*30 Misc. 3d 1228A, *; 926 N.Y.S.2d 345, **;*
*2011 N.Y. Misc. LEXIS 526, ***; 2011 NY Slip Op 50262U*

The People of the State of New York against Sherman Adams, Defendant.

7581/99

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

30 Misc. 3d 1228A; 926 N.Y.S.2d 345; 2011 N.Y. Misc. LEXIS 526; 2011 NY Slip Op 50262U

February 25, 2011, Decided

CORE TERMS: jacket, particle, fabric, weapon, tin, gun, shooting, contamination, floor, lab, shooter, testing, gunshot residue, wearing, fired, cross-examination, tested, clothing, laboratory, microscope, primer, ammunition, forensic, precinct, firing, shot, expert witnesses, supplemental, ineffective, handling

COUNSEL: **[***1]** For Defendant: Sandback and Michelen, (Oscar Michelen, of counsel).

For People: New York County District Attorney Cyrus R. Vance Jr., (Steven Nuzzi and Peter Casolaro, of counsel).

JUDGES: Daniel P. Conviser, A.J.S.C.

OPINION BY: Daniel P. Conviser

OPINION

Daniel P. Conviser, J.

Introduction

Defendant moves pursuant to CPL 440.10 (1) (f), (g) & (h) to set aside a judgment rendered in 2003 which resulted from a jury verdict convicting the Defendant of two counts of Murder in the First Degree and other charges. For the reasons stated below, Defendant's motion is denied in all respects.

The Defendant contends that the alleged recantation of one visual observation which was

testified to by one of the People's **witnesses** at trial, Robert Davis, requires that Defendant's conviction be set-aside and a new trial ordered. Defendant also contends that his conviction should be set-aside because of the allegedly ineffective manner in which his trial counsel, Robert Walters, handled **gunshot residue evidence** ("GSR") introduced by the People at trial. The People contend that Defendant's motion is procedurally barred and also oppose the motion on the merits. For the reasons stated below, the Court holds that Defendant's motion is not **[***2]** procedurally barred with the exception of one claim which was raised for the first time in Defendant's Reply Affirmation which the Court finds should be barred on procedural grounds. The Court does find, however, that Defendant's motion should be denied on the merits.

Procedural History

This case has a long, tangled and unfortunate procedural history which the Court has attempted to summarize here. On May 21, 2003 the Defendant was convicted after a jury trial (hereinafter "Trial 3") of two counts of Murder in the First Degree, two counts of Murder in the Second Degree, one count of Attempted Murder in the Second Degree, one count of Criminal Possession of a Weapon in the Second Degree and one count of Criminal Possession of a Weapon in the Third Degree. The facts underlying these convictions are outlined in detail *infra*. Briefly, the jury convicted the Defendant based on **evidence** that he, along with an unapprehended co-defendant, shot at four victims in a car on West 26th Street in Manhattan in the early morning hours of September 13, 1999, killing two victims and seriously injuring a third. The shootings followed an altercation which one of the decedents, Marcus McLaughlin, had apparently **[***3]** had with a group of black males at a nightclub earlier in the evening.

Justice Edwin Torres, who retired from the bench at the end of 2007, presided over this third trial. The conviction followed two earlier mistrials in which each jury was unable to agree on a unanimous verdict. Trial No. 1 was conducted before Justice Bruce Allen and resulted in a mistrial on April 21, 2001. Trial #2 was conducted before Justice Richard Carruthers and resulted in mistrial on October 30, 2002. On July 9, 2003 the Defendant was sentenced to a term of life imprisonment with no possibility for parole on each of the two counts of Murder in the First Degree. Those two life without parole sentences were order to run consecutively. He was given lesser sentences on his remaining convictions.

As part of the Defendant's original motion requesting post-judgment relief dated June 27, 2006 he moved pursuant to CPL 440.20 (1) before Justice Torres to set aside the sentences. The People conceded that the sentences pertaining to the counts of Murder in the First Degree were required to run concurrently with one another and on August 2, 2007 Justice Torres re-sentenced the Defendant accordingly. In his original motion **[***4]** the Defendant also asserted that he was denied the effective assistance of counsel when his trial counsel, Robert Walters, failed to convey a plea offer that would have resulted in the Defendant receiving a 15-year term of incarceration to cover all the charges in the indictment. Mr. Walters represented the Defendant at Trials 1, 2, and 3.

