The Defense Counsel in the Reopening of a Case *

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A defense counsel who is offered a brief to reopen a case, sees himself confronted in practice with a variety of problems. When dealing with the client, he needs a great deal of knowledge of human nature, when dealing with himself equanimity and when dealing with the judicial authorities perseverance. If he has once taken the decision (which he should make as difficult as possible for himself) then an absolute will to succeed is required to carry it through. Impetuosity is less in demand here, a faculty of judgement and pleasure in detail all the more so.

a) On dealing with the client

Anyone who has tried his hand at some time or other at reopening a case will very quickly learn that there are very many people in our prisons who carry the conviction within them subjectively that they have been convicted wrongfully or even though they are innocent. The letters received as soon as even just one has been answered positively multiply within the shortest time like a geometrical progression. It is a question of one's own working capacity as to how many of these brief inquiries are capable and worth being examined with regard to their substance. The attorney – particularly the young one – should beware of overhastily promising an examination of the brief being offered. Because the problem of almost every reopening is its financing. As a rule, a person convicted and finally sentenced has lost everything he had, and left his last liquid funds with the lawyers who were unable to prevent his conviction and finally also the legal validity of the judgement. The financial fiasco of most clients means ultimately that the reopening is a pro bono brief for the attorney as a rule.[1] Such a retainer can only be taken on if other clients, in effect, pay towards it. Therefore, for that reason alone, a reopening brief is always inevitably something exceptional. Any lawyer working conscientiously can therefore never fulfil a large number of promises to make a preparatory examination. On the other hand, the people with whom he corresponds or possibly even talks see in him their last ray of hope, the only one who is capable of opening locked doors and rescuing their blackened reputation. A letter promising to help may well be well-meant, but is sometimes, however, devastating for the recipient if the promise of help cannot be met. It is worse to first arouse hope only then to disappoint it then to reject it right from the outset.

Every lawyer daring to tackle a reopening should therefore First examine whether his financial and scheduling scope is sufficient in order to be able to prosecute such a brief alongside current business. If he believes he can answer this with yes, moderation is called for: It is better to conduct one brief fully than ten briefs half-heartedly. How to make one's choice? Firstly, every defense counsel must be clearly aware that though our constitutional state has many faults, it does, however, find the right person in effect in the overwhelming majority of cases, even if the reasons given for the judgements are at times fragmentary, sometimes even slipshod, and the amount of the sentence is occasionally excessive. Every other assessment would be fatal: a criminal justice system which sends fifty percent innocent people into

prisons is only to be found under the conditions of state terrorism. Reopening of cases has its field solely in the minimum percentage range in which stupidity, prejudice and arrogance intermingle fatally. It may still be large enough; nevertheless the defense counsel should reserve a considerable portion of skepticism when reading the requests to take up a brief. In the course of time, each one develops his own approach: There are letters in which the loving arrangement of handwritten lines for over twenty pages (often without any margin) conveys the certain impression that forty further pages will follow them as soon as the lawyer in his response reveals even the slightest indication of interest. There are pompous offers in which the advocate's passion for fame is flatteringly appealed to: one had already heard a great deal about him and he was the only one who could manage it. The question of fees is studiously disregarded or veiled with the reference to excellent earnings to be had from exclusive contracts in the media sector which are undoubtedly to be quickly made. Such letters should, it is true, be read, but only rarely be taken as the cause for further consideration. Innocence – and that is all it is about – states its case “innocently” as a rule: factually, sometimes coupled with bitterness, but always clearly.

Innocence? In the practice of a normal criminal case, the criminal defense lawyer has missed his vocation and mistaken his role for that of the judge if he is concerned about more than repelling the state claim to punish. Its repulsion is morally and professionally justified already if the evidence does not support the imputation of wrong. In the practice of reopening a case, the roles are reversed (also that of the justice system – see more on this below): A defense counsel who, after a thorough study of the files and conscientious questioning of the client is not convinced of the latter's innocence, at any rate borne by a lasting “suspicion of innocence” should desist from any further activity.

There are simple and therefore good reasons for this. A petition for reopening always requires a great deal of research. Not every trail that is followed leads to the goal: witnesses have died or refuse, traces have been blurred or can no longer be examined, files have been destroyed or have disappeared, amateurishly proposed hypotheses come to nothing after expert consultation. A defense counsel can only find his way back from all these cul-de-sacs and wrong tracks to the path of knowledge if he is guided by the fundamental conviction that he will in fact be successful, and is driven an by the inner confidence, after the trouble of many vain attempts, to be at last able to hold the exhibit in his hand which will deal a deathblow to the judgement being contested. Solely the feeling, coming close to an inner certainty that the convicted person is innocent gives a motive for all the efforts.

This should not be misunderstood. It is not personal sympathy for the client or the faint belief in his protestations of innocence which are the basis for successful investigation activities, but solely an assumption of innocence which is fed by an intellectual pervasion of the material. It may be accompanied by human experience and occasionally also confirmed by irrational sentiments. What is decisive, however, is that the doubts in the sustainability of the judgement and the strong presumption of a miscarriage of justice have a rational basis; furthermore, the client must, in personal confrontation with his defense counsel, have contradicted the continuing suspicious circumstances logically and constantly. This presupposes a questioning by the defense counsel which is not shaped by a premature confidence in the client, but rather the contrary: The more mistrust against the client there is in the initial phase of the brief, the greater the chances of success in the final phase. In the

reopening of a case, only an attorney who sees his mirror image in the better public prosecutor will prove himself as a defense counsel.

b) First preliminary considerations

What rational considerations lead to a suspicion of innocence? There are seldom judgements that have become final and non-appealable which do not convey a convincing impression. If they do not do so, they only rarely overcome the hurdle of appeal (just as conversely, in view of the at present widespread result-oriented style of working of the Federal Court of Justice, a well-reasoned judgement in the first instance is able to pass even appeal complaints an points of law which appeared dead certain). The written judgement is always the way into the reopening. The defense counsel's first field of work are the files of the closed criminal case which have been placed at his disposal by the public prosecutor. To read them thoroughly is always the first challenge of the judgement: If serious discrepancies appear between witnesses' testimony in the preliminary investigation proceedings and their reproduction in the judgement, the objective is to check whether these are to be attributed solely to the immediacy of the trial and a correction of earlier statements which may possibly have taken place there. A careful presentation of reasons for a judgement would let one expect an explanation and resolution of differing testimony contents. If this has not occurred, it gives rise to the suspicion that the reasons for the judgement might have been smoothened at one or the other point for the purpose of increased chances of legal force.

