On the other hand, additional cross-examination on this point might have led Mr. Schwoeble's testimony to be even more damaging than it was. For example, he might have opined that the transfer of GSR from a smooth fabric like nylon to a coarse fabric like the Defendant's **[***156]** jacket was analogous to the kind of transfer which might be expected from a floor to a denim jacket, a point he never attempted to make during his examination. Indeed, given the fact that the Defendant's jacket had been simply placed on the floor rather than subjected to the kind of weighted or rubbing contact Mr. Schwoeble created in his studies, cross-examination might have elicited an opinion that his studies may have *overestimated* the degree to which GSR might have been transferred from the floor to the jacket. Given these dangers, the Court cannot say that Mr. Walters's decision to not extensively cross-examine Mr. Schwoeble on such issues was error. This is particularly so because these studies loom much larger in Defendant's motion than they did at trial. The studies were not the subject of an extensive amount of Mr. Schwoeble's testimony, nor did he claim they directly supported any particular conclusion. They merited only a brief passage in Mr. Nuzzi's summation. In the Court's view, Mr. Walters's handling of these studies was objectively reasonable.

Failure to Effectively Challenge the Contention That the Presence of Tin *on the Defendant's Jacket Tied Him to the Gun Used* [*157] *in the Shooting***

Dr. Kubic, in his testimony, opined that the conclusion that the tin found in the GSR on the Defendant's jacket had come from the 9 mm Glock alleged to have been fired by the Defendant was "highly, highly speculative". *See* n. 61. He also said that he was not aware of any **expert** who would opine that a given GSR sample had come from a given firearm. Dr. Kubic's conclusion on this issue is part of the reason why the Defendant claims it was error not to have Dr. Kubic present during trial or call him as a **witness.**

The Court understands the point Dr. Kubic was making in this regard as being that a GSR particle (including one containing tin) cannot be forensically identified as coming from any particular firearm. A GSR particle is not like a **fingerprint,** DNA **evidence** or any other unique **evidence** which, when considering the item itself, can be identified as coming from a particular source. But, in the Court's view, Ms. Lunde and Mr. Schwoeble during their testimony did not make such an assertion. In fact, in his testimony, as noted *supra*, Mr. Schwoeble explicitly said that he could not draw the ultimate conclusion that the tin in the GSR on the Defendant's jacket came from the **[***158]** 9 mm Glock. To the extent Ms. Lunde asserted and the People argued that the presence of tin on the jacket linked the Defendant to the Glock there was never a claim that these particles could be conclusively forensically identified with the Defendant's gun. The argument was that the proven facts allowed that inference to drawn. That inference was justified by the fact that: (i) tin was an item which was not a component of American made ammunition and would not normally be expected to be found in guns in the United States; (ii) the 9 mm Glock alleged to have been fired by the Defendant contained tin and, (iii) the GSR on the Defendant's jacket contained tin. Mr. Walters might have chosen to more vigorously cross-examine Ms. Lunde and Mr. Schwoeble on this point. Indeed, one might imagine a number of questions which might have served to undermine the strength of the inference the prosecution sought to draw with respect to the issue. But in the Court's view, any more extended cross-examination might have been as likely to result in these **experts**repeating and reinforcing their conclusions as it would have been in effectively impeaching them.

Dr. Kubic, during his testimony at the hearing, **[***159]** did not offer any specific reason why Ms. Lunde's and Mr. Schwoeble's conclusions on the tin issue were incorrect. He merely offered the conclusory assertion that such an inference was speculative and that he was not aware of any **expert** who would identify GSR as coming from a particular gun. Obviously, however, there are at least two **experts** who *did* draw such an inference in this case: Ms. Lunde and Mr. Schwoeble. Dr. Kubic admitted that he was not an **expert** on the issue of whether tin was a common component of American made ammunition. In the Court's view, Mr. Walters handling of the **evidence** on this issue was professionally reasonable.

Deficiencies in Evidence Presented by Defendant Not Ineffective Assistance of Counsel

In considering Mr. Walters's performance, two general points should also be kept in mind. First, significant aspects of the People's GSR **evidence** were effectively impeached at trial through the testimony of the People's **witnesses.** Second, some of the most significant claimed deficiencies in the **evidence** elicited by the Defendant arose not from Mr. Walters's conduct but from Justice Torres's rulings.

The People's GSR Evidence Was Significantly Impeached at Trial

A review **[***160]** of the testimony concerning GSR **evidence** at trial indicates that the probative value of that **evidence** was significantly limited through the testimony of the People's **witnesses.** During Cathleen Lunde's testimony:
- She admitted that she had provided knowingly false testimony in an unrelated case, later admitted that false testimony to her employer, the FBI and had been given the option to either resign or be fired. A misdemeanor charge was pending against her at the time of her Trial 3 testimony. She acknowledged that at the time of her testimony, she was on administrative leave and said it was possible that an additional case (other than the one in which she had provided false testimony) was also under review. She said she had tendered her resignation and had not been called as a **witness**in other cases. When asked by Mr. Walters whether the FBI lab where she worked was "a bastion of shoddy science, prosecutorial misconduct", Mr. Walters was admonished by the Court. She acknowledged that the FBI lab had received publicity.

- Ms. Lunde said that the proper procedure for testing clothing for the presence of GSR was to take the clothing to a room in which no other firearms examinations are **[***161]** taking place, place the item on a table which had been cleaned with detergent and create a barrier between the clothing and the table with paper prior to testing. [This obviously highlighted the contamination concerns related the placement of the jacket on the precinct room floor].

- She testified that although her testing of the 9 mm Glock and the jacket was consistent with a person wearing the jacket and firing the gun, it could also be consistent with someone being in the "vicinity of someone that was firing the gun". [This was significant because the defense theory of the case was that Mr. Adams, indeed, had been at the scene of the shooting but had been misidentified as the shooter].

- She acknowledged that her testimony at Trial 3 was the third time she had testified

regarding GSR and clothing. Questions put to her regarding the inadequacy of the physical location where her tests were conducted were not allowed by the Court.
- She acknowledged on cross-examination that she was subject at the lab to "open" rather than "blind" proficiency testing, meaning that she was aware she was going to be tested with respect to particular items.

- She acknowledged the potential problem of contamination **[***162]** in working in a lab. She said that if an item had been contaminated prior to her receipt of it, she would not be aware of that and that this could effect her test results. She said that it was possible that particles from a recently discharged gun picked up by an individual wearing gloves could end up on a subsequently held jacket touched by a person wearing those gloves.

