfere with the projection of that blood splatter onto the door. The answer was "no" there would be no interference in the back position, but that "yes" there would be interference as the seat was moved forward when it came into line with where the location of the door lock is (T-7/27/88-I30-I32).

With reference to SE 67, State asked Rhodes whether it would be unusual for him to have been unable to find high velocity blood splatters thereon with a microscope and Rhodes responded thereto by stating "this surface is very rough and it would be difficult to find a stain that small" (T-7/27/88-I33). (Note: The Record on Appeal does not reveal what SE 67 is, but it appears it is the blanket.) He then testified: he conducted another test on the blanket---"a phenolphthalein test,"----which told him that there was "possibly blood" thereon; that when he conducted this test he was looking for areas that turned pink and that if the area turned pink within five seconds, "it is probably blood"; that he tested the blanket based upon information he derived from photographs showing how it was folded and that he folded it accordingly; that this test resulted in three pink areas on "the other side of the blanket," which were presumptively blood; and that the 21 dots "on the surface of the blanket" were found to be presumptively blood (T-7/27/88-130-

l56).

Responding to another long, confusing, and leading hypothetical question about the specks on the blanket, the main assumptions being that no one was in the driver's seat and the blanket was folded as it was allegedly folded in the photographs, and with the passenger seat fully reclined, Rhodes said that these situations being existent would be consistent with high velocity blood splatter having been found on the driver's side door (T-7/27/88-l37,l39).

In response to another hypothetical question, Rhodes said: "If you put her in this reclined position, the pathway from the head to the blanket becomes obstructed by the back of the driver's seat." (T-7/27/88-l62)

Rhodes next testified that a high velocity speck would dry very quickly (T-7/27/88-l64). There followed more leading State questions and more State summarizing culminating in State asking Rhodes a question about blood splatters with Rhodes to assume that Def. shot Kersten from outside the car. A defense objection thereto was sustained but the jury, of course, had already heard the question. There followed two more State leading questions. State then introduced the "template", the plastic sheet that was placed on top of the blanket over defense objections. (T-7/27/88-165-168)

On cross, Rhodes testified he didn't think it was necessary to bring the actual two l8 inches by l8 inches filters of paper to court, of which SE 87 is a copy; that the specks in the photo of the 2 doors of the car were too small to be seen and all that could be seen was circles; didn't test the back of the driver's door on Nov. 3rd, but said he looked at it and did not see what would have appeared to be bloodstains thereon; that he probably didn't look at the right side of the back seat of the driver's seat at that time; that he did find apparent blood on the headliner, but said he couldn't recall whether he found blood on the headliner just above the passenger door; he had been fooled before with substances that looked like blood; that the material in Kersten's head "explodes back" as the bullet entered her head which is how the material got on the headliner; that he did not

know how the blood got onto the driver's side of the inside of the car; and that deflection was a possibility but not a probability (and, in this regard, he conceded that he meant "possibility" in the sense that anything is possible); and that the blood being on the driver's door was consistent with somebody standing outside the passenger door and shooting through a partially open window; and that he would assume that Kersten was tilted to the left (T-7/27/88-I69-I95).

Argument followed the trial testimony of W. Symkowski, who was the MCC inmate who claimed that Def. made inculpating statements to him, and the court indicated a ruling that it would allow the State to adduce testimony from Symkowski that the def. told him he once sold Kersten to Arab persons for up to a month at a time because they like blue-eyed blondes. The court also indicated it would not allow def. to go into Symkowski's bad act of having been a defector from the Soviet Union to live off social security. (T-7/28/88-130-136)

Thereafter followed the matter of J. Benyumes, a person not involved in this trial who told the court he spoke to juror Chris Sabatino in the hallway and that "Chris" had overheard him asking if there were any interesting cases and that "he proceeded to tell me...he was involved in a very interesting case. (T-7/29/88-I2-I9). Benyumes said:

> "Mr. Benyumes: He told me he does not think the defendant is guilty. He told me he can see how some jurors might think the defendant is guilty because of certain evidence, mainly the fact that five or six insurance policies had been taken out on the woman. He said that the State, in his opinion, had a weak case, that they told him that in order to convict this man they had to think beyond reasonable doubt that he was guilty. In his opinion,m he couldn't do that." (T-7/29/88-20) (emphasis added)

Court and counsel next discussed defense counsel's having injured himself and whether he was going to undergo general or localized anesthesia. Defense expressed his concern about having the surgery and then trying to get back to the trial (T-7/29/88-3I,32).

The court called Juror Sabatino to explain his conversation with Benyumes and he denied he had told the latter that some jurors felt the def. was guilty and, specifically, relative to other jurors, Sabatino said, "...sometimes some people start to say something, then they say we are not allowed to talk about it and that's it" (T-7/29/88-41). The court called each juror in and they all denied that they had discussed the case (T-7/29/88-47-85). Argument followed with the State wanting him off and defense wanting him to remain (T-7/29/88-88,94), the following colliguy then occurred:

> "The Court: It is not just credibility which I can decide, but it's a matter of the damage done to the rest of the panel.
> Mr. DiGregory: No damage has been done to the rest of the panel.
> The Court: That's the key...." (T-7/29/88-94,95)

The court then announced that the trial would proceed before the jury as then constituted with it to further question Benyumes (T-7/29/88-101,102).

The State then called Symkowski to the stand and he testified: that he was presently serving a 10-year sentence; that he had provided information to federal government agencies on two occasions and that he had received no benefit except his expectation that someone might write a letter for him to the judge in charge of his sentence; that he and Def. were roommates for two months; that def. played chess well; that they spoke "Germany" (he said he spoke "maybe 30% German"); that def. had been with Kersten for 13 years; that Kischnick was a "high class prostitute"; and that Def. had paid 15,000 DM for a "Swiss guy" to marry Kersten so she could secure a Swiss passport because Swiss passports are good for travel throughout the world; and that Def. said he was a salesman and that girlfriends supported him (T-7/29/88-105-112).

Regarding the shooting itself, Symkowski testified:

> "A. Explained me, he's been to shopping grocery store, drive car, lose road.
> Q. What was that next phrase?
> A. Lose road.
> Q. Continue.
> A. Yes, watch man -- I'm sorry, this is exactly what word came Mr. Dieter "negro", open the window. He asked for direction. This bad guy give to gun, because watch, this is gold Rolex watch.
> Q. Who had a gold Rolex?

A. Watch.
Q. Who had a gold Rolex watch?
A. Mr. Dieter. Mr. Dieter in stare pushed to gas, car to go. Bad guy shooting. Mr. Dieter watch in hands, shot in head, called to help, stopped to police. Woman policeman. He called for other police and help him." (T-7/29/88-II4,II5)

Symkowski testified that Def. told him he had "over a million dollars" insurance on both he and Kersten; that he talked about being a "a millionaire" (this sub-answer was in response to another State leading question); that Def. asked his opinion as to "how many I pay for family, my girlfriend, because family girlfriend very poor"; and that for this "Mr. Dieter tell me,"...."I pay 300,000 DM..."; and that he would use the rest of the money for a Corvette and boutique shop (T-7/29/88-II6,II7).

Then out of the blue, the State asked Symkowski, to-wit: "Q. Where you say he danced and he said I am happy, I am a millionaire." (Emphasis added) (T-7/29/88-117)

Symkowski said he and Def. spoke in English (T-7/29/88-II8). He testified that Def. told him:

> "Because found only three guns which is other guns not found because other guns I buy for civil (phonetic) people. These three people I buy gunshot. The police find it, proceed in trunk. This is my mistake. Why I buy gun for____I tell you: Why buy gun? Better go to Germany." (T-7/29/88-II8-II9)

Thereafter the State's following question and answer exchange occurred:

> "Mr. Dieter, in the walk. I ask: you tell me many things good for your girlfriend, very pretty, very nice, younger to you, help to you, support to you. I tell you: Why Dieter you kill this girlfriend?
> Q. You asked him why he killed his girlfriend?
> A. Yes. Dieter for couple of seconds, maybe 20, 30 seconds, I don't know, I can't explain how many seconds, faced white like this wall.
> Q. Did you say his face was white like the wall?
> A. Yes. In the big later, this is tell me: Walter, you old guy forget everything, better go to play chess. I never more different question.
> Q. So that's the only time you asked him a direct question?
> A. Yes, sir. Yes.
> Mr. DiGregory: No further questions of Mr. Symkowski." (T-7/29/88-I2I,I22)

On cross, Symkowski said his prior convictions were for 17 counts of defrauding people in Michigan arising out of car sales. (T-7/29/88-I23-I35).

Regarding his previous answer in response to the State question about Def. dancing, Symkowski was asked and he answered:

> "Q. Now, you say Dieter danced?
> A. Yes.
> Q. Actually got up on his feet?
> A. No, this is not exactly dance Russian cause rich and polka understanding... The first day go to jail... All day happy because millionaire." (T-7/29/88-I4I)

He then testified that Def. told him:

> "....I am not crazy because I have a save deposit box by every paper, safe deposit box." (T-7/29/88-I43)

Thereafter in the jury's presence State blurted out the following:

> "...He admitted he is an informant, provided information in the past and I don't' know that he needs to go any further than this because it might endanger Mr. Symkowski." (T-7/29/88-4I)

Defense immediately objected and the objection was sustained, and the jury was instructed to disregard, etc., but here again the jury had already heard what was said (T-7/29/88-4I-42).

There followed Symkowski's denial of expecting anything for testifying in this trial, which he then contradicted by talking about wanting to receive a letter to his sentencing judge. (T-7/29/88-I45,I46).

One of the jurors complained concerning the press taking pictures of the jury (T-7/29/88-I82,I87).

The court then returned to the matter of the juror contact and an attorney appeared to represent "Mr. Van Neusen" (who is obviously the man referred to as Benyumes earlier). This attorney told the court that the Sabatino had told "Van Neusen" he thought the Def. was not guilty; and that Van Neusen had said he could understand why another juror might think this Def. was guilty, but that it was a judgment call whether or not Van Neusen was thereby implying that another juror had expressed an opinion of guilt. The

court excused Sabatino from further sitting on the jury, overruling Defense objections and denied the defense motion for a mistrial (T-8/I/88-3-8;22-24).

State again brought up the matter of whether defense counsel was physically able to continue with the trial, having suffered "an unfortunate accident last week" and awaiting surgery, because allegedly he had made comment that his leg was killing him to a newspaper. Defense said he felt able to continue. (T-8/I/88-4I,42). The next morning there was more discussion regarding defense counsel's leg (T-8/2/88-67). Then there was further argument concerning the fact State still had not furnished Defense with two of the insurance policies seized from one of Def's German safe deposit boxes, which policies were on Def's life with Kischnick as the beneficiary (T-8/2/88-67,70). The court denied Defense's motion for production of the two insurance policies despite the fact that Defense said he never received them.

Defense then renewed his motion in liminie to exclude the Def's past criminal convictions because the last crime had occurred in I975 even though the conviction may have been later. The court indicated it would allow in the prior convictions (T-8/2/88-84-90).

Defense argued the court should instruct the jury that the Def's prior convictions were only to be considered on the issue of credibility, and not on guilt or innocence, and over State objections the court said it might rule with the Defense on this point if the Def. should testify (T-8/2/88-92).

Def. took the stand. He testified: that he had 8 years of schooling; that Kersten got into prostitution because he was in jail for perjury (At this juncture State had the interpreter repeat the word "perjury" [T-8/2/88-I02-I07]); he didn't ask Kersten to get into prostitution and denied she was doing so to support him; he bought her freedom from a gang of pimps in March of I978 by giving them "maybe" six months pay; that the State's witness, Reinach, was a male prostitute and he never told him he was either a pimp or Kersten's pimp, which he said he was not; State's witness Steffan tried to have sex with

Kersten and that he told him not to go near her; he bought accident with disability insurance and health insurance on both he and Kersten from Steffan; that he bought his Mercedes with money he made from commodities; and that when he first met Kersten he had 300,000 DM in his account, which he seemed to say he earned from dealing in oil (T-8/2/88-107-116).

Defense objected to the actions of one of the prosecutors before the jury, which the court interpreted as being facial expressions (T-8/2/88-116).

Def. further said: he and Kersten had a short separation during which he moved to Switzerland and he said that when he returned, Kersten "was again involved in prostitution and was in the hands of some pimps over there;" he was threatened and that this was the time "when I bought Kersten six times free" for 8,000 DM or $7,000, which was in 1980; Kersten had initially named her parents as beneficiaries on her life insurance, but that she changed the beneficiary designation to him in 1983 and that he didn't force her to do this; he and Kersten were "life companions" and that they had intended getting married on their last vacation to the U.S. in 1986, but that they didn't do so; that he became a Diner's Club member in 1983 or 1984 to get the insurance and to get credit to use abroad even though he doesn't like credit cards; one has to make a minimum payment of 50,000 DM to be eligible to secure a Diner's Club or American Express card; he also had American Express and Mastercharge cards; that he did not have to include Kersten's earnings to qualify for the Diner's Club card; that he bought Kersten expensive jewelry and gave gifts to her family; that he had a list of insurance policies in his trunk because he had an accident here in 1986---and was in the hospital "for 22 or 23 days"....."and I had the greatest difficulties because they, on the one hand side (sic), wanted to see money"...(and) "I do not carry around $18,700 (sic) in my pocket"; he had better years financially than in 1985, but that the State's contention that he was doing badly in 1985 was "total nonsense;" he made two trips to the United States in 1986 and that he bought guns in Nov. of that year, one the Taurus, from a store and

one from a private person through an ad in "Bargain Traders," which latter gun was 40 years old; and that Kersten was with him when he bought that gun (T-8/2/88-I20-I58).