The suspicion arising becomes firmer when witnesses who have been heard, whose testimony is of importance according to the contents of the file, are completely ignored in the reasons for a judgement. Finally, the uneasiness becomes even stronger when the reasons for a judgement show obvious errors: It is held against the convicted Person as a dearth of credibility that she had only made a certain statement at a late point during the trial whereas the exploration record of the psychiatric expert clearly shows that the (later) convicted person had expressed herself identically in content already three months before the beginning of the trial. [2] A judgement's power of persuasion is really shaken already when the files are being read for the first time if it is based solely an the convicted person's murder confession, but this confession is based an Police interrogations which must have been insinuated in part.[3] An additional point is that well written judgements sometimes contain constructions even if now and then at an inconspicuous point – which appear daring and succeed in arousing mistrust. Thus a criminal court dealing with cases involving drugs claimed in its written reasons for a judgment[4] that the chief witness had been prepared, an the convicted person's behalf and for the purpose of paying off a gaming debt he had with him of just DM 5.000, to bring a total of three kilos of heroin and one pound of cocaine from Hamburg to Munich and to hand it over to an unknown third party. In the same breath, the criminal court imputed that the witness, who had turned state's evidence, was involved completely independently in the dealings with narcotics and, namely, “to a considerable extent”. This simultaneous juxtaposition of the role of a servile underling and that of an independent large-scale dealer in itself seemed scarcely plausible (even if not impossible); in the course of the defense counsel's further investigations, the role of one merged with that of the other. The consultation of ever more new files from the key wittness's milieu brought to light that the recipient of the delivery allegedly made an the convicted person's behalf in Munich was in fact a debtor of the “underling” – and the sum collected from him was just a payment towards debts from the key witness's earlier deals!

c) On dealing with the judicial system

It is a bitter experience which soon infects the defense case when reopening a case: The investigation proceedings as well as the trial know a series of principles of procedure, in particular the principle of finding the truth (§ 244 Par. 2 German Code of Criminal Procedure); in the appeal procedure on points of law, its efficacy is already impaired by uncontrollable imponderable factors – the logical coherence of the reasons tot the judgement, the defense counsel's pleadings in due form as well as the preparedness of the appeal court to make correction influenced by both. The legal force of the judgement, an the other hand, is the Sabbath tot all principles – they begin to rest. A change of roles seems to take place: Defense counsels become investigators in the name of the truth (claimed by them), judges and state prosecutors become defense counsels in the name of legal force. Who has the better moral on his side? Of course: Undisturbed administration of the law does not allow an arbitrary repetition of trials; even a liberal interpretation of the reasons for a reopening would be an invitation to abuse (the simple retraction of a confession must not already per se force a new trial). The critical examination therefore called for of new evidence and new evidence facts – in 99% of all reopening procedures it is a matter of the reason for the reopening under § 359 No. 5 of the German Code of Criminal Procedure – degenerates, however, in judicial comprehension to an impatient rebuff. Witnesses are certified as being untrustworthy before they are even heard; expert witnesses are not appraised according to their findings, but are measured quite formally solely by the fact whether “superior means of research” are at their disposal compared with the expert witnesses deployed earlier; if the criminal courts do not succeed already in this way in “pushing away” a new statement or a new expertise already in the addition proceedings, occasionally the ascertainments of the contested judgement are newly interpreted or even newly made: The crime had in fact been committed one day earlier than ascertained in the judgement [5]; the commission of a crime “shortly after 8:00 pm” assumed in a judgement also included a period until 8:30 pm[6]; the testimony of a witness examined under oath that he had appeared two or three minutes after 8:00 pm in a pub and had met the convicted person there a few minutes later was said to be “rather vague” which is why it could also be possible that the meeting in question with the convicted person had taken place already before 8:00 pm[7]. The decision by a regional appeal court which had regarded a witness produced in the reopening proceedings as an unsuitable means of evidence because his permanent inability to follow proceedings and be examined was established from a psychiatric expertise is of like quality; in fact, in precisely this expertise exactly the opposite was ascertained. Here, too, it was the Federal Constitutional Court which first had to make the three regional appeal court judges take the “(appellant's) constitutionally guaranteed claim to a decision free of arbitrariness”[8] to heart.

However, the rejection of requests for reopening does not take place only through the distortion of the pleading or of the facts of the case established in the judgement and questioned by the pleading. Also pseudological distinctions, such as could really only occur to lawyers, are brought forward against new facts and proofs to defend the final judgement. So the opposite of a fact established in the judgement is said not to be new: Facts which are in such a contradictory relationship to the facts forming the basis of the judgement that they could be excluded by the same by the laws of thinking, are necessarily always said to have already been “examined and rejected” by the trial judge.[9]

The decisions quoted are not glaring exceptions to a decision practice otherwise taking place in constitutional harmony. The lawyer in reopened cases is generally confronted with a criminal justice system which has taken up a defensive position seeking to ward off every attack against the old judgement with tooth and nail. He also has to arm himself against this: by a thorough reading of leading cases[10], in particular, however, with a constitutional law respect, by carefully absorbing the rulings increasingly being handed down by the divisions of the Federal Constitutional Court. In particular, the ruling by the 2nd Division of the Second Senate of the Federal Constitutional Court of 7.9.1994[11] has the merit of having put up two obstacles to too precipitate a handling of arguments for the reopening of a case:
– The court hearing the reopening submissions is debarred by constitutional law in the admission procedures from weighing evidence and making findings by way of a qualifying examination which according to the structure of criminal procedure are reserved for the main trial;
– at all events, the establishment of such facts which materially sustain the conviction in that they delimit the offence sentenced in its decisive features, or the confirmation or rebuttal of which places an outstanding role in the defendant's defense concept, may take place only in the main trial.
In this ruling, it is also emphasized that the reopening proceedings should not miss its objective of resolving the conflict between certainty of the law and substantive justice; the person convicted is stated to have a right to effective protection by the law derived from Art. 2 Par. 1 of the Fundamental Law.[12] What counts here: In reopening proceedings, too, the central concern remains the determination of the true facts of the case without which the substantive guilt principle cannot be put into effect. [13]

d) Analysis of the judgement as the prerequisite for a request for reopening
In view of the prohibitive difficulties described with which the defense counsel finds himself confronted in reopening proceedings, a careful analysis of the judgement for possible weak points is the absolutely decisive working step. The first consideration here is: What structure does the reasoning for the marshalling of evidence have?