- As noted *supra*, when asked whether the floor of a room in which many armed police officers gather several times a day would be a good location to place a jacket that was to be tested for GSR, Ms Lunde said it would not. She said she would have had questions about the placement of the jacket on the precinct floor if she had known about it prior to her testing.
- She acknowledged that no testing had been done of the guns used by the police officers in the case and that in addition to the tin found on the 9 mm Glock, a small amount of tin had been found on the hands of the test firer of the .40 caliber gun.
With respect to the **expert** testimony of Mr. Schwoeble:

- He acknowledged that his company had been retained and paid a range of fees and expenses by the district attorney's office for the work he did.
- He said that **[***163]** he was unaware of whether the protocols for his use of the microscope to test samples and the calibration of the microscope matched those of the International Standards Organization. He also admitted that his lab was not accredited by the American Society of Criminal Lab Directors.

- He said that the presence of **gunshot residue** on the jacket would be consistent not only with a person firing a gun but a person standing right next to a person who was firing a gun.

- He acknowledged that his analysis of the numbers of particles indicative of GSR on the jacket which Ms. Lunde and he had obtained differed materially. He attributed those differences to the superiority of his equipment.
- He acknowledged that the handling of contaminated firearms or ammunition can result in particles characteristic of GSR. During his testimony, it was obvious that he had little knowledge of the chain of custody which had been maintained with respect to the jacket prior to his receipt of it.
- He said that a person shooting a gun may eject GSR **evidence** to the back of his clothing but that no samples were taken from the back of the jacket.

- He acknowledged that he had never test-fired any of the weapons relevant **[***164]** to the case.
- Mr. Schwoeble acknowledged that: "Any time two objects come in contact, there is particle exchange, depending on the texture of each particle."

- He acknowledged that his study of fabric to fabric transfers had not been completed, was ongoing and had not yet been peer reviewed.

- He admitted that he had not conducted any studies relating to the presence of airborne GSR in police gathering rooms.

- He admitted that the premier organization in his field was the American Academy of **Forensic** Scientists and that he was not a member.

- He acknowledged that if a person fired a weapon and then picked up a jacket, GSR from that firing could be transferred to the jacket. He admitted that it was possible for crime scene detectives wearing gloves to pick up a recently discharged weapon and have GSR transferred onto gloves, and in turn transferred to objects subsequently touched by the gloves.

- He acknowledged that he could not say that the GSR from the Glock recovered in this case is the same GSR recovered from the jacket. He was not able to draw that ultimate conclusion. He could only say that the jacket was in an area where GSR was present.

- In discussing whether the jacket may have **[***165]** picked up GSR from the police precinct floor, he acknowledged that he did not know the level of contamination which may or may not have emanated on the jacket.

Much of the Claimed Deficiency in the GSR Evidence Elicited by Mr. Walters

Arose From the Court's Limiting Rulings at Trial

The second general point which must be made with respect to Defendant's ineffective assistance claim is that much of Mr. Walters's alleged deficient performance arose not from his actions but from Justice Torres's rulings. Justice Torres denied Defendant's motion to preclude the discussion by Mr. Schwoeble of his uncompleted fabric to fabric transfer studies. He limited Mr. Walters's cross-examination of Ms. Lunde regarding the adequacy of the procedures at the FBI lab. Most significantly, in the Court's view, he significantly limited the ability of Mr. Walters to cross-examine Ms. Lunde about whether she believed the placement of the jacket on the precinct floor and other deficiencies in the chain of custody of the jacket undermined her conclusions about the probative force of the GSR **evidence.**

As noted *supra*, Ms. Lunde reported that she "would have had a lot of questions" regarding the fact that the Defendant's **[***166]** jacket was placed on the precinct floor if she had been aware of that prior to her testing of the jacket. [74] When Mr. Walters attempted to ask what those questions might have been, the Court repeatedly admonished and precluded Mr. Walters, in the presence of the jury, from that "whole line" of questioning, indicating that such questions were improper and instructing the jury to disregard them. Justice Torres's initial reaction to Mr. Walters's questions appeared to have been triggered by his concerns about the form of those questions, in which Mr. Walters asked Ms. Lunde what questions she would have hypothetically liked to have posed to the District Attorney had she known about the placement of the Defendant's jacket on the precinct floor before she tested it. As reflected in the colloquy quoted *supra*, Justice Torres then appeared to base his further preclusion rulings on the appropriate scope of Ms. Lunde's expertise.

FOOTNOTES

74 *See* n. 21, *supra*.

Ms. Lunde was a **forensic** scientist employed by the FBI who had been qualified by the Court as an **expert** in the field of comparative bullet lead analysis and GSR analysis. Justice Torres apparently believed, however, that it was beyond the scope of **[***167]** her professional expertise to render an opinion about the proper procedures which should have been followed by the police to avoid the potential GSR contamination of the Defendant's jacket.

The repeated rulings by Justice Torres, that the "whole line" of questioning on this issue was improper effectively foreclosed Mr. Walters from eliciting Ms. Lunde's views about the contamination issue. Moreover, given the degree to which his cross-examination of Ms. Lunde was curtailed, Mr. Walters may well have reasonably expected the same limitations and admonitions to have been imposed by the Court to any questioning of Mr. Schwoeble on the subject and that these admonitions would have similarly been made in the presence of the jury. To the extent these rulings limited Mr. Walters's ability to cross examine the People's GSR **witnesses** on the contamination issue, however, those limitations arose largely from Justice Torres's orders rather than Mr. Walters's conduct.

Indeed, the People themselves assert that the reason the Defendant was convicted at Trial 3 and not at Trial 2 was largely because at Trial 3 Justice Torres curtailed the cross-examination of the police **witnesses** regarding their invocation **[***168]** of the "48 hour" rule, a limitation by Justice Torres which the People argue was wholly proper and was not imposed by Justice Carruthers during the second trial. *See* People's Response to Defendant's Motion at 42 ("It was this significant difference between the cross examinations of the police officers in the second and third trials that was one of the important variables that contributed to the different outcome in result in the third trial. After all, both juries heard in essence the same exact **gunshot residue expert** testimony, but they reached very different results.")

Some other points about Mr. Walters's professional conduct deserve mention. At the time of the trial, he was not a novice. He had been a practicing attorney for 16 years, had worked in the district attorney's office, predominantly represented clients in criminal cases and had handled more than 10 **homicide** cases. Mr. Walters testified without contradiction at the hearing that the use of GSR **evidence** at trials was rare at the time Trial 3 was conducted. Mr. Walters represented the Defendant in his first two trials and was successful in obtaining a mistrial in both those cases. Moreover, in addition to his extensive cross-examination **[***169]** of the People's two primary GSR **experts,** he cross examined five other prosecution **witnesses** in an attempt to support the claim that the GSR **evidence** found on the Defendant's jacket was the result of contamination.