Def. thereafter testified as follows:

> "A. First of all, I like to shoot. And in Germany since a few years back, because of the terrorism there, it is not possible anymore to obtain weapons legally. And so I bought the weapon here and it would also be nonsense if I were to buy the weapon here and spend $200 and then basically throw the money away because at that time, we had already planned Kersten and I would live here in Miami and that I would start a business, especially for Kersten. And so it was just a regular every day action, and it was not money to run out of the window because we have the chance to use the weapon, try it out during vacation. And if we had left the country, we had someone here who would have kept it for us, because we couldn't take it with us. And it's not legal to have one in Germany." (T-8/2/88-I57)

Def. further said: in Nov. of I986, they shot the guns at an indoor range and that Kersten shot the Taurus and that they fired the guns 200 to 250 times; when he left the U.S. he left the guns with his investigator on the accident case, Harold Curtis; he and Kersten arrived in Miami from Zurich on Oct. 2nd; he rented a Hertz car with the reservation therefor having been made in Hamburg; they took a room at the Holiday Inn on A1A on MB; they bought videotapes at Luskin's for $II00; they were at the Holiday Inn one day and took some video film; Curtis gave them a box with the guns; that he went to the video store at Bayside on Oct. 2nd and 9th; they left Miami on Oct. 9th and drove to Daytona; and "that from there we went back to Miami, going south....Because we had things to do in Miami because Kersten and I had planned for a long time that we wanted to establish ourselves in a business in Miami" (T-8/2/88-I60-I68).

Def. thereafter testified: "The opening of the boutique was planned with production of Italian design clothing (sic)."...."near Mall, I63rd Street"..."so we took a room at this small motel---Tahiti Motel." (T-8/2/88-I7I,I72)

He, further, said they checked into the Tahiti on Oct. 20th or 2Ist; Oct. 3Ist was to be their last day in Miami and that they had return airplane tickets; he bought the third gun, a derringer, from National Gun Traders and Kersten liked it because it was small and

would fit into her hands, but that they only ordered it and did not receive delivery of it; that they bought 50 rounds of Winchester ammo the same day; and that they fired the two revolvers at an indoor range using only l0 rounds of ammo they had bought that day; and that the remaining 40 rounds were the one's later found in his motel room (T-8/2/88-l72-l77).

Def. next explained to the jury his conviction for solicitation for perjury, and impliedly contends he was not really guilty (T-8/3/88-l84,l85).

Immediately thereafter Defense said that for a "third time in the trial...through its conduct at counsel's table, the State is attempting to influence", and the court stated: "The State will refrain from any show of emotion or any facial expressions" even though defense had made no mention of emotions or facial expressions (T-8/3/88-l86). In addition to whatever motions and facial expressions the "State" had exhibited, it blurted out the following----also in the presence of the jury----to-wit: "He had admitted of asking three people to lie for him. Now he's trying to give....." (T-8/3/88-l87)

A Defense objection thereto was sustained. (T-8/3/88-l89).

Def. further testified: he was convicted of a misdemeanor and that was why he had answered "no" on gun forms where he was asked whether he had been convicted of a felony; the Derringer was never fired insofar as he knows; there had been other insurance policies in the safe deposit box which he contended the prosecution did not bring to court, including a policy on his life for l00,000 DM on which Kersten was the beneficiary; he and Kersten made out the last wills and testaments because they were not married and that under German law Kersten would otherwise have inherited nothing from him, and he said that he had wanted her to inherit from him rather than his family; that personal property owned by him at the time the wills were executed included antiques and a Rolex watch; and that he had a concern that he and Kersten might die together, when after a helicopter ride they had through the Grand Canyon in l986, they read in the newspaper that a small plane had crashed in the Grand Canyon with no survivors (T-8/3/88-

192,212). Then there was another colliguy concerning defense counsel's injury and his having to submit to general anesthesia, with such counsel explaining that he was wearing high tech fiberglass from the groin to the ankle and that he would attempt to finish the trial before undergoing the necessary surgery (T-8/8/88-I-5).

Defense asked the court for an instruction that def's prior convictions were only to be considered for impeachment and credibility purposes (T-8/8/88-I8).

Def. resumed his listing and identifying of insurance policies which were then introduced in evidence. He said that Kersten had saved his life from drowning in the Canary Islands and that he had saved her life many times, including from drowning in the bathtub and from falling off a 5000 foot cliff in the Black Forest (T-8/8/88-25-28).

Def. next testified about his prior convictions, but the court sustained a State objection to his testifying as to the details of a past conviction for document forgery and for going into the details of the solicitation of perjury charge (T-8/8/88-38,39). Def. said he purchased the Mercedes in I984; that he was to pay I05,000 DM for it; and that he lied to Mercedes Benz to save 25,000 DM (T-8/8/88-42-52).

Def. then testified as to the events leading up to and forming a part of the involved shooting incident, to-wit: they drove to Bayside to take pictures with the video camera and that that was the reason they didn't go to the indoor range and, for that reason, they had put all the guns back into the suitcase in the room; they arrived at Bayside between 4 and 5 p.m. and took pictures (which had previously been shown the jury); that they ate at Jardin Bresilian, had several alcoholic drinks, and left there at about I0:00 p.m.; in his Oct. 28th statement to Hanlon he had said that during the past five years he did not drink any alcohol because he had "to cross borders," but that that night he was drinking various cocktails, and the day had been "a fantastic day and we were in a fantastic mood so we tasted the cocktails that were there"; they were not drunk when they left Bayside; that they were going to stop and videotape the "Welcome to Miami Beach" sign on I-195, as a vacation souvenir; that he was driving and that they knew the road they were looking

for would go to the right somewhere between Bayside and 163rd St., but that they were discussing an empty store Kersten had found at Bayside, and other things; and "that we did not watch where we were going so we landed someplace where we hadn't even wanted to go, and I do not know where this place was" (T-8/8/88-52-67).

Def. further testified he had many maps of the Miami area in the passenger area (and not in the trunk) but they didn't use any maps this day; they were both in fantastic moods so having gotten lost was no problem; they saw somebody standing by the road, and he told Kersten he was going to ask for directions; he drove over to the right, put the window down about halfway and called to the man who was standing by the road; the man came over to the car and that he told him in his poor English that they were looking for Miami Beach and that the man was very friendly; he pushed his seat back a little bit and unbuckled his seatbelt to reach for the suitcase to get the video camera because he assumed the man would direct them to where they wanted to go; that he took the video camera out; Kersten said that they should give the man some money because he had been so nice and "I think from her purse she took her money;" he put the camera in Kersten's lap; the man had gone away and that "suddenly he was at the window again" holding something in his hand, but that he wasn't sure what it was, "but I think I hit the gas pedal and I put my hand in a protective manner and kind of in front of me"; there was an explosion and that was when he hit the gas pedal and Kersten fell over; and that he looked in the rear-view mirror and heard Kersten breathing very loudly, but that he wasn't even aware that she was hurt (T-8/8/88-67-74).

He said he then asked Kersten, "Goodie,(phonetic) what is the matter", but that she did not answer; that she continued to lie there and he continued driving; after a time he felt a strange draft and pushed the right button to put the electric window up; he didn't know where he was driving to; Kersten's lips moved but "it wasn't really speaking"; he only saw her head from the side; and that he was trying to find the light" and "there was.....terrible heavy breathing"; and that he moved her seat but didn't know why; he

moved the seat back so Kersten wouldn't hit the dashboard and to make her more comfortable; he told the police on Oct. 28th that he felt the back of her head and it felt soapy; he reached back to get the flashlight in back since the middle light didn't work and he found the flashlight between the towels and took it and pointed it at Kersten but "I didn't see any blood or anything," and that he then did "an idiotic thing," i.e., that he took the video camera from Kersten's lap and threw it in the backseat; that "when it happened and when I saw her blood on my hand, I didn't know....that she was hurt on the head"; that he might have shaken his hand off or maybe wiped it off or something; that he was in a panic and he couldn't even think straight; when he saw a police car, he stopped to get help; that he said, "I need help for my girlfriend;" he knew she was alive; Kersten was lying as if she were looking out the window; the police officer called for other police and they came and that "everyone was standing and looking and no one took care of Kersten"; the people standing around made him nervous in that he was surrounded; they stopped him from getting through to help Kersten 3 or 4 times; they asked him all kinds of nonsensical qustions; his English wasn't too good at the time; someone finally came and spoke German, but that "his German was for sure as bad as my English at the time"; no one did anything for Kersten; the police rubbed his hands with Q-tips; that they questioned him if he owned firearms and that he said "yes"; they put him in a police car (in the backseat) and drove him to the MBPD; they put him in a cell for 3 to 4 hours; that then one of the detectives pretended to be surprised to see him behind bars and opened the cell; this officer (Matthews) said he was sorry he was in the cell and said his colleagues believed he had done the shooting but that he, i.e. the officer, didn't agree with that; that Matthews questioned him with no tape recorder and no video machine for an hour or more; and that he told Matthews he didn't know where the shooting had occurred and when he last saw Kersten "she was almost looking at me through the window" (T-8/8/88-75-94).

Def. said: he rented another car because he wanted to move to Howard Johnson's

on Biscayne Blvd. to be close to the German Consulate; that he wanted to drive around himself to see where he had been on the 25th; he started at Bayside on the night on Oct. 29th and he drove 160 miles and tried to reconstruct his route, but that "I was not sure that I had found it"; he didn't plan to leave Miami even though he had many credit cards and even though Germany has no death penalty and no extradition treaty with the U.S.; he would be subject to trial in Germany no matter what should happen here; he did not see any blood on Kersten's left shoulder up to point he left his car to get police help; he bought the blanket in June,1987, to use on the beach and at the end of the vacation to leave it; he heard Rhodes testify concerning his test on the blanket and that he allegedly found 25 spots of what could be blood, and that if there was blood on there it could have been from one of "our" dogs....Hercules; he didn't know if the air conditioner was on or off when the shooting occurred, but that he had left it in the same position it had been in when he left the car to get help; and that his earlier testimony notwithstanding, Matthews had called him on Oct. 28th, rather than vice versa, and that then he learned in May, 1988, that the telephone call was taped (T-8/9/88-124-133). Defense then announced it wanted to publish the tape and a copy thereof was then moved in evidence and that tape was played but the contents thereof were not included in the transcript (T-8/9/88-133-140).

Def. testified: Symkowski had a general reputation at MCC as an informant; he denied that he danced in his cell; that "at a certain time, i.e., Nov. 15, I wrote a declaration in which I surrendered all claims for all insurances to Kersten's family; at the time of his assignment of the beneficiary rights to the Kischnick family, "I believe I had 440,000 DM or $270,000 on the life of Kersten;" that he didn't know it was 1.7 million Deutschmarks because "I didn't know that this life insurance...also covered the circumstances that someone would be murdered and that I learned later from attorny Tralke...;" that he had 320,000 DM or almost $140,000, on his life for Kersten; he wasn't aware of double indemnity; that he cancelled the assignment to the Kischnick family on May 10, 1988; he

sent a letter to the insurance companies cancelling the previous assignments to Kersten's parents, because he had seen copies of the statements Regina and Sandra Kischnick had given to the German police; he first learned of the Germans searching his apartment in March or May of 1988; Symkowski was lying concerning his having allegedly said that he wasn't crazy because he had everything in a safe deposit box; he never told Symkowski he had more than three guns and that he did not have more than 3 guns; that Symkowski's testimony that he turned white was a lie (T-8/9/88-168-197).

Def. said Kersten was his "big love" and that he did not shoot her (T-8/9/88-197,198).

On cross, def. said he remembered Kersten putting their dog Hercules on the blanket (T-8/9/88-199-201). Thereafter the following appears in the trial transcript:

> "A. I don't remember that exactly.
> Q. You don't remember that exactly? Well, let me---
> Mr. Carhart: Excuse me. I have to object to the sarcasm and echoing of the witness' answer.
> The Court: Sustained."

He said the dog did not bleed aspirated blood because he was bleeding from his foot and not his mouth; and that he didn't go back to the veterinarian when he discovered the dog was bleeding. The State thereafter asked the following question: "Did you shoot the dog in your car so that the blood ended up the way it did on the blanket?" (T-8/9/88-202,204). He said he brought the blanket with the dog blood on it to America without washing it and when the prosecutor asked if he wanted the jury to believe that the blanket just happened to be folded the same way in this car at the time of the shooting as it was at the time when the dog had been bleeding, the Def. asked the prosecutor to repeat the question. The State said: "I will repeat it a hundred times Mr. Reichmann if it takes a hundred times to get an answer" (T-8/9/87-205).