aa) Structure of the reasoning for the marshalling of evidence
It begins with a rough screening: Which means of evidence were evaluated in the judgement?
– the accused
All that is directly suitable for the marshalling of evidence is the accused's confession that appears credible to the court; on the other hand, the fast of remaining silent or denial is the accused's good right. The internal contradiction of the answer to the charge or its demonstrable falseness is as a rule already of little significance because even the innocent may have cause to fall back on excuses or even false alibis. [14]
– witnesses
Witnesses are either witnesses for the offence or witnesses for the facts of circumstantial evidence. Among the latter are witnesses who have brought the convicted person close in time or place to the occurrence of the offence, witnesses to the presumed motivational background and – within the further radius of explanation of the occurrence of the offence – those to the accused's (convicted person's) situation in life. Witnesses are furthermore chance witnesses or relationship witnesses; the latter for their part can be differentiated according to whether they were in some kind of contact with the victim or the accused. Apart

from that, there are also “professional witnesses” who, by reason of their vocational concern, e.g. as police officers or forensic experts, have had to do with clearing up the case.

– expert witnesses

They may be roughly divided up into three groups: the psychiatric and psychological experts (for the evaluation of the accused's criminal capacity, occasionally also to estimate the credibility of a witness), furthermore the forensic experts (to appraise the influence of alcohol, the causes of death and the probable time of death, the nature and direction of the injuries, the analysis of human secretions. as well as traces of blood, etc.) and the other primarily criminological experts (for ascertaining and evaluating other traces secured and evaluated in a criminologically recognized procedure). In addition, of course, experts from every other field of human knowledge can occasionally play a role in the criminal procedure. The marshalling of evidence with experts is, as a rule, closely connected to the collection, presentation and evaluation of what is known as

– material evidence

Material evidence is not an independent form of evidence with the criminal procedure code; it may also be introduced by the testimony of witnesses or by an inspection by the court during the trial. The term material evidence lives above all from the differentiation from what is known as personal evidence, thus the marshalling of evidence with persons who describe unrepeatable observations (witnesses, but also the accused). As material evidence is presented under the neutral auspices in particular of expert witnesses, as a rule it is accorded greater probative value. [15]

– inspection

The visual evidence concerns as a rule just the form of the introduction of a piece of evidence. If a photograph is examined on the judge's bench, then that is inspection, it is true; the actual means of evidence remains, however, the photograph (to which reference may be made in the judgement pursuant to § 267 Par. 1 Clause 2 of the German Code of Criminal Procedure). Things are different, for example, in the case of an inspection by the court of the scene of the crime during the night, such as in order to check the lighting and visibility conditions claimed by a witness: What the court and the other persons involved in the proceedings perceive in the course of this is a direct impression of evidence.

What evaluation structure are the means of evidence listed subject to?[16] This is to be seen firstly from the formulations used in the judgement itself: There is outcome of evidence by which the accused is “seriously incriminated”, other evidence, by contrast, is given the somewhat milder evaluation that it “also speaks against the accused”; if indeed “his guilt is proved” by a piece of evidence, there is no need to deliberate long about the supporting pillar of the verdict. Dangerous for the defense counsel in a case to be reopened are those judgements which are based an several separately treated reasons for suspicion which only in their “overall view” have given the trial judge his conviction. The separate stringing together of items of circumstantial evidence, each of which taken an its own would not have led to a conviction, are then, however, summed up in a concluding sentence that “after all this” it was the court's certain conviction that the offence had been committed by the accused, does superficially urge the assumption that the omission of even just one of the circumstantial facts must be likely to upset the conviction. In reopening practice, the evaluation runs differently; the remaining rest of circumstantial evidence is still sufficient in cases of doubt for the convicted person's disadvantage.

bb) Objective of the request for reopening: Upsetting the marshalling of evidence at a central point

Systematic, textbook-like instructions cannot be given here. The decisive point is: Do not use small shot, but rather – even if sometimes after a long preparation – risk a shot in the breast. In general, the following may be passed an as a fact of experience: New witnesses are (almost always) subject to the suspicion of having been fabricated. Relation witnesses must always let themselves be asked why they did not give testimony in the accused's favor already at an earlier time. At best, chance witnesses are suitable for bearing the attack an the judgement. Thus in the case described in the Federal Constitutional Court's ruling of 20.6.1990[17]: The accused was said, according to the judgement findings, to have met the person later killed "shortly after 8 pm" and to have shot him a few minutes later. His alibi, that at the time in question he had been sitting in a pub and had waited approx. 30 minutes for a dish of mussels to be prepared, could not be proved. No member of the round of card-players which met there regularly could remember him. The accused's statement that opposite him at the bar counter there had been a further male person who had been talking to an acquaintance about the purchase of a yacht for the price of DM 80,000 was printed in the Hamburger Abendblatt. The man who had conducted the conversation read this by chance and then got in touch – shortly after the passing of sentence – with the newspaper. It was not possible for his statement to be taken into account any more in the appeal on points of law. In the proceedings to reopen the case it then led ultimately – by the roundabout way through the Federal Constitutional Court – to the order to reopen the case. (In the new trial, by the way, the accused was once again sentenced, admittedly no longer to a life term, bot to a shorter term of imprisonment.)

Another question is how far the testimony of witnesses, who have given evidence in the trial against the convicted person exonerating him or incriminating him, can be made more precise or even falsified by objective ascertainments in retrospect. This may be of importance above all if objective chronological points of reference can be found which had not been brought out before.

In a case which had been pending at Hamburg Regional Court[18], the two accused had been sentenced for kidnapping with extortion in unity of crime with attempted kidnapping with extortion, as well as attempted robbery with aggravation to a term of imprisonment of eleven years. They were charged with having broken into a dwelling house in the night at about 10.45 pm (this time was able to be determined relatively exactly on account of the end of a TV broadcast seen by one of the victims), tied up the family of four living there and compelled the father of the family to hand over the key to the bank branch of which he was the manager. This branch was then raided the next morning by the two offenders with the further seizure of the bank employees as hostages as they arrived. One of the two convicted men had been seen by his landlady's daughter in the evening still in his flat. She reported initially that she had returned to her parents' house at about 10 pm. The sub-tenant had had a visit, she said, from a man with a red Porsche (the later co-convicted person drove a red Porsche; the description also fitted him otherwise). The visitor had not left the house before 11:30 pm – so her first account to the police. In the trial she stated that she had had a date with a boy-friend on that evening whom she had brought to Hamburg-Altona station after their time together as he had to catch a train to Niebüll in order to be able to arrive at the Federal Army barracks in Leck during the night. On intensive repeated inquiry by the court, she revised her

testimony – which had given the accused an alibi -and declared that it was possible that she had made a mistake of an hour, thus had brought her boy-friend to the station already at 8:30 pm and then had arrived at her parents' house again around 9 pm. Accordingly, her testimony was to be understood to the effect that the visitor had possibly left the house already at about 10:30 pm.