As Defendant acknowledges in his Instant Motion, the standard an attorney must meet in order to provide effective assistance is "a very tolerant one" which may include "significant mistakes". *See* Defendant's Memorandum at 92, *quoting People v. Turner*, 5 NY3d 476, 480, 840 N.E.2d 123, 806 N.Y.S.2d 154 (2005). Attorneys have great discretion in strategic decision making. *Id., citing, People v. Rivera*, 71 NY2d 705, 709, 525 N.E.2d 698, 530 N.Y.S.2d 52. In the Court's view, Mr. Walters's representation of the Defendant during trial

in general and with respect to his handling of the GSR **evidence** was not error-free. But it was also not professionally unreasonable. "Viewed objectively, the transcript and the submissions reveal the existence of a trial strategy that might well have been pursued by a reasonably competent attorney." *People v. Satterfield*, 66 NY2d 796, 799, 488 N.E.2d 834, 497 N.Y.S.2d 903 (1985). The first prong of the*Strickland* standard, therefore has not been met here.

Analysis of Second Strickland Prong Under Federal and State Law

An examination of the second prong **[***170]** of the *Strickland* standard, whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" obviously requires an analysis of how strong a defendant's **evidence** of guilt was at trial. Under the federal standard, even if an attorney's performance was professionally unreasonable, a defendant will not be found to have received the ineffective assistance of counsel if there is no reasonable probability that this would have changed the ultimate result. Under the New York ineffective assistance standard, prejudice to a defendant is also a significant factor to be considered in assessing whether a defendant has received meaningful representation. The Defendant and the People offer two significantly different assessments of how strong the **evidence** of the Defendant's guilt was at trial.

At argument on the instant motion, Defendant's counsel, Mr. Michelen, characterized the trial **evidence** against Mr. Adams as "paper thin . . . This was a shot in the night. Some people saw some people scatter and that was it". [75] Counsel argued, *inter alia*, that by virtue of how close the case was, a proper handling of the GSR **evidence** **[***171]** by Mr. Walters would have certainly resulted in an acquittal. The People in argument on the instant motion through Mr. Nuzzi, on the other hand, urged that their case against Mr. Adams had been very strong. ". . . [Y]ou had two police officers who testified, corroboration of their testimony by civilian **witnesses,** DNA **evidence** linking both and corroborating what the civilian **witnesses** saw and the police officers saw". [76] Mr. Nuzzi also argued that the GSR **evidence** provided additional corroboration of Defendant's guilt.

FOOTNOTES

75 *See* Hearing Transcript, p. 166, ll. 10-12.

76 Id., p. 178, ll. 20-23.

This Court's view of the strength of the People's **evidence** and therefore the probability that different decisions by Mr. Walters would have changed the trial result fall between the characterizations urged by the Defendant and the People. On the one hand, in the Court's view, it was clear that the People would not have been able to obtain a conviction without the eyewitness testimony of Officer Anselmo. Only Officer Anselmo was able to identify the Defendant as one of the people who had fired into the victims' car. Moreover, his identification was obviously made quickly, in the dark, under extreme stress. **[***172]** The fact that Officer Anselmo had shot the Defendant, in the Court's view, moreover, may have also supported Officer Anselmo's own conclusion that it was the Defendant who was one of the two men who had shot into the car. As Mr. Walters

repeatedly argued during his summation, the eye-**witness** identification by victim Shane Kerr was flatly inconsistent with the Defendant and indicated that Mr. Adams had been misidentified by Officer Anselmo.

"Case studies, and legal scholars, attest to the fact that the highest percentage of erroneous criminal convictions results from mistaken identification." [77] "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification". [78] As the Court of Appeals noted in reviewing research findings in one of their seminal holdings on the admissibility of **expert** testimony in eyewitness identification cases:

witnesses often make mistakes, . . they tend to make more mistakes in cross-racial identifications as well as when the events involve violence . . . the professed confidence of the subjects in their identifications bears no consistent relation to the accuracy of these recognitions. *People v. LeGrand*, 8 NY3d 449, 454, 867 N.E.2d 374, 835 N.Y.S.2d 523 (2007) **[***173]** *quoting*, 1 McCormick, **Evidence** § 2067, at 880 (6th ed 2006).
The Defendant's conviction was based in large part on an eyewitness identification of a type which has many of the most important hallmarks of potential error.

FOOTNOTES

77 *New York Identification Law, The Wade Hearing/The Trial*, Miriam Hibel, Lexis/Nexis, March 2010; Introduction, (citations omitted).

78 Id., *quoting, United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

Where the People's argument about the strength of their case gains great force, however, is in the corroborating **evidence** they presented in support of Officer Anselmo's identification. Officer Anselmo was the only person who claimed to identify the Defendant as the shooter. But virtually every aspect of his testimony was supported by a web of corroborating **evidence** including DNA, ballistics **evidence,** police radio transmissions, photographs, diagrams, the location where the gun allegedly used by the Defendant was found, the identification of the Defendant's jacket as the same jacket worn by the shooter, GSR, the behavior of the Defendant, which the People alleged demonstrated a consciousness of guilt and extensive eyewitness testimony. This **evidence** was meticulously brought together **[***174]** by Assistant District Attorney Nuzzi in his summation. In the end, the jury was presented with a case which went well beyond bare legal sufficiency. They were presented with an edifice of corroborating **evidence** which was far greater than the sum of its parts. The People's case was anchored with the one-**witness** identification of Officer Anselmo. But the additional **evidence** presented by the People provided the jury with a firm basis to believe that his identification was wholly accurate. The People also, moreover, presented detailed facts supporting their contention that their **witnesses** provided more reliable identification **evidence** than Shane Kerr or other defense **evidence.**

The most important **evidence** which inculpated the Defendant was not the GSR. It was the identification of Officer Anselmo. The GSR was arguably the most important single piece of corroborating **evidence** supporting the Defendant's conviction. But it was only one of

numerous pieces of corroborating **evidence.** In the Court's view, given the strength of the People's case, the Defendant was not denied the effective assistance of counsel under either the federal or New York state standard, even assuming that Mr. Walters's **[***175]** representation was professionally unreasonable in violation of the first *Strickland* prong. There was not a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". Again, assuming, *arguendo*, that Mr. Walters's representation was not professionally reasonable, in the Court's view, Mr. Adams was also nevertheless provided with "meaningful representation" and received a fair trial. Thus, again assuming that Mr. Walters's conduct was professionally unreasonable, Mr. Adams was also not deprived of the effective assistance of counsel under state law.

For all of the foregoing reasons, Defendant's motion is denied in its entirety.