The def. said that on the morning of Oct. 25th, after breakfast and a couple of hours on the beach, they took showers and decided to go to the shooting range and took guns out, but that they decided to go to Bayside and not the range. He added he didn't tell the police in the Oct. 28th statement that they had handled guns at the Tahiti (T-8/9/88-

208-209).

Following more State questions concerning statements the def. had made in his several statements to the MBP, def. said: "I cannot answer the question regarding getting the flashlight in the back seat because at the time I was not in any mental condition to be able to answer any questions at all". He said he did not remember saying whether---- because of his mental state----he told the police on Oct. 28th of noticing blood and brain matter on his hand when he shined the flashlight on it. He said he was in shock (T-8/9/88-216-217). He further said: "The first three or four days after it happened I didn't even know exactly what was happening around me" (T-8/9/88-218). Thereafter the prosecution read from def's Oct. 28th statement and then asked him a series of questions as to why he hadn't stated therein about putting the video camera in Kersten's lap, repeating parts of the def's answers thereto before asking the next question (T-8/9/88-221-227). Following more State questions relative to his statements to the police, State said: "Q....You were in shock, right?" (T-8/9/88-237). Thereafter the Def. said there were no German translations of his statements given him by the MBP (T-8/9/88-237). He testified again that he was convicted of solicitation of perjury but said that that didn't happen (T-8/9/88-237,238). And to this State asked (and the def. answered): "Q. And you went to jail for it, didn't you? A. That is correct" (T-8/9/88-237-238).

The prosecutor then asked:

> "But, but of course after you had been convicted of asking three people. I think it was to lie for you under oath, you learned your lesson and you didn't ask anybody to lie for you anymore, did you?"

A Defense objection thereto was sustained (T-8/9/88-238). The following occurred immediately thereafter.

> "Q. (State) You a little warm, sir?
> The Court: It is warm in here. Joe, make it cooler in here. The jury will disregard the last remark by the State." (T-8/9/88-240)

When asked by State if he had asked Steffan to lie for him, he said he had not. State later said "If I could get a truthful answer, I wouldn't have to." State then questioned him regarding his having, told bank personnel that he was an agent for the Continental Ins. Co., and at this point a document relative to the Continental Ins. Co. episode was admitted in evidence over the search and seizure objection of Defense (T-8/9/88-251-253). The court then announced, "I'm going to deny your motion to allow your expert to read the State's expert testimony" (T-8/9/88-259).

Def. said his statement to Mercedes Benz in 1986 concerning his allegedly being broke was "a white lie" and he told Mercedes this to enable him to get out of the contract; he denied he had told M. Reinach then that Kersten didn't want to be a prostitute anymore; he said Kersten married a Swiss to get a Swiss citizenship and so he could marry her and get Swiss citizenship himself and not so Kersten could earn more as a prostitute in Switz.; and he added that he never told Symkowski anything about this marriage (T-8/9/88-263-269).

Thereafter when State asked def. if an invoice from Dr. Chemerns would refresh his memory regarding when Kersten received gynecological treatment, Def. answered in the negative, and the prosecutor then said in the presence of the jury, "I didn't think so." Thereafter the court sustained an objection and told the jury to disregard the remark (T-8/10/88-272). State questioned Def. regarding one of the guns, i.e., the Derringer, which was purchased at the National Gun Store, and in connection therewith the Def.. admitted he filled out a Firearms Transaction Record (T-8/10/88-275).

At this juncture defense again successfully objected that the prosecutor was in the witness box (T-8/10/88-275).

Def. admitted he got two years and six months jail time on the solicitation of perjury charges, which he said he was "an offense" and not "a felony"; and he said that when he filled out the gun form he didn't know what a filing was and that the salesman told him, "no, no, no and then sign." Defense objected that State should not be allowed to cross-

examine Def.. relative to this gun form (T-8/10/88-285).

Respective counsel then argued about whether the prosecution should read or reread a question in its entirety and State then said "Judge if he wouldn't keep coming up with these answers...." The court struck this comment and told the jury to disregard it (T-8/10/88-289). State brought to the jury's attention that Def. attended all depositions with no interpreter being present, and then the prosecutor said:

> "Q. In fact, during the course of one of those depositions you had the audacity to ask Ms. Screeman out to dinner in English didn't you?"

The def. then explained:

> "After she, i.e., Assistant State Attorney Screeman, had the audacity of entering my apartment in Germany, I took revenge by inviting her to dinner" and "I believe I did so in English." (T-8/10/88-290,291)

Def. admitted he had been convicted of crimes four times, which he said included being convicted of (a) "being a thief" (b) document forgery (c) solicitation of perjury. He testified that in her last years, Kersten was not a prostitute and that it was a private affair which was none of the police's business, and he said he never told them Kersten was a prostitute (T-8/10/88-293-294).

State then purported to summarize Def.'s prior trial testimony stressing all points unfavorable to him and the court sustained a Defense objection thereto (T-8/10/88-295,296). In response to the State's inquiry as to how the Def. could not describe "the man," i.e., the person Def. contended shot Kersten on cross, while he did tell the police other details and was able to describe "the man" on direct, Def. said that "at the time I was confused and I was not able to think clearly, and the help that I would have needed was refused to me at this time" (T-8/10/88-297-300).

State continued this line of questioning and in the process cut the Def. off from completing an answer to one of its questions (T-8/10/88-301). When State asked Def. how he "suddenly remembered" what "the man" looked like, Defense raised an objection,

which was sustained (T-8/10/88-302). Defense then argued to the court that the State knew that the description of "the man" Def. gave to the jury was the same he initially gave to the police and it was after he was Mirandized that he didn't describe the man (T-8/10/88-303).

Thereafter the following question and answer appear in the transcript:

> "Q. Now sir, isn't it a fact, sir, that you and not this black man are the person who walked up to this window and fired that bullet, that silver-tipped .38 caliber Winchester, hollow-pointed bullet, just like the kind you have in your room into your girlfriend's head on October 25, 1987?
> "A. That is nonsense." (T-8/9/88-313)

Thereafter State again brought up the business about the Def. having allegedly lied on the bank applications to which question a defense objection was sustained (T-8/10/88-313-314).

Thereafter State asked if he wouldn't lie to collect the insurance money from the death of Kersten and a defense objection thereto was sustained (T-8/10/88-315-317). And then the following occurred:

> "Mr. DiGregory: I have no further use for this witness. The Court: Counsel, let's not have any comments. Mr. Carhart: Judge, I would ask that Mr. DiGregory be admonished. We're in a courtroom and I'd ask the jury be instructed to disregard that statement. The Court: Jury will disregard the last statement by the State Attorney." (emphasis ours)(T-8/10/88-317).

Def. said he told Trujillo in the statement to him that after he accelerated and heard the explosion he went through a red light and heard a wind noise so he put the window up and that he heard gurgling sounds made by Kersten (T-8/10/88-335). With reference to his taped interview of Oct. 28th, which interview Def. said began at 1:00 a.m., and after he had been up without sleep since the shooting occurred on Oct. 25th, he confirmed his answer that he was being asked the same question that Matthews had asked him. I think more than one hundred times;" and the Def. said he initially told Matthews he couldn't say how old the black male was, but that when questioned further he said he was "I believe 25 or 20 or 35" (T-8/10/88-337-339). Def. said he talked to the police for

4 1/2 hours on Oct. 29th concerning how Kersten had been shot, etc. (T-8/10/88-339). In response to a direct question by his counsel as to how old the man who shot Kersten was, Def. said "25 to 35" and added that his earlier having included the number "20" was a "speaking mistake." He said he had also said "today" that the man was black, had an oval face, was about his heigth and had a medium build (T-8/9/88-343). He added that that was the same information he had tried to give the police on Oct.25, 26, 27, 28, and 29, 1987. He stated he had no reason to pay any particular attention to the black male until the explosion occurred, and that when he had rolled the window down he had no way of knowing that 10 months later somebody would be asking to describe the man with precision (T-8/10/88-349). He said he had told police that he and Kersten had lived together for 13 years, but that he didn't tell them that the two of them never married because they didn't want children and that Matthews probably invented that (T-8/10/88-345-347). Thereafter the State picked up on the Def's use of the word "invent" and asked Def. a question as to whether Matthews had invented another statement or alleged statement the prosecution attributed to Def. Then the prosecutor said: "Sir, do you have trouble giving me a yes or no answer? You seem to have no trouble with Mr. Carhart....."

The immediate Defense objection thereto was granted but, of course the jury had already heard the patently improper comment . There followed another "invent" question by the prosecutor to which an objection was also sustained and then State started telling Def.---in the presence of the jury---what it allegedly was that he didn't tell Matthews and the court sustained Defense's objection (T-8/10/88-349-351). Then State said, "he invented that too," and Defense objected that this was the third time such had been said, despite the court's previous rulings, and the court sustained the objection and admonished the jury to disregard the state's statement (T-8/10/88-352-354). Def. said he had told Matthews he didn't remember whether the man had a hat or whether he was wearing glasses. He admitted he spoke to Matthews and Trujillo in English on Oct. 26th but, in this regard, he said his English was "miserable" (T-8/10/88-357-359).

The prosecutor then asked this def., to-wit:

"By Mr. DiGregory.
Q. Do you think this is funny, Mr. Riechmann." (T-8/9/88-359,360)

The court then had the jury step out and warned counsel to stop getting personal, and said it would tolerate "no more smart remarks" (T-8/10/88-359,360).

Def. admitted he told police on Oct.28th that he didn't remember if the man had on a light colored shirt or a dark colored shirt, and that he told Matthews he did business in commodities..."gold, silver, iron, whatever..." (T-8/10/88-361-363).

Defense then called Dr. V. Guinn, a gunshot residue and bullet lead analysis expert to the stand who said he was a professor of chemistry at the University of California at Irvine (he listed his other qualifications) (T-8/10/88-364-365). He said he was "thoroughly familiar" with the science of "gunshot residue analysis;" that he had done work in forensic chemistry; and that the FBI uses his technique to analyze gunshot residue (T-8/9/88-366-368). The prosecutor then voir dired Guinn relative to "particle analysis," and the witness said the following: the neutron activator analysis method of gunshot residue, which he helped develop, can determine whether barium and antimony are present, but it is not very useful for looking for lead in gunshot residue samples; the second method, to-wit: "Spectrophatomatry" (atomic absorption) will detect lead; and the third method is "particle analysis;" he had never conducted a gunshot particle analysis, although he teaches this method; he was aware that Q-tip swabs were used to remove gunshot residue from the hand of the victim and the def. in this case; and that alcohol was used to lift the residue and that this is the first time he has run across alcohol being used in particle analysis; none of his papers deal with any specific work he has done with particle analysis; the FBI evaluated all 3 methods and concluded that the neutron activator method---his method---was the best of the three; that he had testified on deposition that the FBI used the neutron activator method because the particle analysis method was so time consuming that it wasn't useful to them; and that he had not examined the gunshot

residue that Rao used (T-8/10/88-373-381). Dr. Guinn was declared to be "an expert in forensic chemistry and gunshot residue detection" (T-8/10/88-381,382). He then testified in chief to the jury, as follows: he contradicted Rao's contention that there are no studies to determine what percentage of the gun powder residue exits the muzzle and said that his lab studies show that 95% of prime particle Derringer residue comes out the muzzle; with reference to the characteristics of gunshot residue particles, Guinn said "there is no way that you can distinguish where that particle came from in even a given known firing, whether it came out of the muzzle or leaked around to the sides or on to the back of the hand the bulk of it goes forward"; that with reference to a "typical handgun," "you'd be able to detect some of the gunshot residue materials out to approximately five feet" and that this would apply to a .38 and a Derringer, and maybe up to five and a half feet; "in a typical case the firing of one cartridge (sic) puts out generates about ten million such particles, ten million"; that this has been confirmed by the FBI; he'd seen nothing published about a 38's muzzle, and he added that the primer parts and gun powder parts all come out together; that "about a thousand particles come out of the breach----in a backward direction----as compared to the 10 million coming out the muzzle" and land on the firing hand in the average case; that ""with the scanning electronuroscope you cannot only look more carefully at each part, its shape, its diameter, and also the print elements in that particle, and what you're looking for particularly are lead, antimony and barium, which come from the primer"; and that based upon the configuration of the skin around the entry wound (on the photographs showing the deceased), even though the shaving of the deceased's head presented a "distorted picture" in that most gunshot particles would have landed on her hair, the approximate distance between the muzzle of the gun and the deceased's skull when the shot was fired was "a bit closer than the outside.....range (of) twelve inches" (T-8/10/88-388-412).