That put an end to the alibi and the accused could be convicted. (The distance from the witness's dwelling house to the scene of the crime could be covered in approx. ten minutes.) In the preparation for the reopening, the defense counsel spoke to the witness who – eight years later – was no longer able to remember exactly the name of the boy-friend whom she had brought to the railway station. He had been called “Christian” who at that time had lived in Trittau – a small suburb of Hamburg. Thanks to the unbureaucratic help of the Federal Ministry of Defense, it was possible to identify “Christian” as Christian Andersen (that really was his name!) and trace him. Questioning him revealed that at the time in question he had been stationed in Leck and had always taken the last train from Hamburg-Altona station. This train departed – according to the German Federal Railway's information – at 9:34 pm! As a result. the witness's original testimony, which had given the convicted men an impeccable alibi, seemed to have been put right again. Nevertheless, the reopening was declared inadmissible: Even if the witness were to have only returned to the dwelling house shortly after 10 pm, this would not contradict her deposition made in the trial, the visitor as well as the sub-tenant had possibly left die house at about 10:30 pm; the period of one and a half hours between the witness's arrival in the dwelling house and the sub-tenant's as well as his visitor's deparmre, which had been matntained both in the testimony to the police and in the trial, was shortened in the addition proceedings to half an hour. The complaint to the Constitutional Court of infringement of rights against this arbitrarily looking reconstruction of the facts of the case was not accepted by the 2nd Division of the Second Senate of the Federal Constitutional Court for a decision[19].

But not only the corroboration of exonerating testimony, the rebuttal of incriminating testimony occasionally also succeeds:

A sentence of eighteen months had been imposed on the convicted man by Paderborn Regional Court on 11.5.1989 for the sexual abuse of persons under his custody in unity of crime with sexual abuse of children. In three cases the convicted man is said to have carried out sexual acts with his daughter in the bathroom of the flat in Paderbom which he had lived in at that time with his new partner. The convicted man had disputed the charge. The judgement was based an the testimony considered credible of the witness who had been eight years old at the time of the trial; it was based here additionally on a psychologist's credibility expertise. Any kind of suggestive influence by the mother, who was living divorced from the convicted man, was considered excluded by the court. According to the judgement findings, the convicted man had only had his daughter with him at the weekend. In the reasons for the judgement, the child's testimony was discussed that the convicted man had always done “that” when Monika (that was the new partner's first name) had been fetching her son Nicolai from the kindergarten at 10 am. The question which neither the three professional judges nor the expert witness had asked was obvious. What kindergarten is open an Saturday or Sunday? The easily arrangeable check showed: in Catholic, children-friendly Paderborn not a single one!

Nevertheless, the reopening was not successful at the first attempt. It was initially rejected by Detmold Regional Court as inadmissible. The child must have just made a mistake. The Hamm Regional Appeal Court quashed this decision and declared the reopening to be admissible. After hearing the kindergarten teacher in the probation proceedings, the reopening was declared unfounded. The complaint against this had no success: The complaint of unconstitutionality was not admitted for a decision. Sometimes, however, even though rarely, a convicted man finds the unexpected help of a fate that has become friendly towards him again: The child's mother wanted to have the girl's name changed, the convicted man opposed this. The administrative authority agreed with her, Minden Administrative Court too. On the other hand, Münster Administrative Appeals Court commissioned an expertise on the question whether the change of name was in keeping with the child's welfare. The expert witness explored the child once again; he endorsed a change of name, but expressed considerable doubt about whether the child had described something she had indeed experienced at the then criminal trial. Thereupon, the state prosecutor in Paderborn, who was himself troubled by growing doubts, saw himself induced to commission the same expert witness – Prof. Dr. Undeutsch from Cologne – with a further credibility expertise. Finally, on application by the Paderborn Public Prosecutor's Office[20], the reopening was admitted and ordered by Detmold Regional Court. The convicted man was acquitted an 14.3.1996[21]. In the written reasons for the judgement it is stated simply and clearly:
“Her account in the trial before Paderborn Regional Court that the accused had done “that” mainly when the witness M.-H. collected her son Nicolai from the kindergarten at 10 am cannot be correct. Sarah only visited the accused on Saturdays and rarely on Sundays. On these days the kindergarten was closed.” And – after recounting further incompatibilities in the child's testimony – the résumé: “There are therefore no proofs for the accused's commission of the offence.”[22]

Admittedly, the rebuttal of incriminating witnesses' testimony seldom succeeds at a first glance. At times it requires extensive research, pushed on solely by the perseverance of the client swearing his innocence:

Hamburg Regional Court had imposed a term of imprisonment of eight years on the convicted man – an Israeli citizen – for dealing in narcotics[23]. He was charged with having organized a transport in summer 1981 of 166 kilograms of hashish from India to Germany. He was incriminated by a witness who claimed to be a globe-trotter, but was in fact working as an undercover agent of the narcotics department of Hamburg Criminal Police. According to his testimony, the convicted man had approached him in a five-star hotel in New Delhi whether he was prepared to conceal a larger quantity of hashish in his mobile home and then have this mobile home shipped to Germany. In fact the mobile home was then also brought on board a freighter in Bombay. Two investigators from the narcotics department – who were later transferred to another department – claimed for their part that they had received the mobile home in Hamburg Harbor and had driven it out of a freight container.