February 25, 2011

Daniel Conviser

A.J.S.C.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. WILLIAM SEIFERT, Appellant

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Appellate Division, Fourth Department

152 A.D.2d 433; 548 N.Y.S.2d 971; 1989 N.Y. App. Div. LEXIS 16233

December 20, 1989

PRIOR HISTORY: [*1]** APPEAL from a judgment of the Supreme Court (Sprague, J.), rendered in Erie County, upon a verdict convicting defendant of murder in the second degree.

DISPOSITION: Judgment unanimously affirmed.

CASE SUMMARY
PROCEDURAL POSTURE: Defendant challenged the judgment from the Supreme Court Erie County (New York), which convicted him of murder in the second degree. Defendant alleged insufficient **evidence.** The people's theory at trial was that defendant lured his brother to an isolated rural area in another county, shot him in the head and then disposed of his body. Although this brother had not been seen or heard from since, neither had his body been recovered.

OVERVIEW: The state alleged that defendant lured his brother to an isolated rural area in another county, shot him, and disposed of his body. The brother's body was never recovered. On appeal, defendant argued that the **evidence,** which was entirely **circumstantial,** was legally insufficient to support his murder conviction. He contended that Erie County lacked geographical jurisdiction to prosecute the murder charge, that the suppression court erred by failing to suppress certain **evidence** obtained during a search of his van, and that he was deprived him of a fair trial. The court affirmed, finding that the **evidence**admitted at defendant's trial compelled a finding that defendant killed his brother and that the **evidence** did so in full accord with the rules that applied in**circumstantial evidence** cases. The jury's finding of geographical jurisdiction to prosecute the murder charge in Erie County was reasonably inferred from all the facts and circumstances and was supported by a preponderance of the **evidence.** The court held that defendant failed to preserve his due process claim for review and the court declined to reach it in the interests of justice.

OUTCOME: The court affirmed the judgment of the trial court, which convicted defendant of murder in the second degree.

CORE TERMS: van, blood, tissue, scene, circumstantial evidence, murder, bone, fragment, blue, fiber, guilt, morning, brain, wound, rug, hypothesis, developer, homicide, killed, rifle, site, geographical, pool, kill, animal, attend, reasonable doubt, parking lot, wood chips, prosecute

HEADNOTES

Crimes -- Murder -- Corpus Delicti -- **Circumstantial Evidence**

1. A defendant may be convicted of murder without direct proof of death and of the criminal agency which produced death since the corpus delicti may be established by **circumstantial evidence**; accordingly, in a **homicide** prosecution, the failure to locate the body of the victim is not an impediment to conviction, so long as the **circumstantial evidence** is sufficient to prove beyond a reasonable doubt that defendant intentionally killed the victim.

Crimes -- Murder -- **Circumstantial Evidence** -- Permissible Inferences

2. In a prosecution for murder based exclusively upon **circumstantial evidence**, the facts must be viewed by an appellate court in the light most favorable to the People where defendant was convicted, and it must be assumed that the jury credited the People's **witnesses** and gave the People's **evidence** the full weight that might reasonably be accorded it. The facts from which the inference of defendant's guilt is drawn, when perceived as a whole, must overwhelmingly establish his guilt beyond a reasonable doubt, must be inconsistent with his innocence, and must exclude to a moral certainty every other reasonable hypothesis. The jury cannot be allowed to make inferences which are based not on the **evidence** presented, but rather on unsupported assumptions drawn from **evidence**equivocal at best.

Crimes -- Murder -- **Circumstantial Evidence** -- Death of Human

3. In a **homicide** prosecution in which the People alleged that the victim was lured to an isolated rural area and then shot in the head with a rifle, proof that a human died at the spot where blood and bone fragments were found was established to a moral certainty by **circumstantial evidence** where local residents testified that they heard a single rifle shot at about the time the murder occurred, where two pools of blood were discovered near

the victim's car, where the blood was human type O blood, the same as the victim's, where tissue found in the blood was identified by **experts** as brain tissue which had hemorrhaged, indicating that it was living when the trauma was induced, where the size and shape of the bone fragments were consistent with a head injury caused by a projectile, where **expert** testimony opined that the wound which resulted in the blood, tissue and bone was most likely fatal, and where no nonhuman blood was found at the scene; accordingly, inasmuch as the brain tissue and bone fragments were found in a pool of human blood, the fact that they were not positively identified as human does not mean that they were from an animal, since an animal suffering such a wound would have bled therefrom, and no animal blood was found.

Crimes -- Murder -- **Circumstantial Evidence** -- Disappearance of Victim

4. In a **homicide** prosecution in which the body of the victim was never found, the **evidence** adduced proved to a moral certainty that the victim is dead and excluded all other reasonable hypothesis, where the victim agreed to attend a meeting at the site where his car, and blood and bone fragments were found, where the victim left home with only the clothes he was wearing, where the victim took no suitcase or other personal effects from his room, where the victim was seen shortly before the murder near the scene of the crime, where blood found at the scene was the same type as the victim's, and where the victim never returned to his home or contacted any friends or relatives; the proof logically leads to the conclusion that the victim was killed at the isolated rural scene where his car and the blood were found.

Crimes -- Murder -- **Circumstantial Evidence** -- Motive

5. In a **homicide** prosecution based exclusively upon **circumstantial evidence**, the **evidence** adduced established to a moral certainty that defendant killed the victim, his homosexual brother, where it was shown that defendant was responsible for luring the victim to the isolated rural spot where the crime occurred, that defendant could not account for his actions at the time of the murder, that defendant's van contained physical **evidence** of rug fibers which were also found at the scene of the crime, and that defendant hated his brother because of his homosexuality and their differences in family disputes. Moreover, defendant's actions after his brother's burned car was discovered demonstrated consciousness of guilt: he left for Florida; defendant owned a high-caliber rifle which was missing from its usual place in his home during the time he was in Florida.

Crimes -- Jurisdiction of Offenses -- Formation of Intent

6. In a **homicide** prosecution in which defendant was not tried in the county in which the crime was allegedly committed, defendant was nevertheless tried in the proper county (see, CPL 20.40[1][a], which provides that a county may assume jurisdiction if conduct occurred therein which established an element of the offense) since the People established by a preponderance of the **evidence** that defendant had formed the intent to kill the victim in the county in which he was tried; the **evidence** revealed conduct by defendant within the county of trial sufficient to establish that the intent to kill was formed there, and the jury's finding of geographical jurisdiction to prosecute the murder charge in the county where such prosecution took place was fairly and reasonably inferred from all the facts and circumstances, and was supported by a preponderance of the **evidence.**

Crimes -- Unlawful Search and Seizure -- Items Seized from Van

7. In a **homicide** prosecution, defendant's motion to suppress **evidence** found during a police search of his van was properly denied where police officers testified that defendant's wife identified the van discovered in a parking lot as "our van", that she executed a waiver form describing the van as belonging to her and her husband, and that she consented to the search, and where the court determined that the officers reasonably relied upon the representations of defendant's wife of joint ownership to search the van; the court's determination that the wife's testimony at the suppression hearing, in which she stated that she told the officers that the van belonged to her husband and that she lacked authority to consent to a search, was unworthy of belief, should be accorded great weight.