He said that assuming the gun had been fired through the opening of the window, gunshot residue particles would have entered the interior of the car as well as onto the

skin of the deceased; he had made "personal measurements where there were firings into and, as well, out of automobiles involved in other cases" and that "the results we have obtained indicate that when a gun is fired either inside of a car or at least very close to an opening in the car, ...you tend to fill the interior ...with a smoke cloud....that diffuses out.....it's not necessarily uniformally distributed but it does get all around the car" (T-8/10/88-412). Guinn said: the gunshot residue would settle on any surface inside the car, including any person sitting inside the car, if the A.C. was on in the car, it wouldn't have any effect on the particles being shot out of the gun (at 800 to 1200 feet per second) but that as the particles slowed down, the A.C. could cause an effect," but unless you have like a fan blowing it right out the window, it tends more or less to just stir up the smoke cloud and distribute it around as opposed to blowing it in any particular direction"; the "usual way for looking for gunshot residue if you want to use the particle analysis method is with the.....sticky tape method" but that the use of Q-tip swabs was okay too; and that a gunshot residue analyst can never be in a position to state that a forensic analysis of gunshot residue particles clearly establishes that somebody fired a gun. (T-8/10/88- 412-414)

Specifically, he said:

> "The answer is no. We wish, as people who work in this field, that it did, but all it tells you in this case, for example, is that gunshot residue particles are there, but never tells you how they got there. There is no way in the measurements, I don't car how you do them or how I do them or the FBI laboratory does, that tells you how they got there." (T-8/10/88-422)

When defense asked Guinn about testimony given by Roa during his deposition, State objected that what was in the deposition was hearsay and Defense responded by stating to the court: "You wouldn't let me show him the trial testimony. That's the problem" (T-8/10/88-425).

Guinn said: Rao did not follow accepted scientific procedure in preparing his report in that he only recorded information concerning 10 particles; there was no scientific basis

whatsoever for Rao having concluded that within reasonable scientific probability Def. had fired a gun on the date in question, and that Rao's conclusion that the number of particles found on Def. indicated he had fired a gun, etc., had no scientific basis whatsoever because he could only have scientifically concluded that he found gunshot residue in the samples (T-8/10/88-431-433).

Guinn further explained:

> "If he (Rao) concludes only he saw gunshot residue in the samples, yes, that's fine, but where the gunshot residue came from, be it a firing or be it in the region where some of the blast from a firearm discharged by whomever landed, or be in a, you might say, in a smoke filled room where it lands around the area, there is no way that he can distinguish among those, and therefore there is no scientific basis for him to make the latter part of that statement that you gave." (T-8/10/88-433)

Guinn also testified that there is no scientific basis to substantiate Rao's testimony that based upon Rao's evaluation of the lead found in the hand swabs of the Def. and the configuration thereof, it was within reasonable scientific probability that Def. handled a gun after it had been fired, such as to dispose of it. He added that all the finding of particles on "one's" hands, be they irregular or spherical, indicate is that such person was in the vicinity of where a gun was fired (T-8/10/88-434-435).

Defense then rested and defense then moved anew for a directed verdict, arguing that State had failed to adduce a sufficiency of evidence to entitle it to have the case submitted to the jury (as to both counts) The Court denied the motion. (T-3/19/90-506)

Defense wanted the following language deleted from the "Rules of Deliberation" instruction because this is a death penalty case, to-wit: "It is the judge's job to determine what a proper sentence would be if the def. is guilty, but the court denied this request (T-8/11/88-537).

The State then gave its opening closing statement and said:

> "You see folks, because the defendant told you a story on the witness stand and because the defendant told the police a story about how he claims his girlfriend met her untimely death, you now only have two choices as to who did it. By opening his mouth to the police and by taking this witness stand and speaking to you,

this defendant has severely limited the number of suspects for you to consider when answering the question who murdered Kersten Kischnick." (T-8/10/88-548)

Thereafter the prosecutor argued:

"Next you have to believe that of all the areas in which to get lost and of all the streets on which to stop and ask for directions, he picks a street on which there happens to be a black man with a gun." (T-8/11/88-552)

Thereafter State argued that "We know he's lied by virtue of his loan applications" (T-8/11/88-562); that the "The grand total this def. stands to collect from all of these policies if he walks out that door based upon the exchange rate that existed at the time of the victim's death is 1,717,238 Deutschmarks or $961,703.68" (T-8/11/88-565); that "You know based upon the circumstances this is human blood and it is human blood from the victim in this case" (T-8/10/88-586); that "Finally, ladies and gentlemen, the Def's story to the police and the Def's testimony on this witness stand may be considered by you as circumstantial evidence of his guilt" (T-8/10/88-587); that "Now, when you consider all the circumstances in this case, I again suggest to you that you start with the Def's story to the police and his story to you" (T-8/10/88-589); that because of Def's "story", the jury must choose between State's version and Def's version (T-8/11/88-589); and that, "He wasn't sitting in the driver's seat at the time because he was outside the passenger door firing a Winchester hollow point, silver tip 110 grain bullet at point blank range into the head of the victim.....she was killed in a car which happened to be rented with a Diner's Club card and the Def. stood to gain almost one million dollars and well over one million Deutschmarks by virtue of her death" (T-8/10/88-590,591).

And further the State argued:

"As he speaks to you, I want you to keep in mind two questions. As he speaks to you, say to yourselves, keeping in mind that the choice now is between the mysterious black man and the defendant, say to yourselves, can I believe that story about the mysterious black man in light of all I know about this case no matter who told the story? And then say to yourselves, can I believe this story about the mysterious black man as told by this defendant who I know to be a man who has been convicted of asking people to lie for him under oath, whom I know to be a man

> who has lied on loan applications in effort to secure funds, a man who I know to be a convicted forgerer, a man who I know to be a liar, a cheat and a fraud." (Emphasis added)(T-8/10/88-593)

Defense requested a limiting instruction regarding that the State's evidence of Def's prior convictions could only be considered "as to the issue of credibility," but the court refused to change its ruling in this regard (T-8/10/88-594,595). In its final summation to the jury, the State reiterated its contention that the jury was compelled to choose between Def. or the mysterious black male having killed her (T-8/11/88-664-679).

After the jury had been excused, Defense objected to the State having argued that if the jury acquitted Def., they would be giving Def. $691,000. To this State said: ".....Judge, I never told them that he was going to get $961,000 if he is acquitted. I never told them that." The court denied the motion and also denied "any" motion for a mistrial (T-8/10/88-694).

Defense then objected to the court's proposed jury charge "on the ground that it does not adequately inform the jury as to the role and the weight to be given to the evidence regarding the previous convictions of Mr. Riechmann" and the court overruled the objection (T-8/11/88-697,698). The court then charged the jury (T-8/11/88-700-723).

The jury then returned to deliberate and thereafter returned its verdict of guilty as to both counts (T-8/11/88-753).

The Def's Motion for a New Trial, which included aground that the verdict was contrary to the evidence, was denied (T-8/30/88-23-35; R-608-615). Thereafter the Def. was sworn in and Defense submitted photographs of 23 news articles concerning this trial (T-8/30/88-36). Defense thereafter argued to the Court that former juror Sabatino could have infected the jury and Defense argued that the jurors be voir dired individually but the court ruled: "not individually. That's denied. I'll do that generally.' (T-8/10/88-36-40).

The jury returned its advisory verdict wherein it recited it had voted 9 to 3 for the imposition of the death penalty (R-568; T-8/30/88-119).

At the sentencing, Defense argued that the German government is adamantly opposed to the death penalty and that it therefore shouldn't be imposed in this case. Def. then told the court that he refused to accept either penalty because he was innocent (II/4/88-12,13). Specifically, he told the court:

> "The Defendant: (Through the interpreter) First of all, I wish to say that the verdict was wrong. I was found guilty and I am innocent. And I am of the opinion that during those four or six weeks of the trial there has not been one shred of evidence that proves to my guilt. The State built up a pyramid of assumptions and assumptions and above all of that is now where the verdict is. And I wish to say since I am innocent I will not accept any kind of penalty, neither the death penalty nor life imprisonment. And that I am firmly convinced that this verdict will not stand as it is in appeal. That was it." (T-II/4/88-I2,I3)

The court acknowledged receipt of a letter from the German government on its feeling toward the death penalty. The court then announced it had reviewed reports from Germany from people who knew Def. and says: "They were good reports;" however defense complained that he never got to read them (T-II/4/88-8-I4).

It then sentenced the Def. to death (T-II/4/88-17).

This appeal followed.

POINTS ON APPEAL

I

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

II

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

III

WHETHER THE COURT ERRED IN FAILING TO REQUIRE THE

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

IV

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

V

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

VI

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

VII

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

SUMMARY OF ARGUMENT

The court erred in admitting the statements Def. gave to the MBP because State failed to meet its burden of showing the Def. knowingly, intelligently and voluntarily waived his Miranda rights and voluntarily gave such statements. It is clear from the evidence that the Def. was not read the Miranda rights until Oct. 28, 1987, or Oct. 29, 1987, even though he was questioned by the MPB from the very outset of the incident giving rise to this cause on the night of Oct. 25, 1987, and then on Oct. 26 and 27, and even though he was locked in a jail cell for at least four hours on the night of October 25 and/or early

morning hours of Oct. 26.

State's evidence is in conflict as to how well Def. understood English. The admission of the testimony by the police officers as to what Def. said about the shooting was harmful because even though Def. denied he killed Kersten, State was enabled to argue that inconsistencies in Def's statements was one of the circumstances indicating his guilt in an all-circumstantial evidence case.

State was guilty of prosecutorial misconduct through improper and harmful comments to and about Def. in front of the jury, and to the judge alone, who would ultimately decide life or death, and by summarizing the testimony and asking leading questions..

The court erred in failing to require State to furnish discovery information and/or to do so within a reasonable period of time.

The court erred in failing to exclude evidence seized from Def. in both Dade County and in Germany in violation of his federal and state constitutional protections against unlawful searches and seizures, including the improper taking of hand swabs, and without this evidence State could not have prevailed.

The court erred in admitting Def's more than l0 year old prior criminal convictions and then in refusing to charge the jury that it could only consider same with reference to the issue of the credibility of the Def.

It is in the "Interest of Justice" that def's guilty verdicts, etc., be reversed because of all the grounds set forth above and other specified deficiences.

In this all circumstantial evidence case, State's evidence was legally insufficient to support the guilty verdicts, judgment and the death penalty. Specifically, the heart of State's case was that the gunshot residue and blood splatters indicated that someone was sitting in the driver's seat when the fatal bullet was fired into Kersten's head, and that Def. had fired a gun, but such evidence from the State's gunshot residue expert and blood spatters expert was unclear, confusing, based upon leading and improper

hypothetical questions, and the circumstances upon which the involved opinions were based were not inconsistent with either the Def's version of what had happened or otherwise with his innocence.

ARGUMENT
POINT I

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

Dieter Riechmann, who was a visitor in our country, was denied a fundamentally fair trial with the result that he was found guilty of premeditatedly murdering his "life companion" of 13 years and based thereupon he was sentenced to death.

From almost the moment he exited his rental car at approximately l0:30 p.m.on Oct.25,l987, to seek help from MBP Officer Reid because Kersten was dying, if not already dead, he was subjected to totally unnecessary and unreasonable police procedures and conflicting police advices, including being forcibly placed in a police car and thereby prevented from finding out if Kersten -- whom he described at trial as being "the love of my life" -- was dead or alive.

Def's ability to speak and to understand the English language was a much debated subject at the suppression hearing and trial, with MBP officers being on all sides of the matter, ranging from that he spoke no English at the scene, as was sworn to by Hanlon in his SW affidavits, to that he spoke and understood English there very well, according to Matthews.

While either in a state of "shock," as was testified to by one officer, and/or while "upset," as was testified to by another, and/or while intoxicated or drunk or under the influence of drugs, as another officer gave as the reason Def. locked in a holding cell, Def. was questioned and subjected to hand swabbing.

Thereafter he was taken to the MBP station, although he was allegedly not under

arrest and, according to Matthews, he was not even a suspect yet, he was literally caged up for at least 4 hours.

If Matthews is to be believed, this deprivation of liberty was simply an honest mistake and, accordingly, he apologized but if other officers are to be believed, Def. was placed in the cell because either (a) detectives suspected him of having killed Kersten or (b) he was drunk or under the influence of drugs or (c) he needed a place to sleep.

Nevertheless, a process of interrogation that began at Indian Creek and continued for several days until after Def. was arrested by federal ATF agents.

During and as a part of this process of interrogation, he was uncontrovertedly not advised as to his Miranda rights until either Oct. 28 or 29 but, nevertheless, he was asked repeatedly what had happened, both at MBPD, while on the several drive-arounds, and at MCC. When Matthews finally did Mirandize him, it was done at an interview that lasted 4 hours at the MBPD, which interview was secretly taped.

And while Def. in all the statements he made never varied from denying that he had killed Kersten, State argued that he gave conflicting versions of involved events and contended that these alleged conflicting versions was one of the circumstances in the chain of circumstantial evidence. In addition, Matthes' use of the so-called "make believe story" to gain Def's confidence and thereby extort a confession from him was outrageous in the extreme. Further Def. contended that at one point he told Matthews he had contacted the German consulate to get a German lawyer, and that Matthews told him he didn't need a lawyer. Matthews denied this but did concede he might have told him he didn't need an interpreter.

Although the essence of the holding in Miranda v. Arizona, 784 U.S. 436 (1966), is well known, because of the importance of that decision here, the proscription of that holding by Chief Justice Warren is restated here, to-wit:

> "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By

> custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. ....[U]nless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required....." Miranda, 384 U.S. at 444-445 (emphasis added).

