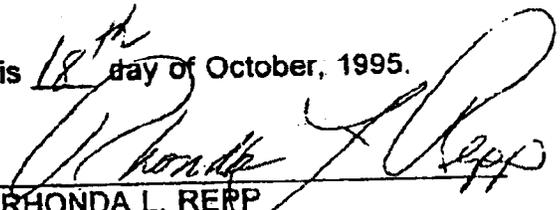


1 counsel needed additional time to review the voluminous files associated with this
2 case and to locate potential witnesses. Accordingly, counsel requested numerous
3 Motions to Extend Time for Filing the Supplemental Petition which this Court granted.
4

5 A Defendant is entitled to an evidentiary hearing on postconviction
6 petition when he presents a colorable claim - one that, if allegations are true, might
7 have changed the outcome. State v. Runningeagle, 176 Ariz. 59, 859 P.2d 169 (Ariz.
8 1993), cert. denied, 114 S.Ct. 609, 126 L.Ed.2d 574 (1993).
9

10 Assuming the allegations raised in Sharon Sprayberry's and Holly
11 Wake's affidavits are true, there is a strong probability the outcome would change.
12 Thus, Schad now files his supplemental petition, affidavits in support of the petition,
13 and requests a full evidentiary hearing upon the merits of the petition after appropriate
14 discovery is undertaken.
15

16 RESPECTFULLY SUBMITTED this 18th day of October, 1995.

17 
18 RHONDA L. RERP
19 Attorney for Defendant

20 COPIES of the foregoing
21 delivered/mailed this 18th
day of October, 1995, to:

22 R. Wayne Ford
23 Assistant Attorney General
24 Criminal Appeals Section
25 1275 W. Washington
Phoenix, AZ 85007-2997

26 Honorable Richard Anderson
Judge of the Superior Court
Division 1
Camp Verde, AZ 86301

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Oct 19 1995
Ellie Dayk

5 Attorney for Defendant

6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF YAVAPAI

9 EDWARD H. SCHAD, JR.,)

Division 1

10 Petitioner,)

No. CR 8752

11 vs.)

DEFENDANT'S SUPPLEMENTAL
STATEMENT OF GROUNDS FOR
RELIEF

12 STATE OF ARIZONA,)

13 Respondent.)
14

15 Defendant EDWARD SCHAD JR., through his attorney RHONDA L.
16 REPP, asks that the Court enter an order setting an evidentiary hearing based on
17 the following:
18

19 1. NEWLY DISCOVERED MATERIAL EVIDENCE EXISTS
20 WHICH, IF PRESENTED AT A NEW TRIAL OR RESENTENCING, WOULD BE
21 LIKELY TO EFFECT THE VERDICT AND/OR SENTENCE IMPOSED.

22 a. New evidence exists which, had it been discovered and
23 presented previously, would likely have effected the verdict of the jury.
24 Evidence which was previously introduced by the State at trial was the
25 product of illegal searches and seizures. The evidence was obtained
26 by the act of John Duncan who was, at the time, acting as an agent of
the police. However, at the time of trial the now known support for the
argument that John Duncan was acting as an agent of the State when
he obtained statements from the Defendant, as the result of custodial
questioning, was not known.

In 1985, Edward Schad was tried and convicted for the murder of

1 Larry Grove, and was sentenced to death. The core of the State's case against
2 Schad was circumstantial evidence because the State had no eyewitnesses to the
3 killing of Larry Grove.

4 Most of the State's circumstantial evidence was derived from the
5 activities of John Duncan¹, a key State's witness. Because of numerous contacts
6 between Duncan and the Salt Lake City Police, who had initially arrested Schad,
7 a question arose as to whether Duncan was acting as an agent of the police.

8 An evidentiary hearing was conducted to determine if Duncan was
9 acting as a police agent. After hearing the testimony of Duncan and Jack Judd, a
10 Coconino County deputy sheriff, the Court concluded that Duncan was not acting
11 as an agent. Thus, all of the circumstantial evidence that was derived from
12 Duncan's activities was not excluded on the basis of police agency.

13 Sharon (Duncan) Sprayberry, was Duncan's wife at the time Schad
14 was arrested. She has first hand knowledge of Duncan's statements, and was with
15 Duncan when they visited Schad at the jail. If she had testified at either of Schad's
16 trials, her testimony would have contradicted Duncan's and would have provided
17 evidence that Duncan was a police agent. Unfortunately, Sharon (Duncan)
18 Sprayberry could not be located and thus her testimony was not available for this
19 Court to consider in determining whether Duncan was an agent of the police (or to
20 assist the jury in determining the credibility of Duncan).
21
22
23

24
25 _____
26 ¹ Counsel has attempted to locate John Duncan without success.
(See affidavit of Sheila Cahill.) Duncan's former wife, who was
not previously interviewed or presented as a witness at Schad's
trials, has been interviewed. She provides new material evidence
which would have effected the Court's earlier ruling on the
admissibility of evidence used by the State and which completely
contradicts Duncan's prior testimony.