Strangely enough, the file contained no photographs of the impounding of the mobile home an the Indian freighter in Hamburg Harbor (photos of illegal freight and its hiding place are usually published in Hamburg like trophies – such as large harpooned sharks – already the next day in the local tabloids); also the photo file contained no photographs of the situation in which allegedly the smuggled goods were found in hiding places provided under the seats

in the mobile home; the picture file showed the mobile home in several photos in the car park of Hamburg Police Headquarters, as well as separate photos of the packages of hashish stacked up by the police outside the car. In the trial, the detective officers submitted a substitute paper with which they had allegedly achieved the handing over of the mobile home by the freight company. This substitute paper (the original bills of lading had allegedly no longer been available for them) contained the number of the container. Inquiries made to the shipping company and the manufacturer of the container in the course of the preparation of the reopening proceedings revealed another strange point that the container had been what is known as a “Closed Box” – a container closed on all sides, whereas vehicles, especially large vehicles are always transported in an “Open Box” – a container with a tarpaulin cover. This caused the suspicion to arise in the convicted man – who had always disputed having anything to do with this import – that the undercover agent's mobile home had never been in the container unloaded on 18.8.1981. Further research finally put him on the track of the mobile home which the undercover agent had in the meantime sold to a friend in Kiel. It was standing in his garden with engine damage. Measurement of the mobile home showed an overall height of 2.42 m. The license certificate for the container allegedly used, which was made available to the defense counsel by the manufacturing company, showed a door opening height of 2.29 m. Simple result: This mobile home had never been in this container.
Somebody had manipulated in and with the means of evidence. It was no longer possible to clarify what had in fact happened. Possibly the American DEA – which had already had an eye an the convicted man for years – in co-operation with certain German agencies had wanted to help things along a little with the conviction. The request for reopening was finally withdrawn after the judicial authorities had promised an immediate pardon. The convicted man was able to leave Germany as a free man in August 1985.

Decisive for a promising “attack” on a judgement is always the distilling of an objective, indisputable finding which is not compatible with the central findings of the trial court. The findings of forensic medicine are particularly helpful in this connection:

The convicted man had been sentenced to life imprisonment by a judgement of Paderborn Regional Court an 18.8.1970[24] for murder in coincidence with rape. He had been charged with first misusing and then strangling the wife of a British officer. The conviction was based an the accused's confession which the latter, however, had withdrawn even before the trial. In the judgement itself, a series of contradictions between the details in the confession and the objective findings are discussed, without, however, raising any doubts in the fundamental correctness of the confession. The woman who was later murdered had left her house at about 7:30 pm in order to take her dog for a walk. According to the ascertainments in the judgement, she must have encountered her murderer soon afterwards. Her body was found the next morning at around 10 am. The two officers in the homicide squad established rigor mortis had occurred only in the victim's fingers and toes. The rigor mortis was not fully developed until the post mortem which was carried out hours later. As rigor mortis arises as a rule approx. two to three hours after death and is fully developed after approx. six to eight hours, the victim must have met her death at a point of time well after midnight. An expertise prepared by Balduin Forster – at that time the Director of the Institute of Forensic Medicine of the University of Freiburg – confirmed this. This did not rule out, it is true, that the convicted man was also still the murderer; however, through this the bottom was knocked out of a central point of the judgement based on the confession – namely the killing shortly

after leaving the house. The victim must have been in the murderer's power for several hours before she was strangled. The convicted man had not reported anything of this in his confession which was undermined anyway by objective falsehoods.
Despite this finding which urgently called for the ordering of a new trial, the request for a reopening was dismissed by Detmold Regional Court and finally by Hamm Regional Appeal Court as inadmissible. The latter[25] considered the detectives' observation of the rigor mortis just at the initial stages of its development in the toes and fingers as “much too uncertain and of little probative strength”, especially as the detectives had “not been trained” for such observations. Although in the judgement of Paderborn Regional Court following the expertise by the forensic expert heard there – the cause of death had been expressly described as strangling, the Regional Appeal Court considered it conceivable in an auxiliary consideration that the victim had initially survived the strangling procedure and had only died from the injuries suffered in the strangling (fracture of the hyoid bone, fracture of the two upper laryngeal horns).[26] That was freely fancied and could be refuted by a look in any forensic medical text book. If the victim has been strangled, he or she only survives the obstruction of the respiratory passages for a few minutes[27]. The ascertainment of a completely different cause of death offended grossly against the allocation of competence in the proceedings for reopening a case[28].

The then defense counsel initially reconciled himself to the finding by Hamm Regional Appeal Court. Later investigations carried out with respect to the detectives who had allegedly “not been trained” to appraise the degree of development of rigor mortis showed that both had already been members of the local homicide squad for many years and one of them had been in charge as the responsible head of a homicide emergency service for two years at the time of the crime. Of course it was part of their training to recognize the formation of rigor mortis and to describe it reliably in reports of the scene of a crime. It did not come to the submission of a new request to reopen the case as the convicted man was discharged from prison in 1997, after 27 years, and – in the meantime of retirement age – no longer wanted to undergo the strains of a new trial.

If a judgement is based substantially an the findings of an expert witness, as a rule this gives his ascertainments a consecration of particular objectivity and increased resistance to attack. However, there is no expert witness – apart from absolutely objectifiable findings (e.g. within the scope of a DNA analysis) – who is unassailable. Precisely when dealing with the expert witness's evidence, the defense counsel should take good heed of Kant's words “Have courage to make use of your own understanding”. There are almost always sources of error. In so far as it is an expert witness from the genuinely criminological field: They occur mainly during the securing of clues and during the (overlooked) obstruction of clues.

A contamination of clues, which had been overlooked by the expert witness, played an important role in a trial before the criminal chamber of a regional court: The accused were charged that traces of smoke had been found on their sleeve cuffs of the same composition as had been emitted when firing the weapon used for the crime. This finding, which seriously incriminated the accused, came to nothing when it turned out that the MEK officers involved in the arrest had carried out shooting practice the evening before. The ammunition used then was identical with the ammunition used in the crime. A transfer of residual smoke to the sleeve cuffs was an obvious conclusion. [29]

e) The defense counsel's research material and aids

These can only be sketched out briefly here:

The basis of every investigation of one's own is the File as it lay before the court last concerned with the matter which is made available to the defense counsel by the public prosecutor's office. The right of inspection of files also extends in principle to all the files consulted in the trial at that time, as well as all the Files on clues. If the defense counsel encounters file reference of other (parallel) proceedings when reading the Files, he should also request them from the public prosecutor's office concerned. From them result occasionally astonishing new aspects.

Thus in case described above of the man convicted for dealing in narcotics. In the investigation files requested from various public prosecutor's offices – which for their part contained references to other investigation proceedings – it became clearer and clearer that the witness for the state had not acted as a subordinate assistant, but had been an active large-scale dealer for years who, himself a close business partner of the allegedly unknown third man, to whom he had supplied three kilos of heroin and half a kilo of cocaine an the alleged behalf of the convicted man.