Crimes -- Appeal -- Preservation of Issue for Appellate Review -- Fair Trial

8. In a **homicide** prosecution, defendant failed to preserve for appellate review his contention that he did not receive a fair trial because the jury erroneously considered certain **expert** testimony, since defendant did not move to have that testimony stricken; moreover, during jury deliberations, when the jury requested that that testimony be reread to them, defense counsel failed to object.

COUNSEL: Mark Mahoney for appellant.

Kevin M. Dillon, District Attorney (John De Franks of counsel), for respondent.

OPINION BY: GREEN

OPINION

[*435] [972]** Green, J.

Defendant, William Seifert, was convicted of murder in the second degree for killing his younger brother, Mark Seifert. The People's theory at trial was that defendant lured Mark to an isolated rural area in Cattaraugus County on February 13, 1984, shot him in the head with a rifle and then disposed of his body. Although Mark has not been seen or heard from since that date, neither has his body been recovered. Defendant argues on appeal that the **evidence,** which is entirely **circumstantial,** is legally insufficient to support his conviction for murder in the second degree. He further argues that Erie **[*436]** County lacked geographical jurisdiction to prosecute the murder charge, that the suppression court erred by failing to suppress certain **evidence** obtained during a search of his van, and that various trial errors deprived **[***2]** him of a fair trial.

DEFENDANT'S PLAN

On February 8, 1984, defendant asked Carol Reese, a waitress with whom he was acquainted, for a favor. He gave her a hand-written letter and asked her to pose as a secretary for Tri-State Developers, to telephone Mark Seifert, and to read the letter to him. Reese knew defendant only as "Bill" and defendant did not tell her that Mark Seifert was his

brother. Reese **[**973]** reached Mark by telephone on Saturday, February 11, 1984. She read the letter, which informed Mark that he had been recommended to act as a contractor for a large recreational development project in Cattaraugus County. She asked him if he could meet with a Tri-State representative on Monday morning at 10:00 A.M. at a site located on Pleasant Valley Road in the Town of Yorkshire, an isolated rural area. Mark agreed to attend the meeting and Reese read to him detailed directions to get to the meeting site. She also told Mark that another contractor, who would be driving a blue van, was also expected to attend the meeting. Reese then telephoned defendant and told him that Mark would come to the meeting.

Although Reese had asked Mark to keep the meeting confidential, Mark told **[***3]** his landlady, his sister, and several others about it, expressing excitement that this would be his big financial break. According to his landlady, on February 12, 1984, Mark set his alarm for 6:00 A.M., and when she awoke at 9:00 A.M. on February 13, 1984, Mark was gone. He had taken his briefcase, but no other personal belongings with him. He was last seen by Burton Pleace, an acquaintance, at a diner located in Yorkshire Corners, about a 10-minute drive from the proposed meeting site. Mark told Pleace he was going to a meeting with a developer on Pleasant Valley Road and asked Please to verify the accuracy of his directions, which he had written on a piece of paper. Mark left the diner at approximately 9:25 A.M. Three persons who lived in the vicinity of Pleasant Valley Road and who were familiar with firearms heard a single rifle shot sometime between 9:30 A.M. and 10:00 A.M.

At 10:45 A.M., the Delevan Volunteer Fire Department was **[*437]** dispatched to Pleasant Valley Road, where they discovered a car fully engulfed in flames. It was determined that the fire was started by use of an accelerant. The vehicle was identified as a Lincoln Continental, registered to Mark Seifert. **[***4]** An engraved cigarette lighter, which Mark had recently purchased, was found under the front seat. Despite an extensive inquiry conducted by the State Police, Mark Seifert has not been seen or heard from since February 13, 1984.

INVESTIGATION AT THE SCENE

At the scene of the car fire, State Police investigators discovered two pools of blood, which were later discovered to contain what appeared to be bone fragments and brain tissue. Photographs were taken, and samples of the bone, tissue, and blood-stained wood chips were removed to the Erie County Medical Center for analysis. Several strands of a blue nylon-type fiber were located within 25 feet of the place where the blood, tissue, and bone were found. No**evidence** of human remains were detected inside the burned-out vehicle.

The blood was analyzed and determined to be of human origin, type O. Veterans Administration medical records document Mark Seifert's blood type as O. Four human enzymes were detected in the blood, including the PGM2 enzyme, which is found in only 6% of the population. Dr. Koeppeen, a **forensic** pathologist, identified the tissue found on the scene as brain tissue from a large mammal, which appeared identical **[***5]** to human brain tissue. The tissue had hemorrhaged, which happens only in living tissue. The bone fragments, because of their size and shape, were consistent with a **gunshot** wound to the head. Tests performed revealed blood and human protein on the bone fragments. No nonhuman blood was detected at the scene. Dr. Justin Uku, Erie County Chief Medical Examiner, testified that the bone fragments found at the scene were consistent with the type of fragments that would result from a **gunshot** wound to the head. He further opined

that the trauma capable of producing such fragmentation would be fatal.

DEFENDANT'S ACTIONS

On Sunday, February 12, 1984, the day before Mark's alleged meeting with a representative of Tri-State Developers, defendant called two persons for whom he worked and told them that he would not be at work the following morning. He **[*438]** left his **[**974]** home between 8:00 and 8:30 A.M. in his blue van, and did not arrive at a jobsite until sometime after noon on that day. On the evening of February 13, as part of the investigation into Mark Seifert's disappearance, State Police Investigator Mullins telephoned defendant. Defendant said that he drove a borrowed blue **[***6]** Cadillac to a local diner for breakfast that morning, then went to a health spa to work out. Defendant said nothing about Mark's meeting with a representative of Tri-State Developers. The following morning, Investigator Mullins visited defendant at his work site and asked him why he sounded so nervous during their telephone call the night before. Defendant stated that his nervousness was caused by the knowledge that 1 of his 2 vans was not registered properly. Defendant did not return home that evening or for six days thereafter.