1 Filed along with this supplement to Defendant's Rule 32 Petition is an
2 affidavit of Sharon Sprayberry. The affidavit, along with the Reporter's Transcripts
3 from 1985, show that Duncan, a key witness against Schad, instead of acting as
4 a private citizen when he searched Schad's wallet and obtained allegedly
5 incriminating statements from him, was acting as an agent of the Salt Lake City
6 Police Department.

7 Schad's conviction was based solely on circumstantial evidence
8 because the state had no eyewitnesses to the killing of Larry Grove. Because
9 critical circumstantial evidence was improperly admitted, substantial doubt exists
10 whether the remaining admissible evidence would have led the jury to reach the
11 verdict it did.
12

13 The items of evidence which were improperly admitted include:

- 14 1). Larry Grove's ring;
- 15 2). Larry Grove's credit cards;
- 16 3). Credit card receipts from Larry Grove's credit cards;
- 17 4). A New York traffic ticket;
- 18 5). Schad's wallet;
- 19 6). A statement purportedly made by Schad to Duncan, when
20 Duncan and Sharon (Duncan) Sprayberry visited Schad at the Salt Lake City, Utah,
21 jail;
- 22 7). The Cadillac registration (RT 6-21-85 page 813)²;
- 23 8). Duncan's testimony as to what he saw or found pursuant to the
24
25
26

²
The abbreviation "RT" will refer to the Reporter's Transcript and will be followed by the pertinent date and page number(s).

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9). The rental Ford found in Flagstaff, Arizona, including the mirror
contraption contained in the trunk of the car (RT 6-20-85 pages 494-497, 509-512);
and

10). The evidentiary items found in the Cadillac (RT 6-25-85 page
964).

Sharon Sprayberry's affidavit and anticipated testimony provide
evidence that Duncan was acting as an agent of the Salt Lake City Police
Department when he obtained the critical statements and physical evidence. In her
affidavit, she states that a detective wanted Duncan and her to go to the jail to talk
to Schad and get any information they could from him. (Sharon Sprayberry
Affidavit statement 8 and 9.) This information directly contradicts Duncan's
testimony where he testified that it was he who came up with the idea to talk to
Schad. (RT 6-21-85 pages 810-1.)

One who is a private citizen may taint his otherwise admissible search
by the participation of government officials, or by becoming the agent of the state.
Aikins v. Gomes, 367 F.Supp. 401, affirmed 488 F.2d 977 (D.Ariz. 1972).

"The determination of whether a [confidential informant is] acting as
a government agent 'must be made on a case-by-case basis by the [trial] judge,
and reviewed under the deferential 'clearly erroneous' standard.'" United States
v. McAllister, 18 F.3d 1412, 1417 (7th Cir. 1994). Factors that a court considers
in reaching its determination are "whether the government knew of and acquiesced
in the intrusive conduct," "whether the private party's purpose . . . was to assist law
enforcement efforts" and "whether the informant performed the conduct at the
request of the government." Id. at 1417.

1 Sharon Sprayberry's affidavit provides evidence that Duncan visited
2 Schad at the jail to obtain evidence at the request of the police. (Sharon
3 Sprayberry Affidavit statements 8 and 9.) The police not only requested Duncan
4 to visit Schad, but arranged Duncan to visit Schad on a non visiting day. (RT 6-21-
5 85 pages 803-4.) Duncan's purpose was to assist law enforcement efforts. (RT
6 6-21-85 page 810). Applying the test enunciated above, Duncan was acting as a
7 police agent.
8

9 Because Duncan was acting as a police agent the evidence used at
10 trial derived from Duncan's activities should have been excluded. Duncan
11 searched Schad's wallet without a search warrant. (RT 6-21-85 page 840.) He
12 also obtained allegedly incriminating statements from Schad without following the
13 constitutionally mandated safeguards. (RT 6-21-85 pages 805-6.)
14

15 The prosecution may not use statements, whether exculpatory or
16 inculpatory, stemming from custodial interrogation of the defendant unless it
17 demonstrates use of procedural safeguards effective to secure privilege against
18 self-incrimination. Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16
19 L.E.2d 694 (1966). Custodial interrogation, within rule limiting admissibility of
20 statements stemming from such interrogation, means questioning initiated by law
21 enforcement officers after the person has been taken into custody or otherwise
22 deprived of his freedom of action in any significant way. Id.
23

24 Counsel has been unable to locate any support in the trial transcripts
25 indicating that Schad was advised of his Miranda warnings, or whether he
26 knowingly, voluntarily, and intelligently, gave up his right to remain silent.
Moreover, the State was concerned about a possible Miranda violation if it were

1 found that Duncan was acting as an agent of the police. (RT 6-21-85 pages 814-
2 5.)

3 Under the facts attested to by Sprayberry and the requirements of
4 Miranda, the State must demonstrate its use of procedural safeguards. Because
5 the State failed to follow procedural safeguards, Schad's alleged jail house
6 statement that he was not in Arizona, particularly Prescott, Arizona, was
7 inadmissible.