In an affirmation submitted with this original motion Mr. Walters said that at the conclusion of Trial 1, he counseled the Defendant to not engage in plea bargaining subsequent to having spoken to some of the jurors who heard the matter who informed him that they "were strongly aligned in favor of acquittal, either 11-to-1 or 10-to-2" [1] After Trial 2 Mr. Walters said that he was informed by the jurors who heard the case that they were divided

7-to-5 in favor of conviction. Although he informed the Defendant of this, according to Mr. Walters, he did not advise the Defendant to consider plea negotiations because he believed that the Defendant would ultimately be acquitted. [2]

FOOTNOTES

1 *See* Walters Affirmation, attached to Defendant's original post-judgment motion, May 31, 2006, ¶ 3.

2 Id, ¶ 4.

Mr. Walters stated that shortly after Trial 2 he had been contacted by **[***5]** the prosecutor on the case, Assistant District Attorney James Rodriguez, who conveyed a plea offer to an unspecified charge that would have resulted in the Defendant receiving a sentence of 15 years. The offer was contingent upon the Defendant agreeing to accept it prior to Mr. Rodriguez's imminent departure from the District Attorney's office. Mr. Walters in his affirmation said that he did not convey the offer to the Defendant until after Mr. Rodriguez had left the District Attorney's office. The Defendant "expressed interest" [3] in the offer prior to the commencement of Trial 3. An affirmation of the Defendant (hereinafter the "Adams Affirmation") annexed to Mr. Zeno's motion asserts that he would have accepted the offer had it been conveyed to him in timely fashion. [4] The Defendant cited the use of **gunshot residue** (GSR) **evidence** at Trial 2 which was not available during Trial 1 as a significant factor hindering, from his perspective, the likelihood of a future acquittal.

FOOTNOTES

3 Id., ¶ 7.

4 Adams Affidavit, ¶ 10.

In response to Mr. Zeno's original motion, ADA Peter Casolaro submitted an Affirmation in Opposition and accompanying Memorandum of Law. Annexed to the People's response was an Affirmation **[***6]** from James Rodriguez, the prosecutor at Trials 1 and 2, and an Affirmation from ADA Steven Nuzzi, who, in addition to appearing before this Court on the instant application with ADA Casolaro, was the prosecuting attorney at Trial 3. Mr. Rodriguez stated in his Affirmation that he never extended an offer of a plea to a lesser charge with a sentence of 15 years incarceration. The only offer which Mr. Rodriquez said that he had extended to the Defendant, subject to certain conditions, was an indeterminate term of incarceration of 25 years to life imprisonment. Mr. Rodriguez stated that Mr. Walters did not respond to this offer. [5] According to Mr. Nuzzi, at no time through the conclusion of Trial 3 was he contacted by Mr. Walters to discuss a possible resolution to the matter, nor was he ever asked by Mr. Walters about the 15-year offer purportedly made by Mr. Rodriguez.

FOOTNOTES

5 *See* Rodriquez Affirmation., ¶5.

On July 19, 2007 the Defendant, through Mr. Zeno, submitted a supplemental motion, dated July 16, 2007. The same motion was subsequently refiled (as discussed *infra*) on February 18, 2010. This motion (hereinafter referred to as the "Supplemental Motion" or the "Instant Motion") is the subject **[***7]** of this Court's instant decision. The Instant Motion asserts that the Defendant's conviction should be vacated because a prosecution **witness,** Mr. Robert Davis, recanted his testimony. Mr. Davis's recantation was memorialized in an Affidavit dated February 16, 2007 (hereinafter the "Davis Affidavit"). As discussed more fully *infra*, Mr. Davis provided trial testimony corroborating the testimony of other prosecution **witnesses** with respect to the chase of the Defendant by the police subsequent to the shooting. Defendant's Instant Motion also asserts that he was denied the effective assistance of counsel at Trial 3 because of the manner in which his trial counsel handled GSR **evidence** found on the Defendant's jacket.

Justice Torres conducted a hearing on these matters on July 17, 2007 and August 2, 2007. He issued a brief written decision on December 10, 2007 denying the Defendant's initial motion with respect to his counsel's alleged failure to extend the People's proferred plea offer. Defendant's counsel, Mr. Zeno, subsequently indicated that the Court never informed him of this decision but that he subsequently learned about it. Justice Torres, however, did not render any decision on the **[***8]** Defendant's Supplemental Motion which was filed on July 19, 2007 (the one which is now the subject of the instant opinion). Justice Torres retired from the bench at the end of 2007. He did not address the Supplemental Motion before his retirement, nor is there any indication that this motion was ever transferred to any other Court for decision. The Defendant re-filed his motion, again through Mr. Zeno, on February 18, 2010. The motion was then assigned to this Court because this Court was responsible for handling unassigned post-judgment motions at the time. During the 2 years and 7 months between the time the Supplemental Motion was filed and the time it was re-filed and assigned to this Court, the People did not respond to Defendant's Supplemental Motion.