In this case, the magic words, "you're under arrest," were not uttered by MBP until after def. was acquitted in federal court. However, with reference to a simple traffic stop situation, the U.S. Supreme Court has enunciated the rule that "lower courts must be vigilant that police do not 'delay formally arresting detained motorists.....and subject them to sustained and intimidating interrogation at the scene of their initial detention'." Pennsylvania v. Bruder, 488 U.S. ___, 102 L.Ed 2d 172, 176, 109 S.Ct. 205 (1988). Further, the locale of the questioning has been held a critical factor and the police station is where questioning is most likely to be considered custodial. Dunaway v. New York, 442 U.S. 200, 60 L.Ed 2d 824, 90 S.Ct. 2248 (1979). And while there is no absolute rule that questioning in a police station is automatically determinative of the custody issue, it should be clear that questioning in a police station is an inherently coercive environment and the presence of this fact should weigh strongly in favor of finding custody, as is indicated even in a decision where the U.S. Supreme Court found there was no custodial interrogation. Oregon v. Mathiason, 429 U.S. 492, 50 L.Ed 2d 714, 97 S.Ct. 711 (1977).

In the instant case Def. was initially placed in the police car; then he was taken to the MBP station and locked up for 4 hours; then he was taken home but according to some of the evidence, told he couldn't leave the motel; then he was driven around by the police at least three times; he was taken back to the police station at least twice for more interrogation; and then after he was arrested by the ATF agents and incarcerated at MCC (and represented by the Fed. Public Defender's office), he was visited by one of the MBP officers and with no Miranda rights being read to him and without the Fed. Public Defender's office being advised, questioned about items of property he had at MCC.

It is Def's contentions that under the totality of the circumstances, this evidence

should have been excluded and that State should not have been allowed to argue the alleged discrepancies in Def's statements as a "circumstance", and that both the police and the prosecutors in this case, in their quest to have Def. convicted, forgot their concomitant obligation to see that he was treated fairly and rendered justice in the process. And, finally, with reference to the State's use of def's statements, every presumption against a waiver of the Miranda rights and against voluntariness, etc., is to be indulged U.S. ex rel Turner v. Rundle, 438 F.2d 839 (3rd Cir. 1971) and U.S. v. Hernandez, 574 F.2d 1362 (5th Cir. 1978).

POINT II

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

Even before the jury was selected the prosecutors tipped their hand that they would do anything they could to secure the conviction of Def. when one of them said at the suppression hearing to the Def., to-wit: "....more and more police officers began to arrive at the scene of this horrible crime" (T-7/5/88-118).

Of course, this was totally contrary to the Def's contention as to where the scene of the crime was. The following partial chronological listing of instances of prosecutorial misconduct make it evident that these prosecutors were so anxious to see Def. convicted that they recklessly abandoned their responsibility to be fair to him, etc. while at the same time prosecuting him.

During voir dire, State made a conscious effort to belittle the Presumption of Innocence by saying to one of the prospective jurors in the presence of all the other jurors that "even people that are now serving time for crimes" started out with the presumption of innocence (T-7/13/88-286). In State's opening statement, it said, "up until this point, the story the def. told the police was that he and his girlfriend had left Bayside...." (T-7/18/88-15). Such statement could well have left it in the jurors' minds that

Def. might take the stand at the trial and change his statement as to the route. While such may not have been intended as a comment on Def's right to remain silent, that is precisely what it was, and when this is coupled with a later comment during the said opening statement, to-wit, "So the version to the police is the def. sitting in the driver's seat," the suggestion is once again thrown out that def. may or may not have another version about where (and more importantly, whether) he was sitting in the car to tell to the jury (T-7/18/88-17).

State then told the jury: "After this arrest this case went to a grand jury and twenty-three grand jurors...." Defense's objection thereto was sustained but the remark should never have been made, and it is inconceivable that the prosecutor, who was after all prosecuting the most serious type of case of all known to the law, did not know that this was improper argument. An indictment is nothing more than instructions of a grand jury to the public prosecutor for the framing of a bill of indictment which, prepared by him, is submitted to them and found a true bill. Kirkland v. State, 86 Fla. 64, 97 So. 502 (1923), and Dougan v. State, 470 So.2d 697 (Fla. 1985).

State also fired the opening gun in its opening statement on an argument it would beat to death before the jury during the trial, to-wit: that the Def. was "pimping" (T-7/18/88-33).

In a bench conference, State insisted in referring to some "metal pieces" found in one of the safe deposit boxes as "pieces of the silencer"; Defense said such pieces had nothing to do with a silencer and the State then announced to the court that it did not intend to offer such items in evidence; but at no time thereafter did State say anything to the court as to whether, in fact, such items were pieces of a silencer; and thus the court, which not only presided over the trial, but which would later pass sentence should a guilty verdict be reached, was very possibly left with another horrible impression of this Def. Silencers are only used for one purpose.

According to Officer Wenk, he and ASA DiGregory, along with Det. Lonergan, went

into def's apartment in Germany in Jan. 1988, and seized several hundred books and photographs. The original search of the apt. took place on Nov. 5th, pursuant to a German court order, and it was uncontroverted that no further order or SW was obtained authorizing more searches and seizures at the apartment after Nov. 5th until Jan. 1988, and after the taking of the German officers' depositions in Miami. And the fact that State during the trial announced it would only seek to have admitted in evidence items seized the first time around does not lessen the abject disregard of Def's rights evidenced by this unwarranted intrusion into his home, and such allegedly purifying position taken by State does mean that the involved American police officer and prosecutor didn't make use of the ideas they may have derived from going to the apartment. Ideas can be seized, too.

During the trial itself, State said that Defense had seen documents which Defense represented to the court he had not seen (T-7/21/88-25,26).

After the Defense had been refused the right to call his German law expert, Mr. Baur, as a witness, State blurted out a question to Officer Schleith, as to whether documents seized from Def. were now admissible in a German court of law. Schleith's answer was that they were. Where is the fairness in this?

During the testimony of the MDPD gunshot residue witness, Rao, whose testimony, if believable, was one of the sine quo non's to Def's being guilty-eligible, State asked him a series of totally leading questions designed to rehabilitate him from Defense's withering cross examination, and the State persisted in doing such after the first objection thereto was sustained (T-7/27/88-29-31). This course of conduct was thereafter repeated by the prosecutor by his asking Rao a series of leading hypothetical questions based, in part, on no evidence before the court, and including therein matters not covered by State's direct examination of this witness, with the answers thereto being helpful to State and concomitantly harmful to Def., and culminating in Rao's testifying that based upon unspecified studies and experiments he would "absolutely not" have expected to find

gunshot residue particles on Def's hands "from (his) having handled a recently fired gun before the day in which he conducted all this activity" (the last quote is from a question of the prosecutor)(T-7/27/88-46).

With respect to State's other sine quo non witness, Rhodes, the blood expert, the prosecutor asked him the following question:

> "Q. (By Mr. DiGregory) Thank you. Mr. Rhodes, these stains that tested presumptively for blood, are you able to tell this jury, based upon your examination of those stains, whether or not those stains that are on the driver side door...can you tell us what type of bloodstain those stains are consistent with?
> A. Okay. They are round stains. They are---they were less than a millimeter in size and they would be consistent with something that you would find from a gunshot.
> Q. With high velocity blood splatter?
> A. Yes, if you want to call it that." (Emphasis added)(T-7/27/88-I28-129)

Subsequent thereto State asked Rhodes:

> "Q. So, Mr. Rhodes, let us assume the defendant is outside of the car, shoots his girlfriend and blood splatters." (T-7/27/88-I64)

The above was immediately followed by the following State's question and Rhode's answer thereto:

> "Q. So, Mr. Rhodes,
> if the defendant sat on this high velocity
> blood splatter, would you necessarily expect
> to find blood splatter on the seat of his
> pants?
> A. Not necessarily" (T-7/2/88-88,165)

Defense's immediate objection thereto was sustained but, of course, the jury heard the question (T-7/27/88-I64,I65).

And during Defense cross-examination of State's witness Symkowski, State in objecting to a Defense question, said:

> "I think it is irrelevant.
> He admitted he is an informant, provides information in the past and I don't know that we need to go any further than this because it may endanger Mr. Symkowski." (T-7/2/88/-I43,I44) (Emphasis added)

An immediate Defense objection and motion to strike was granted and the court told the jury to disregard, but the remark should not have been made in the first place and was another unfairness visited upon this Def. by making his counsel look like an irresponsible person who did not care if the testimony he sought to elicit from Symkowski might get Symkowski killed.

During Defense's questioning of Def. the following was said:

> "Q. Did Kersten get involved in prostitution?
> A. Yes sir.
> Q. How did that come about?
> A. It was 19---just a moment. It was coming a time where I have to stay in jail for perjury.
> Mr. DiGregory: Excuse me, what was that word, Interpreter?
> The Witness: Perjury." (T-8/2/88-106,107)

Did this prosecutor really think the jury didn't hear the word "perjury" the first time?

During the cross of Def., the following occurred:

> "Q. Was that a truthful answer?
> A. Yes, sir.
> Q. And why is that---
> Mr. Carhart: I am going to object again. This is not the first time or the second time or the third time in this trial that the State throught it's conduct at counsel's table is attempting to influence.
> The Court: The State will refrain from any show of emotion or any facial expressions. Please continue on.
> Mr. Carhart: And I would ask the jury to be instructed to disregard any outburst by the State or any grimaces or laughter or anything else they see fit.
> The Court: Let us proceed. Go ahead.
> The Witness: It's like this. According to German law, I was never accused, never----
> Mr. DiGregory: Excuse me. I would object to this witness of expressing his opinion on what the German law. He has admitted of asking three people to lie for him. Now he's trying to give---
> Mr. Carhart: I object to that characterization.
> The Court: Sustain.
> Mr. Carhart: Mischaracterization. Ask the jury be instructed to disregard.
> The Court: You are sustained. Let's limit this with your witness. Start again."
> (T-8/3/88-186,187) (Emphasis added)

It is interesting to note that the court referred to the making of "facial expressions" although such was not specified in Defense's objection.

With reference to the defense contention that the presumptive blood on the involved blanket got there from the dog, Hercules, etc., and during the State's cross-examination of Def, State asked the following question:

> "Q. Did you shoot the dog in your car so that the blood ended up the way it did on the blanket?
> A. (Through the interpreter): I don't understand the question.
> Q, And then, sir, after this blanket, after this dog was placed on this blanket, you decided that you were going to bring this unwashed blanket over to America so that you could lie on the beach with it; is that right?" (T-8/9/88-203,204)

Not only did State ask Def. this outrageously unfairly prejudicial question, it then thereafter didn't have the common decency to explain the question in response to Def's saying he didn't understand it, but proceeded arrogantly forward with his attempted " reductio ad absurdium statement-question."

Maybe such egregious conduct can be understood or tolerated when litigants are fighting over money, but when a human being's life is at stake, such misconduct by a representative of the people of Florida and an officer of the court is without justification.

In the continued cross-examination of def., the following was said:

> "Q.So you asked, after you had gotten out of jail for asking people to lie for you, you asked Mr. Stephan to lie for you. Not only to lie for you, but to cheat the tax authorities? That's right, isn't it?
> A. I didn't understand the question.
> Mr. Carhart: I object to the question as repetitious. Again, it is the echo effect, if the Court please. That is, the answer the witness gave we get it back again. There is no point in answering questions if everytime you answer a question Mr. DiGregory is going to ask you the same question.
> Mr. DiGregory: If I could get a straight answer, I wouldn't have to.....
> By Mr. DiGregory:
> Q. Did you ask Mr. Stephan to lie for you in applying for that apartment lease?
> Mr. Carhart: Judge, the answer already in this record is not only that, but we also cheated on taxes. Now, how many times are we going to do it?
> The Court: Sustained at this point, Mr. DiGregory. Go to the next question.
> By Mr. DiGregory:
> Q. Now, Mr. Riechmann, that wasn't the only--You a little warm sir?
> The Court: It is warm in here.
> Joe, make it cooler in here. The jury will disregard the last remark by the State.

Turn it down. Make it a little cooler in here." (Emphasis added)(T-8/9/88-238-240)

In Gonzalez v. State, 450 So.2d 585 (Fla. 3d DCA 1984), the court reversed and remanded a conviction because of "incredible prosecutorial conduct" even though "it appears, at first blush, that the evidence adduced was sufficient to sustain the jury verdict." This misconduct there consisted of repeated improper questioning, improper comments, and the continuous summarizing of testimony.

Another example of the rampant prosecutorial misconduct at the trial involved the prosecutor evidencing his total disdain for the def., to wit:

> "By Mr. DiGregory:
> Q. Well, Mr. Riechmann, does this document refresh your memory?
> A. I haven't seen this document before in my life.
> Q. Sir, I'm asking you if this document refreshes your memory as to when Kersten Kischnick was treated for inflammation of the fallopian tubes. Does it refresh your memory?
> A. (By the Witness): No, sir.
> Q. I didn't think so.
> Mr. Carhart: And that I object to, move to strike and ask the jury be instructed to disregard counsel's comment.
> The Court: Sustained. The jury will disregard the last statement counsel made. (T-8/10/88-272) (Emphasis added)

Thereafter defense counsel successfully objected to the prosecutor being "in the witness box" and the court sustained the objection (T-8/10/87-277).