8 Because Duncan was acting as an agent of the police, all evidence
9 that he personally obtained plus any derived evidence should have been excluded
10 as "fruit of the poisonous tree." For the doctrine of fruit of poisonous tree to be
11 applicable, seizure of property in the first instance must have been illegal. State
12 v. Rendel, 19 Ariz.App. 554, 557, 509 P.2d 247, 250 (Ariz.App. 1973). A
13 necessary predicate to the application of the "fruits of the poisonous tree" doctrine
14 is that evidence which led to the discovery of the fruit must have been obtained in
15 violation of a persons' Fourth or Fifth Amendment rights. State ex rel. LaSota v.
16 Corcoran, 119 Ariz. 573, 581, 583 P.2d 229, 237 (Ariz. 1978).

17 Applying these rules, any evidence obtained by Duncan, plus any
18 evidence derived from Duncan's activities while acting as a police agent were
19 inadmissible. Because the core of the State's case consisted of this evidence, a
20 different result would have occurred had Duncan's agency status been disclosed
21 and the tainted evidence excluded.

22
23 b. Newly discovered evidence exists which would be likely to
24 effect the sentence imposed.

25
26 A.R.S. § 13-702(G), provides that "Mitigating circumstances shall be

1 any factors proffered by the defendant . . . which are relevant in determining
2 whether to impose a sentence less than death." The mitigation expert appointed
3 by this Court recently discovered that Schad's Presentence Report was inadequate
4 resulting in the Court not having available significant mitigating circumstances prior
5 to imposing the death penalty.

6 The recent discovery that the Presentence Report had material
7 omissions was the result of two visits by the court-appointed mitigation expert
8 (hereafter referred to as "expert" or Wake") to the Defendant. The expert's visits
9 with Schad were necessarily recent because of several extraordinary
10 circumstances.
11

12 Schad's original request for the appointment of the expert was lost in
13 the system. Schad's original request was mistakenly believed filed on March 27,
14 1995. Schad's Motion for an expedited ruling was filed on June 21, 1995. This
15 Court ordered the appointment of the expert on July 6, 1995, only three months
16 ago.
17

18 Schad has been in custody since 1978. He been tried twice for the
19 same charge, and has been represented by numerous attorneys. Schad's files are
20 therefore voluminous.
21

22 The files in counsel's possession are contained in eight boxes. The
23 expert has preliminarily reviewed the files and copied pertinent portions, but must
24 perform further substantial review and copying.

25 As a result of her visits with Schad, in addition to the files in counsel's
26 possession, the expert believes that she needs additional files as a result of her
visits with Schad. Additional files will be sought from outside sources, such as the

1 military, other law enforcement agencies, etc. The information in these files, to the
2 best of counsel's knowledge, has never been presented to the court and was never
3 requested by Schad's prior counsel or the Presentence Report writer.

4 Since Schad has been convicted of a capital offense, the expert
5 believes that contact visits between Schad and the expert are essential for the
6 expert to obtain adequate information, which has never been presented to the court
7 regarding physical and emotional abuse to which Schad was subjected as a child
8 and teenager. Counsel has asked prison officials to permit contact visits. The
9 request has been denied. Counsel is now pursuing alternatives.

10 Each one of these circumstances taken by itself is extraordinary.
11 Taken cumulatively, Schad can easily show extraordinary circumstances for having
12 only recently met with the expert. Thus, the expert only recently discovered the
13 serious deficiencies in the 1985 Presentence Report.

14 In the limited time available to her, the expert has summarized her
15 findings of Schad. Those findings are contained in her affidavit³ filed along with
16 this supplemental statement of grounds for relief and constitute a sufficient showing
17 that a full hearing on the matter is required.

18 **c. The core of the State's case against Schad was**
19 **inadmissible circumstantial evidence.**

20 The core of the State of Arizona's case against Schad was
21 circumstantial evidence. Absent the improperly admitted evidence, the verdict
22 would likely have been different. The newly discovered evidence of Sharon
23 Sprayberry goes to the core issue of whether Duncan was acting as an agent of
24 the Salt Lake City Police.
25
26

³See attached affidavit of Holly Wake.

1 Had that evidence been presented this court would likely have
2 reached a different ruling as to Duncan's "agent" status and a substantial portion
3 of the circumstantial evidence admitted would have been excluded, because
4 Duncan failed to follow procedural safeguards required by the federal and state
5 constitutions. Duncan did not obtain a search warrant prior to searching Schad's
6 wallet. Duncan also did not advise Schad of his Miranda rights prior to the jail
7 house questioning of Schad. Further, all evidence derived from Duncan's illegal
8 activities must be excluded as a result of the "fruit of the poisonous tree doctrine."
9

10 Had the illegally obtained evidence been properly excluded a strong
11 probability exists that Schad would not have been convicted or that offense of
12 conviction would have been different.

13 d. The 1985 Presentence Report relied upon by the court in
14 imposing the death penalty failed to adequately disclose the physical,
15 psychological, and emotional abuse Schad suffered as a child and
16 teenager.