State prosecutors' offices have been wont up to now to grant lawyers still liberal inspection of files, even if they were not active as defense counsel in the case concerned. It is sufficient if justified interest is asserted[30].

However, the files do not only contain references to other files and further investigation approaches. Now and again they expose quite directly blurred clues:

Thus in the aforementioned Gensmer case. The convicted man had been sentenced to life imprisonment for the murder of a five-year old girl – a police officer's child. The child had last been seen an an April day in 1970 at 10:45 am.. Her body was found at about 12 noon. The convicted man was arrested in August 1970. The conviction was made on the basis of a confession which had been retracted in between times, but half-heartedly renewed in the trial.

In the file was a land surveyor's map showing the area in which the child had been and on the borders of which her body was found. At the edges of the map were two names: “Dr. Schütte” and “Krischke” with arrows pointing to certain roads. These names did not turn up anywhere in the whole file; but there was a note in which it was vaguely indicated that directly after the crime – within the scope of a check of all persons who had attracted notice in the past years through sexual crimes in the north of Hamburg – the accused had already been the subject of a check which had not resulted in any suspicion. The names an the map must have somehow been connected with this alibi check. The further investigations carried out by the homicide squad at the defense counsel's instigation brought to light a three-page note in the police file about a questioning carried out an the day alter the crime of the accused, as well as his dentist Dr. Schütte and his hairdresser Krischke. At the former he had had two teeth extracted at about 11 am. The treatment lasted 45 minutes. He was at the hairdresser's directly afterwards from 12 noon to 12:30 pm. Two of the detectives involved in the check were still alive at the time of the thal and confirmed the result of their then investigations without any ifs and buts. The convicted man was acquitted in the new trial. In the reasons for the judgement it is stated

verbatim: “The court has acquitted the accused of the change of murder of Birgit K. because in its conviction his innocence is proved.”[31]
What is absolutely necessary is an inspection of the exhibits (in so far as they have not been destroyed):

Thus, for example, an inspection of the items of linen in the Weimar murder case revealed that the bed sheets, bed covers and pillow covers of the children' s beds had been sent by the Bad Hersfeld homicide squad in one plastic bag to the Hesse State Criminal Investigation Office (a cardboard seal with the details of these items of linen written an it was stuck to the plastic bag). In view of the fiber contamination already possible as a result of this, right from the outset reliable findings were not to be made from the Fiber traces from the children s clothing an the bed linen. But tot Fulda Regional Court the convicted woman had been “seriously incriminated” precisely on account of these finding (possibly influenced by significant sources of error) by the expert witness from the Hesse State Criminal Investigation Office[32].

On principle, the defense counsel should carry out his researches himself. Only his authority as an attorney opens doors to him. In this connection, a preparatory letter is always advisable in which the facts of the case (also the conviction) are briefly explained and the defense counsel refers with reticent emphasis to the possibility from his point of view of a miscarriage of justice. The trust in the functioning of our judicial system is, it is true, great as a whole, but it is nevertheless astonishing what a thick sludge of continuing mistrust underlies this trust. The reference to a miscarriage of justice is taken seriously by the recipient as a rule; the readiness to help is accordingly great, in so far as the defense counsel presents his request sincerely.

This attitude does not automatically change even if the person approached is a civil servant (despite all the lofty ideas of data protection). Thus in the aforementioned case of the unknown “Christian” who had been taken to Hamburg-Altona station because he wanted to travel back to his Federal Army barracks in Leck in the same night, the senior officer in the personnel department of the Federal Ministry of Defense to whom the letter was written was immediately prepared to instruct the barracks in Leck to go through the six-year old staff books tot “Christian” from Trittau. The work took two days; the result was, of course, notified to the defense counsel just by phone.

It is advisable during the course of one's own researches to only have recourse to private detectives in cases of emergency; hardly one of them is reliable and the bills are mainly too high.

For the appraisal of forensic medicine questions, the defense counsel should equip himself with the relevant text books; in addition, the staff of forensic medical institutes are always ready to provide information and prepare expert opinions. On the other hand, things are more difficult with respect to the primary criminological findings. They are, it is true, published in part in Germany (especially in the periodical Kriminalistik), but in part they are also withheld in order not to make them known in professionally working criminal circles. Very much more open, by contrast, is the publication practice in the United States. There are publications an the latest state of things in almost all branches of criminology[33]. The lawyer

working on-line in Internet will find an excellent survey of current literature under the keywords of the Internet bookstore “amazon.com”, for example under “forensic science”. Outstanding web sites an really all sections of criminological knowledge are provided by the American Academy of Forensic Sciences, American Board of Criminalists, American College of Forensic Examiners, American Society of Crime Laboratory Directors, ARBIDAR, Crime Scene Investigation, Dr. Joe Davis' Web Page, Forensic Science Society, Dean's Home Page, Zeno's Forensic Web Page. Despite the reservation generally prevailing in Germany with respect to the publication of methods of securing clues and evaluating clues and the fact that official regulations make any activity by non-official agencies for the most part impossible, the informal readiness to help in state criminal investigation departments is definitely great. The experts in question – whether for fibers, firearms, ballistics, etc. – are (almost) always ready for a personal discussion which is not intended to result in a written expert opinion. This applies even then when it is a question of the expert witnesses whose expert opinion prepared in the original trial is to become the subject matter of a critical examination in the reopened case. The curiosity about what one may have possibly done wrong is always great. As a rule, however, in cases of that kind, it is advisable to consult an expert from the criminal investigation department of a neighboring state.

f) Presentation of the reopening pleadings

When the defense counsel has got so far with his research that he believes he is able to assert reasons of significance for reopening the case against the old judgement, then the second – not less significant – part of his work starts: its presentation. Well-saddled is a long way from meaning well-ridden. First of all, the reopening must take the obstacle of admissibility. And this is (almost) insurmountably high: almost an oxer followed by a ditch. In this connection, the term admissibility in § 359 of the German Code of Criminal Procedure (or non-admissibility in § 368 Par. 1 CCP) seems at first to suggest it is here solely a matter of countable and easily exercisable formal rules and requirements, as the term admissibility means as a rule the formal initial prerequisites for a step in the proceedings (of an application, a statement of claim or a legal remedy). It is among the follies of the indeed extraordinary legal remedy of reopening that the existing concepts do not retain a constant meaning. As a rule, in the law of reopening, admissibility already means its justification.