That same evening, Carol Reese saw a television news report concerning the discovery of Mark Seifert's burning car in Cattaraugus County. She went to the police and stated that, at defendant's request, she had arranged for Mark to attend a business meeting at 10:00 A.M. at that location. She turned over to police the letter defendant had asked her to read to Mark. The following morning, when defendant had still not returned home, defendant's wife called the State Police and reported that defendant was missing. Both the blue van and defendant's white van were gone. According to defendant's wife, one of defendant's two "long guns" was also missing. On February **[***7]** 15, 1984, police located defendant's blue van in a supermarket parking lot in East Aurora. The license plates, registration and inspection stickers, and vehicle identification number tags had been removed.

Defendant returned home on February 20, 1984, and was interviewed by a State Police investigator in the presence of his attorney. Defendant denied any knowledge of Mark's present whereabouts. When confronted with the information from Carol Reese, defendant stated that he had received a call from a man named "Jim" who represented a Mr. Sandburg of Tri-State Deveolpers in Pennsylvania. Jim told him that they wanted him and Mark to be the major contractors for a large recreational development project in the area of Pleasant Valley Road, and Jim insisted upon the participation of both brothers. Jim told defendant to contact Mark and set up a meeting for February 13 at 10:00 A.M. Because they had not been getting along very well, defendant feared that Mark would not agree to work with him, so he decided to have **[*439]** Reese telephone Mark. Defendant felt that once Mark got there and realized the importance of the job, he would agree to work on the project. Defendant claimed he **[***8]** did not attend the meeting because Jim called him back and told him that due to adverse weather conditions, the developer had decided that only Mark need come to the meeting. Defendant admitted that he had been driving his blue van on Monday, February 13. He expressed the fear that someone had "set him up". He acknowledged familiarity with the Pleasant Valley Road area, but stated that he had not been down there for about 10 years.

William Strickland, who has known defendant for 15 to 18 years, indicated that every year his motorcycle club, of which defendant was a member, sponsored a cross-country race in the Yorkshire area that usually included Pleasant Valley Road. Defendant recently

participated in the race and usually helped with the layout of the course. Subsequent police investigation revealed that defendant had not signed in at his health club on the morning of February 13.

THE VAN

Pursuant to a consent form signed by defendant's wife, the State Police impounded and searched defendant's blue van, which they had located in the supermarket parking lot. A piece of carpet from the rear of the van nearest the back door appeared to be newly cut away. Wood chips were found in the **[***9]** rug near the driver's seat. The rug was made of blue nylon. Fibers from the rug and the fibers found at the scene were tested and found to match. The rugs in the van also contained a significant **[**975]** number of orange-colored polyester fibers, testing of which revealed a strong association with an orange polyester fiber found at the scene.

Ralph Marcuccio, a **forensic** scientist and serologist, found human blood on fabric and wood shavings removed from the rug in defendant's van which contained the PGM2 enzyme.

DISCUSSION OF LEGAL SUFFICIENCY OF THE **EVIDENCE**

[1] In People v Lipsky (57 NY2d 560, rearg denied 58 NY2d 824), the Court of Appeals overruled the common-law rule, enunciated in Ruloff v People (18 NY 179), that *HN1* a defendant cannot be convicted of murder without direct proof of death and of the criminal agency which produced death. The court held that "the corpus delicti may be established by **circumstantial [*440] evidence**" (People v Lipsky, supra, at 569). Therefore, the failure to locate Mark Seifert's body is not an impediment to conviction, so long as the **circumstantial evidence** is sufficient to prove beyond a reasonable doubt that defendant intentionally **[***10]** killed him.

[2] *HN2* When reviewing a case based exclusively upon **circumstantial evidence**, the facts must be viewed in the light most favorable to the People (People v Morgan, 66 NY2d 255, 256, on remittitur 116 AD2d 919, cert denied 476 US 1120), and it must be assumed that the jury credited the People's **witnesses** and gave the People's **evidence** "the full weight that might reasonably be accorded it" (People v Benzinger, 36 NY2d 29, 32; People v Pugh, 107 AD2d 521, 529, lv denied 67 NY2d 764). Moreover, a conviction based entirely upon **circumstantial evidence** "is subject to strict judicial scrutiny, not because of any inherent weakness in this form of **evidence,** but to ensure that the jury has not relied upon equivocal **evidence** to draw unwarranted inferences or to make unsupported assumptions" (People v Way, 59 NY2d 361, 365). The facts from which the inference of defendant's guilt is drawn, when perceived as a whole, must overwhelmingly establish his guilt beyond a reasonable doubt, must be inconsistent with his innocence, and must exclude to a moral certainty every other reasonable hypothesis (People v Morgan, supra; see also, People v Lewis, 64 NY2d 1111, 1112; **[***11]** People v Sanchez, 61 NY2d 1022, 1024; People v Way, supra; People v Benzinger, supra). The reason for the application of this rule is to foreclose "a danger legitimately associated with **circumstantial evidence** -- that the trier of facts may leap logical gaps in the proof offered and draw unwarranted conclusions based on probabilities of low degree" (People v Benzinger, supra, at 32; see also, People v

Cleague, 22 NY2d 363, 367).

Defendant identifies three questions that must be answered in the affirmative by the jury in order to sustain his conviction for second degree murder. The questions, as framed by defendant, are: (1) was someone killed? (2) Was that person Mark Seifert? (3) Was defendant Mark Seifert's killer? Defendant argues that none of these questions could have been answered affirmatively by the jury based upon the **evidence** presented at trial unless the jury engaged in improper speculation and based inferences upon inferences, not upon proven facts. Defendant claims that the law requires that each inference drawn by the jury must be based upon testimonial or other direct **evidence.** We find that defendant has overstated **[*441]** the requirement of the rule. The commentators have noted **[***12]** that HN3 the prohibition against basing an inference upon an inference, found in the case law, is merely a restatement in different terms of **[**976]** the principle that a jury cannot be allowed to "make inferences which are based not on the **evidence** presented, but rather on unsupported assumptions drawn from **evidence** equivocal at best" (People v Kennedy, 47 NY2d 196, 202, rearg dismissed 48 NY2d 656). As articulated by one commentator:

"Hence, HN4 when this phrase [basing an inference upon an inference] is used in a criminal case, for example, all that it means is that the circumstances introduced to prove the controverted issues are not consistent with guilt and inconsistent with a reasonable hypothesis of innocence, or do not exclude to a moral certainty every other reasonable hypothesis.

"To the extent that it implies that every inference must be based directly upon testimonial **evidence** without any intervening inferences, the phrase is misleading and its use should be discontinued" (Fisch, New York **Evidence** § 164, at 94 [2d ed]; see also, Richardson, **Evidence** § 148, at 118-119 [Prince 10th ed]).