17 Following Schad's conviction, a major factor relied upon by this Court
18 in deciding the sentence to impose was the 1985 Presentence Report. The expert
19 appointed by the Court has recently discovered that Schad's 1985 Presentence
20 Report was inadequate because of significant material omissions. As a result the
21 Court could not have considered all of the mitigating circumstances which do exist,
22 prior to sentencing. Thus there is a high probability that had the 1985 Presentence
23 Report had been adequate, the sentence would have differed.

24 **2. THE NEWLY DISCOVERED MATERIAL EVIDENCE COULD**
25 **NOT, WITH REASONABLE DILIGENCE, HAVE BEEN DISCOVERED AND**
26 **PRODUCED AT TRIAL.**

a. Mr. Duncan's wife, Sharon (Duncan) Sprayberry, was not
called to testify at trial.

1 Schad's trial attorney reasonably tried but was unable to locate
2 Sharon Duncan. Thus Sharon Duncan was not available to testify at trial.
3 Therefore, the Court only considered the self-serving statements of Duncan, the
4 police agent, and Detective Halterman, the Salt Lake City Police Detective in ruling
5 on the admissibility of critical evidence.

6 Had Schad's attorney been able to locate Sharon (Duncan)
7 Sprayberry, who would have testified to her knowledge of the circumstances
8 surrounding the jail house visit by Duncan, there is a high degree of probability this
9 Court's ruling on the admission would have been different.
10

11 **b. As to the inadequacy of the Presentence Report, the newly**
12 **discovered evidence has only recently been uncovered because the**
13 **mitigation expert was not appointed until July 6, 1995.**

14 The mitigation expert, only recently appointed, has determined that
15 the 1985 Presentence Report was seriously inadequate. Even though the
16 probation officer presumably used reasonable efforts to complete the 1985 report,
17 the probation officer was handicapped by a lack of information.

18 There are several reasons why the probation officer's information was
19 incomplete. First, Utah prison authorities refused to relinquish necessary records
20 for Schad's defense at his first trial. Second, Schad's family was uncooperative in
21 providing information relating to Schad. Additionally, the military refused to release
22 records pertaining to Schad.
23

24 Thus, even though Schad's trial attorney and the probation officer
25 used reasonable diligence to obtain the necessary information, the report did not
26 and could not contain adequate information for the Court to make an informed
decision as to the sentence to impose.

c. **Schad brought this petition promptly.**

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Schad brought this petition promptly after learning of the newly discovered material evidence when he was informed that efforts to locate Duncan had failed, and that the mitigation expert has determined that the 1985 Presentence Report was materially inadequate.

3. IN THE ALTERNATIVE, IF THE COURT FINDS THAT THE NEWLY DISCOVERED MATERIAL EVIDENCE COULD HAVE BEEN DISCOVERED AND PRODUCED AT TRIAL WITH REASONABLE DILIGENCE, SCHAD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER FEDERAL AND STATE STANDARDS.

Schad was charged with a capital offense. Under both the Arizona and federal constitutions, he was entitled to effective assistance of counsel. This constitutional right includes not only trial counsel versed in the defense of serious felony charges, but the effective assistance of experts in areas necessary to adequately defend.

Generally, ineffective assistance of counsel claims should be raised in postconviction relief proceedings. State v. Atwood, 171 Ariz. 576, 599, 832 P.2d 593, 616 (Ariz. 1992), cert. denied, 113 S.Ct. 1058, 122 L.Ed. 2d 364 (1993). To show ineffective assistance of counsel, petitioner for postconviction relief must do more than show that his counsel was unsuccessful or made tactical errors; additionally, he must demonstrate substantial prejudice resulting from ineffective assistance of counsel, without which the outcome of the case would probably have been different. State v. Ramirez, 126 Ariz. 464, 467, 616 P.2d 924, 927 (Ariz.App. 1980).

If this court finds that the newly discovered material evidence could have, with reasonable diligence, been discovered and produced at trial, by

1 competent defense counsel, with competent expert assistance, then Schad is
2 entitled to a new trial and sentencing as he did not receive effective assistance of
3 counsel. Constitutionally adequate counsel would have exercised sufficient
4 diligence to have brought this newly discovered material to trial.

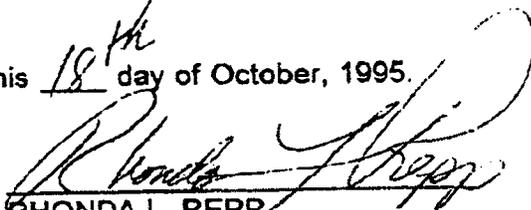
5 The newly discovered material evidence goes to the heart of the
6 State's case against Schad and has verdict-changing capacity. Schad was plainly
7 prejudiced by the failure to obtain effective assistance of counsel under the federal
8 and state constitutional standards.
9

10 **4. FURTHER, THE FAILURE OF THE STATE TO DISCLOSE**
11 **THAT DUNCAN WAS AN AGENT OF THE POLICE DENIED SCHAD A**
FUNDAMENTALLY FAIR TRIAL VIOLATING HIS RIGHT TO DUE PROCESS.