§ 359 No. 5 CCP demands the “production” of new facts or means of evidence which are suitable alone or in connection with the evidence taken earlier to justify the acquittal of the accused or – in applying a milder penal provision – a lower punishment or a considerably other decision on measures for the prevention of crime and the reformation of offenders. The term suitability, which § 359 CCP demands from the new facts and means of proof, creates the way in to discretionary judicial appraisal: Already here, when checking the suitability, a “certain weighing” of the probative value of a new means of evidence with the results of the evidence of the earlier proceedings is said to be indispensable[34], “a certain anticipation” of the weighing of the evidence would also seem unavoidable already during the check of admissibility[35]. The restriction to an exclusively abstract-logical testing of the merits of the action is said to be “too formally” thought and therefore to be rejected[36].

In the upshot, the prohibition of anticipation of evidence valid for the marshalling of evidence in the main trial is suspended in the reopening proceedings. There are hardly statutory reasons for this adjudication, at the most practical requirements[37]. Nevertheless, the

defense counsel will have to prepare himself for the fact that he has already to set the course in his first written pleadings. The request for reopening is quasi an opening statement which must already have the quality of a closing argument.

This means: The presentation of the new facts and means of evidence must be borne by a perceptible will to persuade. The reader of the request for reopening should definitely notice that he is to be won over for the reopening of the case. But he is also to notice that he is not being duped: The medium of every formation of conviction is careful argumentation. This includes, firstly reporting an and analyzing the reasons for the conviction. What were the main strands of the marshalling of evidence? It is definitely to be recommended that the essential passages from the judgement be included in the request for reopening. This will not only make things easier for the reader, so that he can avoid having to constantly search through the file, but the feeling is also conveyed that the author has nothing to fear from the judgement that he wants to destroy. The report and the analysis of the marshalling of evidence have to show its structure. It should attempt to impart the impression of the greatest possible objectivity, and must be marked neither by indulgence nor improvement. It may include criticism: If the petition for reopening is based, for example, an the withholding of information by an important witness about a one-hundred percent impairment of vision in one eye, then it is definitely appropriate not only to state this fact of evidence calling the clarity of the identification into question, but also to submit other considerations concerning the same complex of evidence to a critical examination: If other faults in the optional identification parade proceedings become apparent from the file which found no mention in the judgement, these should also then be pointed out with comments if they do not in themselves represent a reason for reopening, but are suitable for supporting the request for reopening proper atmospherically – in the same direction of proof. The judge who has to find an the admissibility of the reopening is bound, it is true, by the evaluation of the results of the taking of evidence by the judge previously passing judgement[38]. Therefore the defense counsel does not need to limit himself to attacking just those results of the taking of evidence which are directly touched an by his reason for reopening.

The argument for reopening is described by the law as an “assertion” (§ 370 Par. 1 CCP). However, the defense counsel must never limit himself to asserting. The new means of evidence and the new fact are to be presented in the argument for reopening so directly as the written form of the proceedings allows. The testimony of a new witness should be in the form of a written declaration with signature by the witness[39] or included in full in the request for reopening in the form of a record of the witness's statement recorded by the defense counsel. If the request for reopening is based on an expertise by an expert witness, this should also be submitted in written form and integrated into the written pleadings. Visual evidence objects are to be recorded photographically and as far as possible included with the original prints or color copies in the text. Annexes may also be included with the written pleadings for reopening, it is true – unlike in the case of the presentation of reasons for an appeal an points of law -; reference to component parts of the file is also admissible (which already results from the fact that every argument for reopening is to be read and evaluated per se “in connection with the evidence taken earlier”[40]); this is not, however, to be recommended: The request for reopening has to present itself as a uniform whole. The reader is supposed to allow the reasons which led to the judgement, just like the reasons which call for its quashing, to act on him directly and in one draft. Anyone referring him to other parts

of the file and not quoting the same himself, first provokes an interruption in the momentum of reading. One's own ideas are able to captivate all the more the less the recipient's readiness to take in is distracted. Anyone who expects the reader already when reading the request for reopening for the first time to conduct a search in old – sometimes distinctly decrepit – files, causes only discontent.

Such hints concern not only externals. Quite certainly: The quality and plausibility of the items of evidence which are opposed to the old judgement are always decisive for the success of the reopening of a case. However, in criminal procedure the form is always already a good part of the content. This applies not only for the course of procedure and the compliance with the formal procedure determining it. It applies in like manner for the method and strength of the defense. A defense counsel who does not submit the marshalling of his ideas and evidence to a formal design will, does not want to convince and even less win. In the reopening of a case – as also otherwise – the contrary is required.

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* The paper seeks to impart practical assistance; *Marxen/Tiemann*, Die Wiederaufnahme in Strafsachen [Reopening in Criminal Cases], Heidelberg 1993, is to be recommended as a (more or less) topical compendium of the established precedents. *Steffen Stern* devotes himself very vividly to the practical problems of the defence in NStZ 1993, 409 ff.; *Wasserburg*, Die Wiederaufnahme des Strafverfahrens[The Reopening of a Criminal Case], Stuttgart 1984, is helpful but also voluminous. On the reform of the law an reopening last: *Rieß*, NStZ 1994, 153 ff. There have been no empirical studies an the legal reality of the law an reopening since the imposing study by *Peters*, Fehlerquellen im Strafprozeß[Sources of Error in the Criminal Trial, Karlsruhe 1970. *Radelet/Bedau/Putnam*. In Spite of Innocence – Erroneous Convictions in Capital Cases, Boston 1992, contains a comprehensive evaluation of 400 reopened Gases in the USA from the eighties; *Huff/Rattner/Sagarin*, Convicted but Innocent – Wrongful Conviction and Public Policy, SAGE Publications, London 1996, endeavours to analyse the causes.

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[1] Is this due to the fact that reopening leads a shadowy existence in a lawyer's professional practice? The law on reopening cases is also outside of any discussion from the professional and legal policy aspect -apart from the widening of the reasons for reopening a case made last year to include infringements of the European Convention on Human Rights (§ 359 No. 6 of the German Code of Criminal Procedure). Of 21 Congresses of Criminal Practitioners, just one – the 16th Congress of Criminal Practitioners in Hamburg in 1992 – dealt with the law an reopening in one panel. The two speakers – Peter Rieß and Steffen Stern – addressed three interested listeners.
[2] Thus in the trial before Fulda Regional Court in the criminal case against Monika Weimar.
[3] Thus in the case of Holger Gensmer heard before Hamburg Regional Court who in 1971 had not only confessed to the murder of a policeman's child, but at the same time had described six still unsolved cases of rape to the same detective officer in detail; from the file, however, it emerged from the sperm examination an the clothing of one of the rape victims that the perpetrator had blood group 0, whereas Gensmer – as was also to be seen from the file – was a secretor of blood group A. At least one of these detailed confessions had been put into Gensmer's mouth.
[4] Hamburg Regional Court, judgement of 6.10.1995 – 619 KLs 13/95, p. 24.