We find that the **evidence** admitted at defendant's trial compels an affirmative **[***13]** answer to each of the questions framed by defendant, and does so in full accord with the rules that apply in **circumstantial evidence** cases.

1. Did a human die?

[3] HN5 Proof of death may be established by **circumstantial evidence** (see, People v Lipsky, supra). The **evidence** in this case establishes to a moral certainty that ahuman being died at Pleasant Valley Road on February 13, 1984. Three local residents testified that they heard a single rifle shot between 9:30 and 10:00 A.M. that morning. Two pools of blood were discovered near Mark Seifert's car, and these pools contained what appeared to be tissue and bone fragments. The blood was human type O blood. The tissue was identified as brain tissue, consistent with human brain tissue. The tissue had hemorrhaged, and was living tissue when this hemorrhaging occurred. The size and shape of the bone fragments were consistent with a head injury caused by a projectile. Dr. Koeppen opined that the presence of this quantity of brain tissue and bone fragment meant that the wound was most likely fatal. This conclusion was also reached by Dr. Uku, Chief Medical **[*442]** Examiner for Erie County, who opined that the bone fragments found at **[***14]** the scene were consistent with fragments produced by a **gunshot** wound to the head, and, in his opinion,

the wound was fatal.

This **evidence,** when viewed in its entirety, overwhelmingly establishes that a human being with type O blood suffered a fatal **gunshot** wound to the head. Moreover, the proof, when viewed in the light most favorable to the prosecution, excludes to a moral certainty all other reasonable hypothesis. Although the brain tissue and bone fragments were not identified conclusively as human, they were found in a pool of human blood. Dr. Koeppen testified that if an animal had suffered a head wound resulting in the loss of brain tissue, the animal would have bled from the wound. No nonhuman blood was found at the scene. This**evidence** excludes the possibility suggested by defendant that an animal death was the source of the blood and bone fragments.

2. Did Mark Seifert die?

[4] The **evidence** adduced at trial proves to a moral certainty that Mark Seifert is dead and excludes all other reasonable hypotheses. Mark agreed to attend a meeting at 10:00 A.M. on the very site where his car was found. He left home with only the clothes he was wearing. He did not take a suitcase, **[***15]** or any other personal effects from his room. About 9:00 A.M., Mark was seen by an acquaintance at a diner in Yorkshire Corners, about a 10-minute drive from the scene of the fire. Mark told his acquaintance that he was on his way to a meeting with a developer on Pleasant Valley Road. He left the diner before 9:30 A.M. At or near 10:45 A.M., the fire department was dispatched to Pleasant Valley Road. Mark's car was totally engulfed in flames and his monogrammed cigarette lighter was found under the front seat. Blood found at the scene was type O, which is Mark's blood type. Mark never returned to his home, nor has he contacted any family members or friends. The proof logically leads to the conclusion that Mark Seifert was killed on Pleasant Valley Road that morning. Defendant argues that the proof equally supports the conclusion that Mark left the area without telling anyone, because Mark had left the area before for long periods of time. However, various family members testified that, although Mark had moved from the area on prior **[**977]** occasions, he telephoned them and sent post cards and gifts during his absence. This **evidence,** viewed in the light most favorable to the **[*443] [***16]** People, excludes defendant's theory that Mark left the area coluntarily.

3. Did defendant kill Mark Seifert?

[5] Finally, we find that the **evidence** adduced at trial establishes to a moral certainty that defendant killed his brother. Defendant was responsible for luring Mark to the Pleasant Valley Road site, using Carol Reese as his intermediary. The letter defendant gave Reese to read to Mark contains detailed directions which lead precisely to the spot where Mark's vehicle was found. Defendant called his employers the night before and told them that he would not be working for them on the morning of February 13. Defendant left his home early that day and no one could verify his whereabouts until he arrived at a jobsite sometime after noon. He was driving his blue van, which he admitted had been in his exclusive possession that day. This van contained a blue nylon rug, and fibers from this rug matched blue nylon fibers found at the scene. The rug in defendant's van contained a quantity of orange polyester fibers, which were strongly associated with an orange polyester fiber found on the scene. Traces of human blood were detected on wood chips and fiber found in the van, and the **[***17]** blood on the wood chips contained the human blood enzyme PGM2, which occurs in only 6% of the population. This enzyme was also detected in the blood found at the scene. Thus, defendant was linked to the scene by a continuous chain

of physical **evidence.**

HN6 Although there is no requirement that the People establish motive, motive is always a relevant consideration in cases based solely upon **circumstantial evidence** (People v Pugh, supra, at 528). The **evidence** demonstrates that defendant hated his brother Mark because Mark was a homosexual and because they had been on opposite sides of family disputes. Mark had filed criminal charges against defendant in the Elma Town Court, and these charges were pending on February 13, 1984. Defendant's twin brother, Ted, testified at trial that he overheard defendant say: "It will never get to Court; I will kill the bastard first".

The actions of defendant after Mark's burned car was dicsovered demomstrated consciousness of guilt. **Evidence** of consciousness of guilt has been labeled a "relevant but weak form of **evidence**" (People v Benzinger, supra, at 33; see also, People v Leyra, 1 NY2d 199, 208-209). However, HN7 in an appropriate case,**evidence** of consciousness **[***18]** of guilt bolsters other **[*444]** circumstances which in and of themselves strongly point to the defendant's guilt (People v Leyra, supra, at 208). This is such a case. When a State Police officer initially spoke with defendant on the day Mark's car was discovered, defendant did not mention Mark's meeting with Tri-State Developers. Defendant told the officer that he had been driving his cousin's blue Cadillac that morning. The following day, after a second interview with the State Police, defendant removed all identifying markings from his blue van, abandoned it in a local supermarket parking lot, and left for Florida. When he returned six days later, and only after being informed that Carol Reese had gone to the police, defendant admitted to writing the letter. Moreover, defendant owned a high-caliber rifle, which was missing from the place it was usually kept in his home during the time he was in Florida. These facts, when viewed in their entirety, overwhelmingly establish defendant's guilt beyond a reasonable doubt and are inconsistent with innocence, and exclude to a moral certainty every other reasonable hypothesis.