12 The Defendant is entitled to a new trial based on prosecutorial
13 misconduct only where the misconduct prejudices the defense and has the
14 cumulative effect of denying the Defendant a fair trial. State v. Schneider, 148 Ariz.
15 441, 715 P.2d 297 (Ariz.App. 1985).
16

17 The failure of the State to disclose that Duncan was an agent of the
18 Salt Lake City Police allowed the introduction of inadmissible circumstantial
19 evidence and allegedly incriminating statements which were instrumental in Schad's
20 conviction thus denying him a fair trial. The State's conduct is so egregious as to
21 deny Schad a fundamentally fair trial in violation of the due process clauses of the
22 state and federal constitutions.
23

24 RESPECTFULLY SUBMITTED this 18th day of October, 1995.

25 
26 RHONDA L. REPP
Attorney for Defendant

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COPIES of the foregoing
delivered/mailed this 13th
day of October, 1995, to:

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Honorable Richard Anderson
Judge of the Superior Court
Division 1
Camp Verde, AZ 86301

Edward Schad, Jr.
#40496
ASP Florence
P.O. Box 8600
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By: Lupe I. Niguez

APPENDIX A

EXCERPTS OF TRIAL TRANSCRIPTS

<u>Trial Transcript Date</u>	<u>Volume</u>	<u>Pages</u>
6-20-85	3	494 through 497 509 through 512
6-21-85	4	803 through 806 810, 811 813 through 815 840
6-25-85	5	964

1 Q How do you know?

2 A I took the photographs.

3 Q And this -- these three pictures actually show the
4 automobile at Mr. Wolfe's residence?

5 A Yes, sir.

6 Q What did you do while you were there at the Wolfe
7 residence?

8 A I initially photographed, took four photographs of
9 the vehicle, and after that I, myself and Deputy Don Brown,
10 processed the exterior of the vehicle for latent fingerprints.

11 Q Did you lift some latent fingerprints?

12 A Yes, sir.

13 Q You're trained to do that sort of thing?

14 A Yes, sir.

15 Q Did you keep those latents as evidence to be
16 examined at a later time perhaps?

17 A Yes, sir, I did.

18 Q Did you also seize some items from the Ford
19 automobile?

20 A Yes, sir.

21 Q What was done with those items?

22 A They were identified, numbered, tagged and retained
23 in our evidence room.

24 Q At that time, was then Deputy Brown in charge of
25 keeping that evidence, the evidence custodian as we call it?

DAVID W LUNDY/COURT REPORTER

CHARLES WONG - DX BY MR. DAWLEY

1 A Both Deputy Brown and myself.

2 Q Did you keep a record of the various items taken
3 from the Ford automobile?

4 A Yes, sir.

5 Q I now show you State's exhibit number 37, a mirror
6 contraption we have had identified by some other witnesses.
7 Would you take a look at that, please. Do you recognize it?

8 A Yes, sir, I do.

9 Q How do you recognize it?

10 A This is one of the items that I obtained from the
11 vehicle.

12 Q How are you able to tell us that that item came from
13 the vehicle?

14 A If I may look at the tag.

15 Q If you would, please.

16 A Okay, it's marked as item number 4, dated the 13th,
17 9th month of 1978, and my identification number is affixed to
18 the tag.

19 Q That's the number 22 on the tag?

20 A Yes, sir.

21 Q And you tagged that particular item then when you
22 recovered it?

23 A Yes, sir.

24 Q And also placed the date and the police report
25 number on the tag?

DAVID W LUNDY/COURT REPORTER

CHARLES WONG - DX BY MR. DAWLEY

1 A Yes, sir, I did.

2 Q Does that appear to be in basically the same
3 condition now as it was when you recovered it?

4 A Yes, sir, it does.

5 MR. DAWLEY: I offer exhibit 37.

6 MR. SHAW: No objection.

7 THE COURT: 37 is admitted

8 BY MR. DAWLEY:

9 Q Do you recall, Sergeant Wong, where in the Ford you
10 found this item 37?

11 A Okay, that item was located in the trunk compartment
12 of the vehicle.

13 Q Were there other items in the trunk beside that
14 particular item?

15 A Yes, sir.

16 Q What other types of things were in the trunk?

17 A If I can recall, there were various papers, I
18 believe newspapers, lot of children's toys, beach toys, plastic
19 type toys.

20 Q What about clothing?

21 A I don't recall if there were any clothing or not in
22 the trunk.

23 Q There were a number of items in the trunk though?

24 A Yes, sir.

25 Q Do you know whether those items were in the trunk

DAVID W LUNDY/COURT REPORTER

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when the Ford automobile was first discovered by D.P.S.?

A That I can't answer because I wasn't in the vehicle at that time.

Q Was it your understanding that the Ford had been there at the Wolfe residence for some time before you went to process it?

A Yes, sir, but the time limit I'm not sure.

Q And it was then Sergeant Judd's orders that initiated your investigation?

A Yes, sir.

Q What was your understanding of the investigation you were conducting at that time?

A At that time I was directed to go out on what we call an assist other agency on homicide, and I was instructed to process the car and photograph the outside and the inside of the car.

Q What other agency were you assisting at that time?

A The Yavapai County sheriff's department.

MR. DAWLEY: No further questions.

THE COURT: Mr. Shaw?