[5] So the Case from Coburg Regional Court forming the basis of the ruling by the Federal Constitutional Court in NStZ 1995, 43 = NJW 1995, 2024.
[6] Thus Hamburg Regional Court in the case forming the basis of the ruling by the Federal Constitutional Court m StV 1990, 530 = NJW 1990, 3193.
[7] Thus the Hanseatic Regional Appeal Court Hamburg in a fatal correction of the judgement of the Regional Court; both were taught better by the Federal Constitutional Court which certified that the Hanseatic Regional Appeal Court Hamburg had made an "inadequate unfounded speculation from a constitutional aspect" the basis of its decision.
[8] Federal Constitutional Court in NJW 1990, 3191.
[9] Thus Karlsruhe Regional Appeal Court in NJW 1958, 1247; even today still earnestly subscribed to by *Krehl*, in Heidelberger Kommentar. StPO, 2nd ed., Heidelberg 1999, marginal note 18 on § 359; by contrast justifiably *Schmidt*, in KK, StPO, 3rd ed., marginal note 24 an § 359.
[10] A particularly good commentary an the regulations an reopening cases is, by the way, that by *Wilhelm Schmidt* in Karlsruher Kommentar.
[11] In NStZ 1995, 43 = NJW 1995, 2024.
[12] NStZ 1995, 43; thus also the Federal Constitutional Court in NJW 1993, 2735.
[13] *Strate*, in Gedächtnisschrift für Karlheinz Meyer, Berlin 1990, p. 474 with further references.
[14] Cf. just BGH in StV 1982, 158/159.
[15] The System of the account deviates from the traditional one in so far as the term material evidence is understood in this present case in the criminological sense, not in the procedural one, which is why the marshalling of evidence with expert witnesses is also included in this; thus also *Foth/Karcher*, NStZ, 1989, 166 and *Kleinknecht/Meyer-Gossner*, StPO, 43rd ed., see marginal note 49; differently *Peters*, Fehlerquellen im Strafprozeß, 3rd volume, Karlsruhe 1974, p. 70 ff.
[16] As an introduction to the logic of the proof by circumstantial evidence, you are referred to *Nack*, in MDR 1986, 36 ff., the reading of which is absolutely recommended.
[17] StV 1990, 530.
[18] File reference at the Public Prosecutor' s Office: 70 Js 1216/81.
[19] Ruling of 25.10.1991 – 2 BvR 1177/91.
[20] The silent hero of this reopening proceedings should also be named for honour's sake here: It was Senior Public Prosecutor Günter Krüssmann, in the meantime deputy head of the Paderborn Public Prosecutor's Office.
[21] File reference of Detmold Regional Court: 4 Kls 3 Js 462/95; the passage quoted is to be found on p. 9/ 10 of the written reasons for the judgement.
[22] The case is described in detail and grippingly by the man concerned himself: *Bernd Herbort*: Bis zur letzten Instanz, Bergisch-Gladbach, 1996.
[23] Judgement of 14.2.1983 –[97]68/82 KLs.
[24] File reference of Paderborn Regional Court: 8 Ks 1/70.
[25] Ruling of 24.6.1986 – 2 Ws 153/86.
[26] The unutterable verbatim: "Regardless of these considerations, the adequately ensured ascertainment of a later point of time for the death would not be suitable for taking the supporting bases away from the contested judgement. The judgement assumes, it is true, that the death of Mrs W. occurred through the throttling or strangling of the victim. If it also suggests itself according to the coherence of the judgement that the convicted man inflicted the injuries leading to death an the day of the crime between 8 and 8:30 pm, the judgement

does not fix the time of the actual occurrence of death. It is conceivable and under the given circumstances quite consistent with the other ascertainments in the judgement that the convicted person did indeed commit the crime as established, then left the unconscious victim, who was possibly not giving any further noticeable signs of life, in the belief that death had already occurred which would then be consistent with the result of the expertise by Prof. Dr. Forster. Such a sequence of events, not in contradiction to the judgement findings, is possible because in the case of a throttling or strangling of the victim death must not necessarily occur in chronologically direct connection with the actual act of killing, but the victim may not succumb to the injuries suffered as a result – here fracture of the hyoid bone, fracture of the two upper laryngeal horns – until a later point in time without further involvement."

[27] Cf. for example *Schwerd*, Rechtsmedizin, 5th ed., p. 71.

[28] Cf. the ruling by the Federal Constitutional Court quoted above in NStZ 1985, 43.

[29] Errors in the securing of clues can be of a manifold kind. An exemplary description (the Weimar case) is to be found in *Strate*, in Kriminalistik 1997, 634 ff.

[30] Cf. No. 185 Par. 3 RiStBV.

[31] Hamburg Regional Court, judgement of 15.12.1987 –[83]74/86 Ks. p. 47/48.

[32] Judgement by Fulda Regional Court of 8.1.1988 – 103 Js 8247/86 Ks. p. 131.

[33] An excellent textbook is for example the introduction by *Saferstein*, Criminalistics, New Jersey 1998.

[34] Thus Celle Regional Appeal Court in GA 1967, 284; 285.

[35] Thus Nuremberg Regional Appeal Court in MDR 1964, 171.

[36] Nuremberg Regional Appeal Court, loc. cit.; the Federal Court also considers an evaluation of the means of evidence being offered to be admissible "already for reasons of procedural economy" (BGH in JR 1977, 217 with note *Peters*).

[37] Cf. on this *Strate* in Gedächtnisschrtftfür Karlheinz Meyer, Berlin 1990, p. 469 ff.

[38] Cf. *Gössel* in Löwe-Rosenberg, StPO, 24th ed., marginal note 142 an § 359 with further references.

[39] Not in the form of an affirmation in lieu of an oath: cf. BGHSt. 17, 303/304.

[40] § 359 No. 5 German Code of Criminal Procedure.