GEOGRAPHICAL JURISDICTION

[6] Defendant argues that Erie **[***19]** County lacks geographical jurisdiction to prosecute him for a murder that took place in Cattaraugus County. HN8 CPL 20.40(1)(a) provides that a county has geographical jurisdiction to prosecute an offense if "[c]onduct occurred within such county sufficient to establish * * * [a]n element of such offense". In a previous appeal by the People from the dismissal of the indictment against defendant, this court held that the People had established by a preponderance of the **evidence** that defendant had formed the intent to kill Mark Seifert in Erie County (see, People v Seifert, 113 AD2d 80, lv denied 67 NY2d 889; see also, People v Tullo, 34 NY2d 712). We find that **[**978]** the **evidence** before the jury likewise reveals conduct by the defendant within Erie County sufficient to establish that the intent to kill was formed in Erie County. The jury's finding of geographical jurisdiction to prosecute the murder charge in Erie County is fairly and reasonably inferred from all the facts and circumstances and is supported by a preponderance of the **evidence** (see, Matter of Steingut v Gold, 42 NY2d 311).

DEFENDANT'S MOTION TO SUPPRESS **EVIDENCE** FOUND IN THE VAN

[7] Defendant's motion to **[***20]** suppress **evidence** found during a **[*445]** police

search of his van was properly denied. The testimony of the officers, as developed at a suppression hearing, was that defendant's wife identified the blue ban discovered in a supermarket parking lot as "our van", executed a waiver form, which described the van as belonging to her and her husband, and gave her consent to search the van. This testimony supports the court's determination that the officers reasonably relied upon Mrs. Seifert"s representations of joint ownership to search the van (see, Peiole v Adams, 53 NY2d 1, 8-10, cert denied454 US 854). Although Mrs. Seifert testified at the suppression hearing that she told officers that the van belonged to her husband and that she lacked authority to consent to a search, the court found her testimony to be unworthy of belief. The court's determination of the credibility of **witnesses** should be accorded great weight (see, People v Rucker, 144 AD2d 943, lv denied 73 NY2d 926).

FAIR TRIAL

[8] Defendant also argues that he did not receive a fair trial. His first contention is that the jury erroneously considered the testimony of the serological **expert**concerning his analysis **[***21]** of wood chips and fibers taken from defendant's van. Defendant claims that the wood chips and fibers were not admitted into**evidence.** Athough the court refused to admit the samples into **evidence** at the conclusion of the **witness'** testimony, defense counsel did not move to have the testimony stricken. Moreover, during jury deliberations, when the jury requested that this testimony be reread to them, defense counsel did not object. Therefore, defendant has failed to preserve this issue for review (CPL 470.05[2]) and we decline to reach it in the interests of justice.

The remaining issues raised by defendant were no preserved

CIRCUMSTANTIAL EVIDENCE–ENTIRE CASE [1]

There are two types of evidence; namely, direct evidence and circumstantial evidence.

In this case, the People contend that there is circumstantial evidence of the defendant's guilt.

Let me explain what constitutes direct and circumstantial evidence and how they differ.

Direct evidence is evidence of a fact based on a witness's personal knowledge or observation of that fact. A person's guilt of a charged crime may be proven by direct evidence if, standing alone, that evidence satisfies a jury beyond a reasonable doubt of the person's guilt of that crime.[2]

Circumstantial evidence is direct evidence of a fact from which a person may reasonably infer the existence or non-existence of another fact. A person's guilt of a charged crime may be proven by circumstantial evidence, if that evidence, while not directly establishing guilt, gives rise to an inference of guilt beyond a reasonable doubt.[3]

Let me give you an example of the difference between direct evidence and circumstantial evidence.

Suppose that in a trial one of the parties is trying to prove that it was raining on a certain morning. A witness testifies that on that morning she walked to the subway and as she walked she saw rain falling, she felt it striking her face, and she heard it splashing on the sidewalk. That testimony of the witness's perceptions would be direct evidence that it rained on that morning.

Suppose, on the other hand, the witness testified that it was clear as she walked to the subway, that she went into the subway and got on the

train and that while she was on the train, she saw passengers come in at one station after another carrying wet umbrellas and wearing wet clothes and raincoats. That testimony constitutes direct evidence of what the witness observed. And because an inference that it was raining in the area would flow naturally, reasonably, and logically from that direct evidence, the witness's testimony would constitute circumstantial evidence that it was raining in the area.

The law draws no distinction between circumstantial evidence and direct evidence in terms of weight or importance. Either type of evidence may be enough to establish guilt beyond a reasonable doubt, depending on the facts of the case as the jury finds them to be.[4]

Because circumstantial evidence requires the drawing of inferences, I will explain the process involved in analyzing that evidence and what you must do before you may return a verdict of guilty based solely on circumstantial evidence.

Initially, you must decide, on the basis of all of the evidence, what facts, if any, have been proven. Any facts upon which an inference of guilt can be drawn must be proven beyond a reasonable doubt.[5]

After you have determined what facts, if any, have been proven beyond a reasonable doubt, then you must decide what inferences, if any, can be drawn from those facts.

Before you may draw an inference of guilt, however, that inference must be the only one that can fairly and reasonably be drawn from the facts, it must be consistent with the proven facts, and it must flow naturally, reasonably, and logically from them.[6]

Again, it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence.[7]

If there is a reasonable hypothesis from the proven facts consistent with the defendant's innocence, then you must find the defendant not

guilty.[8]

If the only reasonable inference you find is that the defendant is guilty of a charged crime, and that inference is established beyond reasonable doubt, then you must find the defendant guilty of that crime.[9]

1. The following charge does not use the words "moral certainty" which are no longer required in this state. In the words of the Court of Appeals:

> "While it is not necessary that the words 'moral certainty' be used, when the evidence is circumstantial the jury should be instructed in substance that it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence." *People v Sanchez*, 61 NY2d 1022, 1024 (1984); *People v Ford*, 66 NY2d 428, 441-443 (1985). *See also People v Gonzalez*, 54 NY2d 729 (1981).

2. *See People v Bretagna*, 298 N.Y. 323, 325 (1949).

3. *See People v Bretagna, supra; People v Roldan,* 211 A.D.2d 366, 368-369 (1st Dept. 1995), *aff'd* 88 N.Y.2d 826 (1996); *People v Marin*, 102 A.D.2d 14, 26-27 (2d Dept. 1984), *aff'd* 65 N.Y.2d 741 (1985); *People v Vitalis*, 67 A.D.2d 498, 503 (2d Dept. 1979).

4. *See People* v Benzinger, 36 N.Y.2d 29, 31-32 (1974); *People v Cleague*, 22 N.Y.2d 363, 367 (1968).

5. *See People v Cleague, supra*, 22 N.Y.2d, at 365-366.

6. *See People v Benzinger, supra*, 36 N.Y.2d, at 32.

7. *See People v Sanchez*, 61 N.Y.2d 1022, 1024 (1984).

8. *See People v Morris*, 36 N.Y.2d 877 (1975).

9. *See People v Kennedy*, 47 N.Y.2d 196 (1979).