CHARLES WONG - CX BY MR. SHAW

1 Q So that was found in the trunk then?

2 A Yes, that item number was.

3 Q Go ahead. What else was found in the trunk?

4 A Material with floral design and a white material
5 attached with no design.

6 Q How's that again?

7 A Listed as material with floral design and white
8 material attached with no designs.

9 Q Was that a big sheet-type material?

10 A I can't recall.

11 Q Okay. Anything else?

12 A There was a shopping bag with two rolls of toilet
13 tissue and a brown paper bag. Also various newspapers listed
14 as newspaper, Columbus Dispatch, Howard Johnson children's
15 menu. Brown paper sack with empty Camel and Belair cigarette
16 cartons. Typo instruction sheets. Belair cigarette carton,
17 they were empty. Map of Norfolk, Virginia Beach and
18 Portsmouth. A black pendant with Pedro's south of the border,
19 Sears sales receipt dated July 1978, 15, 1978, plastic
20 cardboard with name Juanita, I can't read the -- looks like
21 Borracks, in folded instruction sheet. Also this item here.

22 Q All those were found inside the trunk?

23 A Yes, sir.

24 Q Okay. Was it cluttered or was that -- was the trunk
25 large enough that you you would recall the thing packed full

DAVID W LUNDY/COURT REPORTER

CHARLES WONG -- CX BY MR. SHAW

1 with those items?

2 A I can recall it wasn't packed full, but everything
3 was scattered about the trunk.

4 Q All right. Now, you were very careful when you
5 picked up that mirror, item number 37, so that you wouldn't
6 leave any fingerprints on it, weren't you?

7 A Yes, sir.

8 Q As a matter of fact, you carried it in a way such as
9 this, is that right, so you wouldn't get any fingerprints on
10 the rest of it?

11 A I believe that was the way I handled it.

12 Q Okay. And you did that because you knew this was a
13 critical item of evidence, didn't you?

14 A Yes, sir, possibly.

15 Q ~~But you didn't fingerprint it, did you?~~

16 A ~~No, sir, I didn't.~~

17 Q And is that because this wasn't your case?

18 A It was because of the instructions received from
19 Sergeant Judd as to photograph and process the vehicle, obtain
20 items of evidence for retention for Yavapai County sheriff's
21 department.

22 Q Okay. Isn't it normal in cases such as this to
23 fingerprint all the items of evidence found at a crime scene
24 that could leave fingerprints?

25 A Yes, either by our department or for submission to

DAVID W LUNDY/COURT REPORTER

1 the department of public safety.

2 Q Okay. ~~And this item was never fingerprinted was it?~~

3 A ~~Not by myself.~~

4 Q To your knowledge it was never fingerprinted until
5 it was attempted just very recently, this year, isn't that
6 right?

7 A I have no knowledge of that, just from myself.

8 Q Now you didn't know on September the 12th anything
9 about Yavapai County being connected with this case, did you?

10 A Other than we were assisting Yavapai County.

11 Q You weren't assisting them on September the 12th,
12 were you?

13 A No.

14 Q You didn't -- they didn't come into the picture
15 until after a body in Prescott was identified on October the
16 11th, a month later, isn't that right?

17 A Well, I don't recall that. What I do recall is the
18 assignment from Sergeant Judd to process this vehicle for
19 Yavapai County.

20 Q He said for Yavapai County? Are you sure about
21 that?

22 A I believe so, because on the report, on my evidence
23 sheet, I have AOA, which is assist other agency, homicide.

24 Q What's the other agency mentioned there? Wasn't it
25 Salt Lake City?

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1 the one that turned in Mr. Schad due to some of the statements
2 that he had made to me and which would lead to that, yes.

3 Q Okay.

4 And then you had a discussion with Mr. Halterman
5 that day about your interviewing Mr. Schad in jail, isn't that
6 right?

7 A I don't know what you mean interview. Visit.

8 Q Visit, talk to?

9 A Visit, period, not an interview. A visit.

10 Q Okay. And didn't you have an understanding at that
11 time with Mr. Halterman that whatever you found out from Mr.
12 Schad at the jail you would then tell Mr. Halterman?

13 A I told him I would call him and tell him what was
14 said.

15 Q And that was your understanding at that time with
16 Mr. Halterman?

17 A Well, I had nothing to hide.

18 Q Answer the question yes or no.

19 A Yes.

20 Q Is that yes?

21 A Yes.

22 Q Okay. And this day that — did you visit Mr. Schad
23 in jail then on that day?

24 A Yes.

25 Q And that wasn't a normal visiting day, was it, sir?

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1 A To my knowledge I don't believe so.

2 Q Okay. And Mr. Halterman had arranged that visit for
3 you, isn't that right?

4 A He or someone else had to have.

5 Q He or someone from the Police Department?

6 A Right.

7 Q And that's because you couldn't have visited him
8 that day unless it had been arranged, isn't that right?

9 A Previously stated.

10 Q That's a yes?

11 A Yes.

12 Q Now, previously to this time, Mr. Halterman had
13 furnished you information about the Schad case that you
14 wouldn't have gotten on your own, isn't that right?