> "By Mr. DiGregory:
> Q. Well, you didn't tell Mr. Carhart that you were worried about the translation when he asked you on direct examination about answering that question, did you, sir?
> Mr. Carhart: Objection. We still have not had the complete question read to the witness despite three rulings from this court.
> Mr. DiGregory: Judge if he wouldn't keep coming up with these answers---
> The Court: Mr. DiGregory.
> Mr. Carhart: Move to strike Mr. DiGregory's improper comment.
> The Court: All right. Let's not have comments. Motion to strike is granted.
> Mr. DiGregory, finish the entire question and then ask your questions." (T-8/10/88-287)

Further State questioning of def. consisted of the following questions and answers:

> "By Mr. DiGregory:
> Q. And during the course of those depositions, you didn't have an

interpreter there like Ms. Brophy, did you?
A. No, sir.
Q. And during the course of those depositions you spoke English, didn't you, sir?
A. Yes, sir.
Q. In fact, during the course of one of those depositions you had the audacity to ask Ms. Sreenan out to dinner in English, didn't you, sir?
A. (Through the Interpreter): This question I did not understand.
Q. Well---the question that I asked you you didn't understand?
Mr. Carhart: Maybe it's "audacity."
The interpreter: Mr. Riechmann said, I need to have the question translated, which interpreter is doing now.
A. (Through the interpreter): After she had the audacity of entering my apartment in Germany, I took revenge by inviting her for dinner.
By Mr. DiGregory:
Q. And you invited her to dinner in English, sir?
A. (By the Witness): I believe so."

While the degree and extent to which Def. spoke and understood English at any given time material to this cause was a disputed matter, with even the police officers being in disagreement concerning same, for State to bring to the jury's attention that Def. had asked ASA Beth Sreenan to dinner (which was obviously a spoof on his part because in his incarcerated status he wasn't going to dinner with anyone) under the guise of trying to establish that Def. was trying to take advantage of the language situation, was a total sham. What the prosecutor wanted to do was to put another nail in the coffin....any way he could!

This was followed by more summarizing of Def's prior trial testimony stressing all the points unfavorable to him and a Defense objection was properly sustained by the court (T-8/10/88-295,296).

Thereafter State asked Def. whether he "suddenly remembered" what the shooter looked like to which a Defense objection was sustained but, again, the jury had already heard the question.

At the end of the State's initial cross-examination of Def. the transcript reveals the following was said:

"Mr. DiGregory: I have no further use for this witness.
The Court: Counsel, let's not have any comments.
Mr. Carhart: Judge, I would ask that Mr. DiGregory be

admonished. We're in a courtroom and I'd ask the jury be instructed to disregard that statement.
The Court: Jury will disregard the last statement by the State Attorney." (T-8/10/88-317) (Emphasis added).

On recross Def. testified that Matthews must have "invented" the latter's testimony that Def. had told him the reason he and Kersten had never married was because they didn't want to have children. Thereafter, picking up on this "invent" theme, State asked Def. if he had "invented" a statement attributed to him by Matthews, and then State said:

"Sir, do you have trouble giving me a yes or a no answer? You seem to have no trouble with Mr. Carhart when he went through those lines." (T-8/10/88-397)

Following the sustaining of the objection, State asked Def. another "did you invent this, too" question and the objection thereto was sustained but as this prosecutor had already bountifully demonstrated, the sustaining of an objection to one of his questions was no deterrent whatsoever to his immediately thereafter asking another question with the same infirmity, and thusly he asked a third "did you invent" question of the Def. (T-8/10/88-352-354).

No sooner was this peccadillo completed than State said to the def.:

"By Mr. DiGregory: Do you think this is funny, Mr. Riechmann?"

The court excused the jury and, in part, told counsel:

"Gentlemen, this is breaking down and becoming a shouting match now and I will have no more of it. I will have no smart remarks..." (T-8/10/88-360).

In Smith v. State, 95 So.2d 525 (Fla.1957), this Court stated (at p. 527):

"It is not the duty of a State Attorney merely to secure convictions; the State Attorney is required to represent the State, it is his duty to present all of the material facts known to him to the jury; and it is as much his duty to present facts within his knowledge which would be favorable to the defendant as it is to present those facts which are favorable to the State; being an arm of the court he is charged with the duty of assisting the Court to see that justice is done, and not to assume the role of persecutor." (Emphasis added)

Misconduct of counsel in the examination of witnesses, or at any other time during the course of the trial, will, on proper showing of prejudice, constitute reversible error.

Further, comments of counsel cannot be considered as harmless where the evidence in the case is inconclusive. 55 Fla.Jur 2d § 94, Trial, Conduct and Argument of Counsel, 485-486.

In Porter v. State, 84 Fla. 552, 94 So. 680 (1922), this Court stated and held as follows:

> "PER CURIAM. The charge in this case is grand larceny. The property alleged to have been stole is an automobile. The verdict was guilty as charged with recommendation of mercy of the court. By writ of error the judgment adjudging guilt and imposing sentence is here for review. Because of the inconclusive character of the proof, errors assigned in the admission of evidence respecting other similar offenses alleged to have been committed by the defendant and comments of counsel on behalf of the state during the trial regarding such alleged crimes cannot be considered as harmless errors, and it is considered that justice demands another trial of the case when a recurrence of such errors are improbable. Reversed."

In Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed 1314 (1935), the Court stated, in pertinent part, to-wit:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor---indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so laxly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." (Emphasis added)

Another unfairness heaped upon the Def. was the statement of State to the jury in its closing argument that it had to select between the alleged two versions of how the shooting actually occurred (T-8/11/88-589). That is clearly not the law in a criminal case

even where the defendant testifies. It remains the prosecution's burden to prove the defendant guilty to the exclusion of every reasonable doubt and, in this regard, the jury is not restricted to choosing between two testified to versions of how the crime allegedly happened. It is where the defendant has pleaded an affirmative defense that the burden of proof rests upon the def. 23 Fla Jur 2d § 78, Evidence, etc., 102. This was not the case here and an incorrect statement of the law on summation is clearly improper and may, under the circumstances of the case, be regarded as prejudicial. Pait v. State, 112 So.2d 380 (Fla. 1959).

POINT III

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

The earlier substitute judge, Judge Alfonso Sepe, was right when he told respective counsel:

> "The Court: Capital punishment, I am a strong believer in capital punishment. I am also a strong believer in making the State suffer to get it and really to make it very difficult to get it. I do believe in it. I am saying this for both counsel. I think you are entitled to know whether a judge believes in it or not. I am telling you now that's where I stand, but by the same token I want this man protected every bit of the way. No technicalities, none of those little things. He is getting Carte Blanc discovery from me. I am going to give him total discovery. Total. No if's and/or buts, no conditions. Whatever the State has, he gets, okay. That's to protect everybody so that ten years down the road no one is going to come in and say to abort the execution of the man if it ever should come to pass." (T-I/27/88-8)

The record in this case is replete with the instances of the State holding back its discovery information and demonstrating how said Defense counsel had to work to secure State's compliance with even a minimum level of discovery response compliance, as is reflected, in part, at the following places in the transcript, to-wit: (6/3l/88-4-6l; 7/5/88-7/6/88-ll3-ll6; 7/20/88-15-21. (At this juncture the frustrated court went so far as to declare "this is a Richardson hearing" but unfortunately for Def. the court thereafter

denied defense's request to have turned over by the State the statements and documents secured from 32 of the 37 Germans who were interviewed from photographs found in def's apartment, which the court had previously refused to review in camera. An equally frustrated defense counsel declared: "I fought for everything I've got" (sic) out of Mrs. Screenan (7/21/88-28,29).

It is apparent from a reading of the transcripts that State intransigently delayed and held back the furnishing of discovery information, which was not only itself unfairly prejudicial to the Def's right to be able to defend himself, but had an extremely deleterious effect on defense counsel's being able to conduct the defense.

The underlying principle supporting pretrial discovery in a criminal case is fairness. State v. Coney, 294 So.2d 82 (Fla.1973).

One of the principal concerns in this respect is that the prosecutor not have sole access to evidence. See Dennis v. United States, 384 U.S. 855 (1966). Further, liberality in this area, which is being contributed to by ongoing litigation of important discovery rulings, contributes vitally to the "search for the truth." United States v. Pollack, 417 Supp. 1332 (E.D. Mass, 1978).

And, of course, the holding in Brady v. Maryland, 373 U.S. 83 (1963), is an ever present factor compelling the prosecutor to give up that which it wants to hold back. There was too little giving of discovery in this cause and two much holding back, and it is the Def's contention that such not only reached the level where it was part and parcel of the prosecutorial misconduct, but that it also reached the level of adversely affecting this def's rights under the United States and Florida Constitutions to not be deprived of liberty or property without the due process of law, to be fully informed of the nature and cause of the accusations against him, to the effective assistance of counsel, and to a fair trial.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO EXCLUDE EVIDENCE SEIZED FROM THE DEFENDANT IN VIOLATION OF

HIS RIGHT TO BE FREE OF UNLAWFUL SEARCHES AND SEIZURES UNDER THE FEDERAL AND STATE CONSTITUTIONS.

As has already been touched upon herein, there was not only prosecutorial misconduct present in this case but, as well, police overreaching and misconduct.

One instance thereof was the taking of the hand swabs from Def. and, as has already been touched upon, without believable expert testimony from both the State's gunshot residue and blood splatters experts, the State simply could not make out even a prima facie case.

The police had no probable cause to swab Def's hands because at the time such was done ---- if the police were to be believed ---- Def. was either free to leave or was only being held in a status equivalent to an investigative stop. See Terry v. Ohio, 392 U.S. I (I968).

In Davis v. Mississippi, 394 U.S. 72I, I962), it was held that probable cause was required to transfer a suspect to police headquarters for fingerprinting. Further, after making a valid arrest, the police may conduct a warrantless search of the suspect without probable cause, or reasonable suspicion that the suspect possesses either weapons or evidence, but here there was no formal arrest until months later, and it is very clearly the contention of both the MBP and State that there was no de facto arrest. Thus there was not even a pretextual arrest in order to justify the taking of the hand swabs. In the unlikely event that State would contend that what was involved here was a Terry investigative stop, the law is clear that while a pat down or car search for weapons could be made in connection therewith, it is also clear that under no circumstances does this authority allow searches for evidence. Michigan v. Long 463 U.S. I032 (I983). Finally, with regard to the taking of the hand swabs, it was State's contention at the trial that Def. consented thereto. He, on the other hand, related at the suppression hearing an officer grabbing his hands and rubbing Q-tips on them. While it is to be conceded that there is no 5th Amendment right involved in the taking of hand swabs, there is a 4th Amendment

right, and like any federal or state constitutional right, it is axiomatic that the waiver thereof must not only be itself shown, but it must also be shown that it was free and voluntary. Schneckboth v. Bustamonte, 412 U.S. 218 (1973), and Bumper v. North Carolina, 391 U.S. 543 (1968). And, in this regard, the burden is on the prosecutor to prove by clear and convincing evidence that consent was in fact freely and voluntarily given. United States v. Gonzlez, 842 F.2d 748 (5th Circ.,1988).

In the instant case there was police testimony that Def. was in shock and/or that he was upset, including that he was crying, and/or that he was drunk, or had been drinking; and/or that he was high on drugs; that he spoke only English, and/or that he spoke through the German speaking police officer.

Succinctly stated, it would be the grossest of miscarriages of justice for State to be allowed to get away with picking and choosing as between its conflicting evidence as to the Def's condition at Indian Creek in order to meet the "free and voluntary" test.

The court thusly erred in denying the motion to suppress the hand swabs, in violation of Def's right to be free of unlawful searches and seizures under the Fourth Amendment and under Article I, Section 12, Declaration of Rights, Constitution of the State of Florida.

Def. also contends that the court erred in failing to suppress and/or erred in admitting, the following evidence seized in Dade County: 3 guns, bullets and the Def's clothing seized at the Tahiti Motel; all items seized from the trunk of Def's car; including but not limited to the gray Energizer flashlight and the receipt from Bayside and a paper listing insurance companies; all items seized from Def's room at the Howard Johnson's Hotel; and all papers, photographs, insurance policies, magazines and other items seized from Def's residence and safety deposit boxes in Germany.

State raised two arguments in favor of the validity of the Oct. 26th search of the Tahiti room, to-wit: that they did such armed with a search warrant and that Def. had given his consent. The search warrant affidavit in question, which was executed on Oct.