15 A I don't think so.

16 Q Well, he had informed you that there had been a Ford
17 Fairmont found around Flagstaff that was involved, hadn't he?

18 A I don't believe so.

19 Q Well, he had informed you of information regarding
20 this case, hadn't he, prior to this time?

21 A We had discussed information on this case. I don't
22 know if he gave me any new information than what I knew myself
23 already.

24 Q But he had given you information too that he had
25 learned, isn't that correct?

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1 A I can't recall specifically any.

2 Q Okay. You then talked to Mr. Schád in the jail,
3 didn't you?

4 A Yes.

5 Q And you were there about five to 10 minutes?

6 A I'd say probably 15 minutes to a half hour.

7 Q Okay. You didn't tell Mr. Schad that you had an
8 understanding with Halterman that whatever you found out you
9 would tell Mr. Halterman, did you?

10 A I did not tell Schad that, no.

11 Q And you didn't tell Mr. Schad that this visit had
12 been especially arranged for you by Mr. Halterman, did you?

13 A I don't recall if I told him or not.

14 Q Okay. You know about Miranda warnings, don't you?
15 You have been arrested many times, haven't you?

16 A I've been arrested a few times, yes.

17 Q And you had your Miranda warnings read to you?

18 A I know what the Miranda Rights are, the warnings,
19 yes.

20 Q Those are basically the rights to have the presence
21 of your attorney and not to talk and that sort of thing?

22 A I imagine that's what police officers have to say.

23 Q Now, you didn't tell Mr. Schad about his Miranda
24 Rights when you talk to him, did you?

25 A I'm not a police officer. I didn't arrest him.

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1 Q Okay. You didn't tell Mr. Schad that Mr. Halterman
2 had especially arranged this visit for you?

3 A I don't recall that. I don't know if I did or not.

4 Q Now you were in court here when Mr. Judd, Lieutenant
5 Judd, testified that Halterman had told him on September 14,
6 1978, that an informant had spoken to Schad in jail. Did you
7 hear that?

8 A Yes, I heard that.

9 Q Okay. You don't like to refer to yourself as an
10 informant, do you?

11 A I am not an informant.

12 Q And is that because you are in jail now?

13 A No.

14 Q Is that because you're worried about being labeled a
15 snitch and having trouble in jail yourself?

16 A No.

17 MR. SHAW: All right. I have no further
18 questions.

19 THE COURT: Mr. Dawley?

20 MR. DAWLEY: By the way, Your Honor, Mr. Shaw
21 and I agreed we wouldn't apply the rule to this hearing for
22 security reasons, so one deputy could stay.

23 THE COURT: That true, Mr. Shaw?

24 MR. SHAW: That's correct.

25

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1 kids? One of the children I believe is -- one of Wilma's
2 children is, I believe the father is Ed. I'm not sure how this
3 worked but I've been told that.

4 Q Let me put it to you --

5 A I'm -- it was over concern.

6 Q I can see concern for Wilma, but why help the
7 police?

8 A I don't -- I don't feel that -- I had seen all the
9 preponderance of different things that come together in the
10 case. I felt if I could help any way I would.

11 Q So that you volunteered to Detective Halterman that
12 you would go talk to Mr. Schad?

13 A Yes.

14 Q What did he say in response to that? Did he say
15 fine?

16 A He agreed to it. He asked if I would tell him what
17 was said. I told him I would.

18 Q He asked if you would do that?

19 A I don't recall if he asked if I would or if I told
20 him I would relay it to him what was said.

21 Q Did he give you any questions in particular to ask
22 Mr. Schad?

23 A No.

24 Q I want to make sure this is clear. Are you saying
25 that you were the one with the idea to go talk to Schad?

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1 A Yes.

2 Q And he basically arranged that talk by getting you a
3 visitation?

4 A Yes.

5 Q But it was your idea in the first place?

6 A Yes.

7 Q And whether you said it or Halterman said it in the
8 first place, all Halterman said basically was basically was let
9 me know what you find out?

10 A Yes.

11 Q Didn't give you any specific questions?

12 A No.

13 Q Any specific orders?

14 A No.

15 Q Didn't pay you for that?

16 A No.

17 MR. DAWLEY: Nothing further.

18 THE COURT: Mr. Shaw?

19

20 REDIRECT EXAMINATION

21 BY MR. SHAW:

22 Q But your understanding with him was that whatever
23 information you got from Schad would be relayed to him? That's
24 what you said on direct, isn't that right?

25 A In direct I said what we discussed I would tell him.

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1 any.

2 Q Did Halterman tell you -- regarding these questions
3 of Halterman sharing information with you, did he tell you that
4 there was a trailer involved in this case?

5 A Mr. Schad mentioned the trailer.

6 Q Didn't Halterman tell you that?

7 A I don't know one way or the other whether Mr.
8 Halterman or not said it. Mr. Schad had mentioned the trailer
9 long before I ever even talked to Mr. Halterman.

10 Q Didn't Halterman mention to you that a person named
11 Grove was missing?

12 A He didn't have to tell me a person named Mr. Grove
13 was missing. I told Mr. Halterman that the credit cards that
14 were in Mr. Schad's possession and the registration ownership
15 certificate that was in Mr. Schad possession was in the name of
16 Mr. Grove.

17 Q Did Halterman tell you, just answer the question
18 please sir, that a Mr. Grove was missing? That's all I'm
19 asking. Just think about that question and answer it.

20 A It's very possible he did, yes.

21 MR. SHAW: Okay, that's all I have.

22 THE COURT: Mr. Duncan, thank you very much.
23 You can step down at this time.

24 I suppose we'll be seeing you again later on in the
25 case.

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1 MR. DAWLEY: Can he stay in the courtroom, Your
2 Honor? He is the next witness.

3 THE COURT: Yes.

4 MR. DAWLEY: Okay.

5 THE COURT: What do you want to tell me now,
6 gentlemen? Mr. Shaw?

7 MR. SHAW: Well, I'll rely on the case law which
8 is in State versus Schad, which you read during lunch. That's
9 the lead authority in the case. We have new facts at this
10 time, as I have told you, from Lieutenant Judd, was very clear
11 that this person was acting as an informant for the Salt Lake
12 City police department. The understanding was that whatever he
13 found out would be relayed to Mr. Halterman. The visit could
14 not have been made without the setup. I believe now,
15 particularly with the testimony of Lieutenant Judd and the
16 admission made by Detective Halterman, which is the new
17 information I told you at lunch today we had, which we didn't
18 have before, I believe with that the testimony regarding the
19 jail interview is inadmissible in this case, as in violation of
20 the Massiah doctrine and State versus Smith doctrine.

21 THE COURT: Mr. Dawley?

22 MR. DAWLEY: Your Honor, I don't think
23 Lieutenant Judd's testimony helps at all in this case. As this
24 court pointed out earlier today it's a matter of semantics. I
25 don't think there's any question this man is an informant

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1 because he's giving information to the police. The question
2 for the purposes of this hearing is the admissibility of
3 statements made to Mr. Duncan, and then the question becomes
4 whether he was an agent at that time, to bring into play the
5 Miranda situation. Our position is he was not an agent, that
6 he initiated those actions and was doing it on his own and
7 therefore was not an agent for the purposes of Miranda, and we
8 think the testimony regarding that jail conversation should be
9 admitted.

10 MR. SHAW: I don't have any response.

11 THE COURT: Well, to bring it all together,
12 because we have had some -- several discussions about this, or
13 a couple, plus the hearing here this afternoon, I previously
14 mentioned that the Halterman testimony was rather clear, was
15 extremely clear and unequivocal relative to the witness
16 Duncan's not being, term of art, a confidential informant. The
17 way we come up with the language confidential informant and
18 informant in this particular case is from Lieutenant Judd from
19 his police report, I suppose, and we have heard him testify as
20 to that, but of course as you know, Lieutenant Judd had no
21 facts whatsoever upon which to base a conclusion that this
22 might -- that Mr. Duncan might be what we have come to know as
23 the confidential informant. Simply wrote down something that
24 apparently he heard on the phone from Halterman.

25 I was interested to note this afternoon that Mr.

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1 from the jail, didn't she?

2 A Not the first time.

3 Q Well, did you go to the jail two times?

4 A Yes.

5 Q All right. The first time I take it she couldn't
6 get anything because it was too early yet, is that what
7 happened?

8 A Yes.

9 Q The second time she came back with a ring and a
10 wallet and a watch, isn't that right?

11 A Yes.

12 Q Did you and Wilma then go through that wallet when
13 you got back to the house?

14 A Well Wilma, my wife and I went through it when we
15 got back to the house.

16 Q You went -- let me show you what's been marked as
17 the wallet -- where is that wallet -- exhibit 81 is the wallet,
18 I think you identified on direct, is that correct?

19 A Yes, sir.

20 Q That's the one which you went through?

21 A Yes.

22 Q Were you just you two sitting down at the table --

23 A You keep saying two. There was my wife, Wilma and
24 I.

25 Q All three of you went through?

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KENNETH HANSEN - DX BY MR. DAWLEY

1 A Yes, sir.

2 Q Where have you seen that before?

3 A This was the ring Wilma Ehrhardt had on her finger
4 at that time, and I asked her if I may have it, I would give
5 her a receipt for it, and if it had nothing to do with the case
6 I would see it would be returned to her.

7 Q Did you take it from her?

8 A Yes, sir.

9 Q At a later time did you show the ring to Mr.
10 Williamson?

11 A Yes, sir.

12 MR. DAWLEY: I offer exhibit 35.

13 MR. SHAW: No objection -- well, let's see it
14 first. No objection.

15 THE COURT: 35 is admitted.

16 BY MR. DAWLEY:

17 Q At some point, Ken, did you take the Cadillac itself
18 into evidence?

19 A Yes, sir.

20 Q And the items that were in the Cadillac?

21 A Yes.

22 Q By the way, where was the Cadillac when you first
23 saw it and took the Utah license plates from it?

24 A That was in the impound yard at Salt Lake City
25 police department.

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