26, 1987, by Lonergan, recited, in pertinent part:

> "The driver of the car, Mr. Riechmann, does not speak English and appears to be a German tourist. Efforts to obtain information as to what occurred have been mostly unsuccessful because of the language barrier, but he indicated the name of the victim is Kersten Kischnick and that he has a firearm in the motel room of the Tahiti Motel, where they are staying." (R-170)

The stated purpose for the search was set forth early in the search warrant affidavit, and that was to find:

> "1. A firearm and/or bullets.
> 2. Identification documents of the deceased and the driver or other occupants of vehicle.
> 3. Documentation of deceased and occupants of vehicle's residence(s) including travelling documents.
> 4. Documents of ownership or leasing of the vehicle." (R-168)

Then followed the stated reasons "for the belief that 'the premises' is being searched as stated above...." which included Lonergan's sworn attestations that Def. spoke no English and that the efforts to secure "other information" were "mostly unsuccessful because of the language barrier. Under the definition of the truth as "the truth, the whole truth, and nothing but the truth," Lonergan lied because he didn't tell the whole truth. The part of the truth that he didn't put into his affidavit was that he did not include therein any recitation about Def. speaking through the MBP German interpreter, Psaltides.

Under these circumstances, Def.. would have been entitled to what is known as a Franks hearing under the holding in Franks v. Delaware, 438 U.S. 154 (1978), but, in this regard, he essentially was given the hearing below but the result reached was wrong. Under the Franks test there are five instances where the suppression of evidence is an appropriate remedy: and the first and applicable one of these is where the search warrant affiant has intentionally or recklessly misled the magistrate with material misstatements or omissions and such clearly was the case here.

Further, the holding in United States v. Leon, 468 U.S. 897 (1984), offers no solace to the State because the "good faith" exception enunciated there involved a search warrant insufficient to establish probable cause but with the officer who had prepared

same having acted in good faith. Here it is Def's complaint that the officer did not act in good faith.

And insofar as consent was concerned as an alternate justification for the search of the Tahiti room, in addition to all the various conditions Def. suffered from as testified to by the various police officers, by the time they finally got Def. to his room, he was by State's evidence so tired that he literally collapsed in bed. Under these circumstances, it is inconceivable that it could be concluded that Def. freely and voluntarily consented to the search and seizure at the Tahiti.

The affidavit for the search of the trunk of the rental car suffered from the same infirmity.

With reference to the search warrant directed to the Howard Johnson's room, State ultimately abandoned same because it was unexecuted by a judge but, in the meantime, State had seized therefrom and had the informational benefit of a black colored address book, Hertz Car Rental Agreement, Mead yellow colored notepad, Sony video camera paperwork, four postcards, eight credit card receipts, and two car keys (R-I58), which was another of the unfairnesses visited upon Dieter Riechmann. And here again, the seized ideas.

But the bulk of the evidence was seized in Germany and the German police were told by MBP, via Interpol or otherwise, that Def. was "a prime suspect based upon forensic findings and his conflicting statements;" that the projectile found in Kersten's head was similar to the ammunition found in his Tahiti room; and that the German police were requested "to see if the suspects (sic) and victims (sic) house in Rheinfelden can be searched and their mail and phone records screened to determine insurance claims." (R-99-II3). Regardless of whether the German police were authorized to prosecute Def. for the death of Kersten, insofar as the MBP were concerned, they were both using the German police as an extension of their police department and they were utilizing information in so doing previously and unconstitutionally seized from Def. in Miami Beach

as explained hereinabove. Since no search warrant was obtained from a magistrate within the jurisdiction of the trial court, the German searches were warrantless searches which are "per se unreasonable under the Fourth Amendment," as is enunciated in Katz v. United States, 389 U.S. 347 (1967), and "subject only to a few specifically established and well-defined exceptions," one of which is "searches of the high seas", and none of which is applicable here. The German evidence should have been suppressed; it was error that it was not suppressed; and such error was clearly not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). And it goes without saying that the German evidence -- like the gunshot residue and blood splatters -- was a sine quo non the Def. would not have been guilty eligible.

Without the seized evidence -- seized here and in Germany -- the State would not have been even arguably able to contend there was a sufficiency of evidence for this case to be submitted to the jury.

POINT V

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

The Def's prior criminal record was introduced in evidence after the court overruled his Motion in Limine requesting that such evidence be excluded (R-93,96). At the charge conference, Defense objected to the court's charge "as it does not adequately inform this jury as to the role and the weight to be given the evidence regarding the previous convictions of Mr. Riechmann. State responded that "that's all covered" and that telling the jury he is to be treated as any other witness would be sufficient. Defense's objection was noted and overruled. (T-8/12/88-697,698).

Section 90.610(1) is concerned with the believability of a witness and its purpose is to adversely affect his credibility. Perry v. State, 146 Fla. 187, 200 So. 525 (1941); Madison v. State, 138 Fla. 467, 189 So. 180 (1939). Believability, or credibility, is obviously a character

trait but it is not the same thing as general bad character, nor is it to be confused with propensity. While the language of 90.610 would at first blush appear to blur the distinction between credibility and general bad character, a closer reading of it shows that it deals with how a party may attack the credibility of a witness.

It is bad enough that one charged with committing a crime can have convictions for other uncharged crimes used as indirect evidence against him, which is what the Rules of Evidence permit, but it is adding insult to injury to have it left in the jury's mind that there are no limitations upon them as to what weight and use it can put this essentially extrinsic and foreign information. Def. was entitled to have this court tell the jury that it could only consider the prior convictions with reference to the issue of his credibility, lest the jury should go beyond that and assess the prior convictions against him as evidence of general bad or sociopathic behavior. It was particularly important in this case that this be done in light of the fact that the overzealous prosecutors were doing everything they could to make this Def. look like a terrible human being, or as the expression goes, "a bad guy". See United States v. Cavender, 578 F.2d 528 (4th Cir.1978).

Under the rule long extant in Fla. the so-called Williams rule, named from Williams v. State, 110 So.2d 654 (Fla. 1959) it is held that the test for the admissibility of evidence of collateral crimes is relevancy and that such evidence is inadmissible if its sole relevance is to establish the bad character or propensities of the accused. Further, evidence is relevant if it casts a light on the character of the crime for which the defendant is being prosecuted. Such is not the case here.

A requested instruction that is proper in all respects, announcing a proposition of law applicable to the case and in harmony with the theory of one of the parties, and not adequately covered by other instructions, should not be denied. Blount v. State, 30 Fla. 287, 11 So. 547 (1892); Atlantic v. C.L.R. Co. v. Shouse, 83 Fd 156, 91 So. 90 (1922); et al.

But even more basic, the court should never have allowed the convictions in the first place because they were more than 10 years old and simply too remote in time to really

be probative of the Def's present character or, for that matter, his credibility, and the unfair prejudice engendered thereby far outweighed the legitimate probative value. For evidence of a prior conviction to be admissible to impeach a witness, the crime must not have been so remote in time as to have no appreciable bearing on the witness' present credibility, absent evidence that witness has not reformed. Braswell v. State, App., 306 So.2d 609 (1975). It is obviously for this reason that the counterpart federal rule of evidence to § 90.610, Fla. Stat., to-wit: Fed. R. Evidence 609, provides that evidence of the prior conviction shall be admissible if more than 10 years has elapsed from the date thereof, and while 90.610 has no such express time period specified, the fact that the federal rule has specified the 10 year period should at least be persuasive.

It is the Def's contention that the probative value of these more than 10 year old convictions was substantially outweighed by the danger of unfair prejudice. See § 90.403, Fla. Stat. and Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

As a result, State had a field day in making the Def. look bad.

POINT VI

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

In carrying out the mandate of the Florida Constitution that it shall hear appeals from final judgments of trial courts imposing the death penalty, this Court fulfills its most awesome responsibility. That mandate, which appears in Art. 5, Section 3(b)(1) of the Constitution, is more fully implemented in § 921.141(4), Fla. Stat. which provides, in pertinent part:

> "The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida...."(Emphasis added)

However, there is precious little law which has eminated from this Court as to what the concept of "automatic review" means, but considering the great seriousness of the

subject matter of this appeal, this Def. will be so bold as to tell the Court that it means nothing less than a total and complete review of every aspect of what happened in the case below, whether or not such is raised as appellate error in this appeal. In State v. Dixon, 283 So.2d 1, 6 (Fla.1973), this Court discussed at length how and why it felt that the post Furman v. Georgia (408 U.S. 238 [1972]), Florida death penalty law (Chapter 72-724, Laws of Florida, 1972), did not run afoul of the protections against "cruel and unusual punishment" provided by "the 8th and 14 Amendments" to the U.S. Constitution.

The Dixon Court stated, in pertinent part:

> "Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes....
>
> "It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty----each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient....
>
> "Review of a sentence of death by this Court, provided by Fla.Stat. Section 921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution." (Emphasis added)

And at this "one final hearing before death is imposed," which hearing is before the Court on "automatic review", it is clearly this Court's constitutional, legal and yes, moral, responsibility to probe deeper and to look higher to reach its judgment than is the case with any other type of appellate proceeding it is authorized or empowered to consider, and thus it was that the Court, itself, provided in one of its own Supreme Court rules, to-wit: Rule 9.140(f), provided:

> "(f) Scope of Review. The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an

> appeal. In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review." (Emphasis added)

In Tibbs v. State, 397 So.2d 1120 (Fla.1981), this Court stated, in pertinent part:

> "....in the interest of justice....has long been, and still remains a viable and independent ground for appellate reversal...."

Def. therefore urges upon the Court that, in addition to the grounds raised hereinbefore, that it is in the interest of justice that his guilty verdict and judgment, and his sentence of death, be reversed and that he be set free because of the following additional occurrences and omissions in this case.

He was denied a fair trial by having a juror excused just before the jury retired, which juror had allegedly told a non-juror that he was leaning toward innocence, without having had the whole panel stricken and a mistrial declared, where this same juror implied to the non-juror that there were others on the jury that were leaning toward finding the Def. guilty.

He was denied a fair trial in that he was represented in the latter stages of the trial by an attorney who had seriously injured himself, who was in pain at least part of the time, and who declined the opportunity to have a recess declared while he underwent the necessary surgery.

There was a bench conference outside the presence of the court reporter and the jury (T-7/18/88-110). This should not have occurred in a death penalty case. Rule 9.140(4)(A), Florida Rules of Appellate Procedure, specifies that it is "the complete record" that is to be furnished this Court in a capital appeal. That was not done here and never can be done because something was dealt with off of the record. A man's life is at stake and there should be no exception to the rules allowed that permit there to be even the slightest of possibilities of his defense being thereby adversely affected.

Shades of the Caryl Chessman case where a man was put to death even though there was a missing transcript! See Chessman v. California, 340 U.S. 840; 341 U.S. 929; 343 U.S. 915; 343 U.S. 937; 346 U.S. 916; 347 U.S. 908; 348 U.S. 964; 361 U.S. 871; 361 U.S. 892; 361 U.S. 925; 361 U.S. 941.

Further contributing to the Keystone Cops air that prevailed both during the police investigative stage and during the trial itself was the problem of news media people clicking their cameras in the courtroom, causing the Def. to complain, and causing the court to remonstrate them. This situation certainly didn't contribute anything positive to an already unfair situation, and when this is coupled with the amount of attention this case and trial received in both the Miami Herald and the television stations such was -- - to paraphrase the prosecutor's terminology --- just another link in the chain of unfairness visited upon Def.

The court erred in that it was manifestly unfair to the Def. to have allowed in evidence the federal firearm form signed by Def. while excluding evidence of his being found not guilty of the federal firearm criminal charges.

All items taken from the apartment of Def. and Kersten in Rheinfelden were listed by the German court and this list did not include the dirty magazine, Treffpunkt, which State was so anxious to have admitted in evidence against Def. This filth magazine was never in the Def's apt. and should not have been offered or received in evidence against him.

The trial court erred in not striking from the jury charge the following language:

> "It is the judge's job to determine what a proper sentence would be if the defendant is guilty" (T-8/[illegible]88-537-538)

Defense was correct in his argument that this language implanted in the juror's minds that the judge alone would be responsible for imposing the death sentence and thus the role of the jury in this death penalty case was unnecessarily trivialized in violation of the rule of Caldwell v. Mississippi, 472 U.S. 320 (1985).

With reference to all errors charged herein to be in violation of any provision of the U.S. Constitution, if the Court finds any such error to exist, Def. avers that it is thereafter required to determine whether such error is harmless beyond a reasonable doubt before it can treat such error as being harmless. Chapman v. California, 380 U.S. 18 (1967).

Unless the concept of "automatic review" of death penalty cases as provided for by Section 921.141(4) Florida Statutes, Def. respectfully calls upon each member of this Court to read the record on appeal and the transcripts in their entireties, and to so certify that such has been done, and to protect him from any errors or injustices contained therein that have not been raised by his counsel in this appeal, thus fully implementing the "review of a sentence of death...as the final step within the state judicial system". State v. Dixon, supra.

Regarding the death penalty, itself, it should have been neither sought nor imposed in this case, firstly because the Defendant is a citizen of the penalty, and secondly because that penalty is violative of the 8th Amendment proscription against cruel and unusual punishment, as well as being violative of the Art. I Section 17, Fla. Const. and of the due process clauses of both.

POINT VII

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

The bottom line issue in this appeal involves whether there was a sufficiency of circumstantial evidence for Def. to have been convicted.

With reference to the gunshot residue and blood splatters evidence, which has been described above as the sine qua non for State being able to convict def., it can only be said that for a person's life to hinge on that evidence as adduced in this trial would not even make sense in the trial in Alice in Wonderland.

Regarding the blood splatters and related evidence and testimony, Officer Ecott, Metro Dade crime scene technician, testified he found "blood splatters" in the car from the headwound to Kersten (T-7/18/88-161-163); that there was a "transfer blood pattern" on def's trousers and "high velocity" blood splatters on Kersten's dress (T-7/18/88-169); that he found not "a speck of blood" on Def's clothing or arms but there was blood splatter on his hands and pants (T-7/18/88-175,176); that there was a great deal of blood in the interior of the car but that he didn't test it for blood because it was red (T-7/19/88-20-23); that he didn't recall seeing blood on the blanket in the driver's seat (T-7/19/88-38,39); and that he didn't swab the interior of the car for gunshot residue (T-7/19/88-55,56).

Officer Travers thereafter testified he found no fingerprints of value in the car; that Kersten's body was fully reclined; and that he found no firearms or ammunition in the car.

Officer Quirk testified that he would "not particularly" expect to find gunshot residue on the tank top of someone who fired a gun; that the bullet taken from Kersten's head was a .38 special 110 grain Winchester silver tip bullet; and that three types of weapons could have fired the fatal bullet and that two of these types were found in def's Tahiti room (T-7/20/88-167-174). He said a six sight Taurus and an FIE Derringer could have done it; that the bullets taken from the Tahiti were the same type as the one that killed Kersten; and that all three of the types of guns, as well as the type of bullets, found in Def's and Kersten's Tahiti room were "popular" (T-7/20/88-177,178).

Quirk further said there were no gunshot grains on Def's blue tank top shirt; that he found no gunshot residue on the right shoulder of Kersten's blouse; that he found no burnt nitrates on either the skirt or the blouse; that there is no "blow back" to the firing of a Derringer and that it was "possible" that gunshot residue from firing an FIE Derringer would only be found on the web and not the palm of the hand (T-7/20/88-179-197).

Quirk then testified, contrary to what he had said before about two of the three found guns having been able to fire the fatal shot, that he "now" knew for sure that an FIE

Derringer was used; that the explosion could go twenty inches to five feet but that didn't know how far it went in the instant case because he didn't know how far t muzzle was from Kersten's head; that almost l00% of the gunshot residue cloud comes out of the muzzle of a gun; and two models of the FIE Derringer could have been used (T-7/20/88-l98).

Regarding the positioning of Kersten's seat, State argued that the seat was not fully reclined at the time of the shooting because Def. had testified he reached over and pulled the seat down and that therefore the seat had to be upright at the time of the shooting. Regarding measurements and water spray tests conducted by Rhodes, defense argued that they shouldn't be allowed in evidence because same were not made until January 27, l988, for the first time, to which State countered that if the seat wasn't in that position, the splatters would have been blocked from the window and that what it was trying to prove was that nobody was sitting in the driver's seat at the time of the shooting (T-7/29/88-6-12).

Defense argued that allowing the measurements and string-water spray test (and the opinion testimony to be based thereon) would be speculative. The court took a middle ground, allowing the measurements in but keeping out the test (T-7/27/88-23-27).

Hanlon said he didn't know if Kersten's seat was all the way back when she got shot (T-7/29/88-77-79).

Mr. Rao testified "conclusively" that Kersten did not fire a weapon based upon his not finding enough gunshot residue particles on the back of her hand, nor any on the palm (T-7/29/88-l54,l55). He said that the person who fired the FIE Derringer would have had gunshot residue on their palm and that he found 22 particles on Def. and that within reasonable scientific probability, Def. fired a gun. He said that he could not expect to find the number of particles he found on Def's right hand on a person who fired through a window (T-7/29/88-l58-l69).

He said he didn't find one "unique" particle on Def. and that therefore he could say

that it was scientifically certain, but not scientifically positive, that there were more gunshot residue particles on Def's hands than he later found on the hand swabs (T-7/29/88-170-172).

Rao also said that the number of particles he found on Def's hand swab indicated that he did more than just fire the gun one time; that he probably could have handled the weapon after firing the shot" (T-7/29/88-174-178). He added that he couldn't state with reasonable scientific certainty that Def. fired a gun on Oct. 25th, but that (in his Nov. 6th report), "I said he did fire a weapon within reasonable scientific probability" (T-7/29/88-179,180). He said he was not a firearms expert, nor had he read the literature in the field of firearms identification (T-7/29/88-186,187).

He said he used a scanning microscope with a magnification of 100,000 times to look at the particles (T-7/29/88).

He testified as to the number of particles and the types thereof he found on Def's hands and Kersten's hands and admitted that in this regard he used different numbers on direct examination at the trial than he had on deposition and he attempted to justify the discrepancies (T-7/29/88-199)(T-7/27/88-22-24).

Rao conceded that it is possible one can get gunshot residue on them from being in close proximity to where a gun is fired (T-7/29/88-243).

He said a lot more, which is stated more fully in the Statement of the Case and the Facts, including that millions of particles would not come out of the barrel of a gun because "tests have proved, whatever, that there are in particular firearms anywhere.....from 7600 particles to 75" (T-7/27/88-54). He said that assuming the air conditioning was off; that the shot was fired through the window; and that the whole cloud went into the car, he wouldn't have found the number of particles he did "if he were just sitting behind the driver's seat" (T-7/27/88-62). Of all the answers to all the inference upon inference laden hypothetical questions that Rao was asked by State, this was perhaps the most ridiculous one of them all for what Rao was saying was that if the

cloud had gone into the car, Def. would have gotten more particles on him than he would if he had been standing just outside the passenger side window. He also said that he would not have expected to find the number of particles that he did find on the right hand of a person who had fired a gun through a window or, alternatively, on the right hand of a man sitting in the driver's seat at the time. This answer, of course, makes no sense whatsoever (T-7/28/88-107,168).

Rhodes was not as compliant to the State's questioning as was Rao, but almost all of his answers were based upon more inferences piled upon inferences. He admitted he did not know how blood got onto the driver's side of the car. The main thing the State wanted him to say was that he found high velocity blood splatters on the driver's side door and it led him into saying that (T-7/27/88-128,129).

A hypothetical question propounded to an expert witness is objectionable where it inferentially requires the witness to determine a matter that is exclusively within the province of the jury. 24 Fla.Jur. 2d § 671 Evidence and Witnesses, 320; Atlantic Coast Line R.Co. v. Shouse, 83 Fla. 156, 91 So. 90 (1922). The questioning of Rhodes was almost all based on hypothetical questions and in almost all the hypothetical questions, inference was piled on top of inference. The most extreme example of this had to do with his testimony about the blanket because it was Rhodes' testimony that he found no blood on the blanket-----human or otherwise-----but only that he found "presumptive blood." It therefore violated the rule of prohibiting an inference upon an inference for Rhodes to have been asked if his examination of the spots of "presumptive blood" indicated whether these spots were, on the one hand, from either aspirated or gunshot blood splatters, on the other, from the dripping of the blood. And, of course, this alleged blanket evidence is the heart of the state's contention that Def. was not in the driver's seat when Kersten was shot. However, this whole business about the blood on the blanket was a house of cards to begin with since it was Rhodes' uncontroverted testimony that presumptive blood spots were found on the underside of the blanket as

well as on the top of it (T-7/27/88-156).

Defense's gunshot residue, etc., expert, Dr. Guinn testified that the firing of one cartridge causes ten million particles to come out of the muzzle of the gun, with 1000 particles coming out of the breach (T-8/10/88-403). He said the gunshot residue would settle on any surface inside the car, including any person sitting inside the car (T-8/10/88-412,413). He said that a gunshot residue analyst can never be in a position to state that a forensic analysis of gunshot residue particles clearly establishes that somebody fired a gun (T-8/10/88-422). He added that all the finding of particles on one's hands, be they irregular or spherical, indicate is that such person was in the vicinity of where a gun was fired (T-8/10/88-434,435).

Perhaps it is that Def's undersigned counsel is missing something, but after reading and rereading the testimony of State's experts, and particularly that of Mr. Rao, it still comes out confusing, contradictory, inconclusive and simply insufficient to help support the circumstantial evidence case against Def.

Another of the circumstances relied upon by State was the purchase of insurance policies, but when one considers all the evidence adduced at the trial regarding same, it is apparent that Def. was an insurance-minded person who had begun the purchasing of various types of insurance policies for both he and Kersten in the 1970's; that while he as at MCC he endeavored to substitute Kersten's family for himself as the beneficiary on her life policies and that he only attempted to change this after he found out that Kersten's sister had apparently given the German police statements hostile to him.

In McArthur v. State, 357 So.2d 972, 976 (Fla.1977), this Court in citing its earlier cases of Davis v. State, 90 So.2d 629 (Fla.1956); Mayo v. State, 71 So.2d 899 (Fla.1954), and Head v. State, 62 So.2d 41 (Fla.1952), recited that the parties "agree to the legal standard to be applied in cases where a conviction is based on circumstantial evidence...." and, more importantly, it was clear from headnote 12 in the McArthur case that this Court concurred in such agreement and that the standard to be applied "to the

record" was that where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction may not be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.

What this Court in McArthur was talking about was a standard of appellate review, such as the U.S. Court of Appeals in the Eleventh Circuit requires be expressly set forth in all appellate briefs.

In Jaramillo v. State, 417 So.2d 257 (Fla.1982), this Court found the State's evidence in a first degree murder-death penalty case legally insufficient where that evidence failed to establish that the fingerprints found on certain items in the murder victim's home could only have been placed on such items at the time the murders were convicted. In explaining this holding, this Court stated, in pertinent part (at p. 257):

> "The State's case against Jaramillo was based on circumstantial evidence. A special standard of review of the sufficiency of the evidence applies where a conviction is wholly based on circumstantial evidence. In McArthur v. State, 351 So.2d 972, 976 n. 12 (Fla.1977), we reiterated this standard to be that "[w]here the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt a conviction cannot be sustained unless the evidence is inconcistent with any reasonable hypothesis of innocence." See also McArthur v. Nourse, 369 So.2d 578 (Fla.1979). Proof that Jaramillo's fingerprints were found on certain items in the murder victims' home was the only evidence offered by the State to show that Jaramillo was involved in these murders. This proof is not inconsistent with Jaramillo's reasonable explanation as to how his fingerprints came to be on these items in the victims' home. The State failed to establish that Jaramillo's fingerprints could only have been placed on the items at the time the murder was committed....."

Based thereupon, this Court reversed the trial court and remanded thereto with directions to discharge the defendant.

In Cox v. State, 555 So.2d 352 (Fla.1989), which was another first degree murder-death penalty case, this Court held that circumstantial evidence consisting of a hair found in the victim's car, same O-type blood, a boot print, and the fact that part of the defendant's tongue had been bitten off and had to be repaired surgically, was not sufficient to support the conviction. Based upon such holding, this Court reversed,

vacated the death sentence, and directed that the defendant be acquitted of the first degree murder charge.

The Court in Cox explained its holding thusly (at p. 353):

> "The Court has long held that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629, 631 (Fla.1956); McArthur v. State, 351 So.2d 972 (Fla.1977). Circumstantial evidence must lead "to a reasonable and moral certainty that the accused and no one else committed the offense charged." Hall v. State, 90 Fla.119, 120, 107 So. 246, 247 (1925). Circumstances that create nothing more than a strong suspicion that the defendant committed the crime are not sufficient to support a conviction. Williams v. State, 143 So.2d 484 (Fla.1962); Davis; Mayo v. State, 71 So.2d 899 (Fla.1954). One of this Court's functions in reviewing capital cases is to see if there is competent substantial evidenc to support the verdict. Williams v. State, 437 So.2d 133 (Fla.1983), cert. denied, 466 U.S. 909, 104 S.Ct. 1690, 80 L.Ed.2d 164 (1984). After reviewing this record, we find that the state's evidence is not sufficient to support Cox' conviction." (Emphasis added)

Evidence will be deemed substantial if a reasonable mind might accept it as an adequate support for the conclusion reached. Evidence may be regarded as insufficient where it is so weak, or unconvincing as to appear false and uncertain, or where it lacks probative force, or leaves to conjecture that which must be proven beyond a reasonable doubt. 15 Fla. Jur. 2d § 981 Crim. Law, 703. And aside from this consideration, the State's evidence in the instant case was not inconsistent with any reasonable hypothesis of innocence and it did not lead to a moral certainty that the Def. and no one else committed the offense charged.

It is the Def's contention here that the evidence was insufficient as a matter of law to support the guilty verdicts and that, as in Cox and Jaramillo, supra, this Court should reverse the guilty verdicts and judgment, vacate the death penalty sentence, and order that the Def. be discharged.

As a final note on this point, the Def. respectfully suggest to the Court that the matter

of the insufficiency of the evidence should be dispositive of this appeal and that therefore the other grounds argued herein, although meritorious with each on its own warranting reversal, need not be considered.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing Appellant's Initial Brief was mailed this 31st day of July, 1990, to the Office of the Attorney General, State of Florida, 401 N.W. 2nd Avenue, Miami, Florida.

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