During that time period, according to the Defendant, the Appellate Division denied his application to appeal the denial by Justice Torres of his original 440.10 motion concerning the alleged failure to convey the People's 15 year plea offer. Defendant's original counsel Mr. Zeno submitted affirmations with the Appellate Division, First Department dated May 12, 2008 and May 11, 2009 requesting an enlargement of time to perfect the **[***9]** Defendant's direct appeal until after the Supplemental Motion had been decided. Mr. Zeno also wrote a letter to the Defendant on February 1, 2008 about the matter. The letter indicates that Mr. Zeno was anticipating a response from the People to his Supplemental Motion. Subsequent to Mr. Zeno's re-filing of his motion the Defendant retained Mr. Michelen, who is his current attorney. The Supplemental Motion made by Mr. Zeno on Defendant's behalf was then adopted by Mr. Michelen.

Subsequent to adjournments for administrative reasons, both parties were afforded the opportunity to make written submissions. The People submitted an affirmation and memorandum of law opposing the Defendant's Supplemental Motion on August 10, 2010, a little more than three years after the Defendant's motion was filed. Defendant's new counsel, Mr. Michelen replied on September 22, 2010 and this Court conducted a hearing between September 27, 2010 and September 30, 2010. The Defendant called three **witnesses:** Mr. Robert Walters (Defendant's trial counsel), Mr. Robert Davis (the recantation **witness)**, and Dr. Thomas Kubic (a GSR **expert** who had been consulted by Mr.

Walters during Defendant's third trial). The People **[***10]** called Mr. James Rice, a retired detective who was present at an interview of Mr. Davis by the District Attorney's office.

Facts of Underlying Incident

As noted *supra*, this case involved a shooting of four individuals in a car in the early morning hours of September 13, 1999: Shane Kerr, Lendell Kerr (his brother), Marcus McLaughlin and Zenobia Penn. Prior to the shooting, these four individuals had been spending an evening at the Tunnel nightclub in New York County. Mr. McLaughlin was a friend of the two brothers and Ms. Penn's boyfriend. Ms. Penn testified about some apparent hostility which arose between Mr. McLaughlin and a group of males outside the club after a bomb scare forced the evacuation of the club around 12:45 A.M. This involved a group of males exchanging looks with Mr. McLaughlin and backing up as if in anticipation of a conflict. She recalled that there were about six men wearing white colored clothing and a "lot of Coogi sweaters". [6]

FOOTNOTES

6 Trial 3 Transcript, (hereafter "Tr")., p. 1193, l. 5.

Anticipating a physical altercation, Ms. Penn left the club to go sleep in the vehicle of a friend who drove her and her boyfriend to the club. Ms. Penn and Mr. McLaughlin were visiting **[***11]** from Baltimore and planned on returning home by taking a bus departing at 3:45 A.M. on September 13, 1999 after having missed an earlier train. Ms. Penn was awakened by Mr. McLaughlin in the early morning hours of September 13, 1999. The two of them proceeded to wait for Lendell Kerr inside his vehicle. Mr. Kerr was planning to drive them to the bus station. Shane Kerr recalled an incident before the four drove away in which Mr. McLaughlin noticed some black males looking at Ms. Penn, and remarked that he wondered why they were looking at her. In response to an inquiry by Shane Kerr as to whether Mr. McLaughlin had a problem with the men, Mr. McLaughlin replied, according to Mr. Kerr's recollection "its not about nothing". [7] Mr. Kerr described the men as wearing "Coogi sweaters, white t-shirts, jean suits". [8]

FOOTNOTES

7 Tr., p. 984, ll. 10-11.

8 Tr., p. 985, ll. 2-3.

After leaving the club Lendell Kerr proceeded to drive his vehicle, a green Mercury Sable, on to West 26th Street. Shane Kerr was seated in the front passenger seat, Mr. McLaughlin was seated in the rear driver side seat and Ms. Penn was seated in the rear passenger side seat. A white vehicle pulled up adjacent to the vehicle driven **[***12]** by Lendell Kerr. Ms. Penn stated that there were approximately three passengers in the other vehicle and that they appeared to be looking into the Mercury Sable as both cars proceeded down the street. Mr. McLaughlin stated that the individuals in the other vehicle were the ones with whom the confrontation had occurred at the club.

As the vehicles approached a stop light Mr. Kerr was cut off by the driver of the white vehicle. At that point two individuals exited the white vehicle and proceeded to fire **gunshots** into the Sable. Shane Kerr and Ms. Penn ducked down to avoid the gunfire. Lendell Kerr informed his brother that he had been hit by the gunfire and that he was unable to feel his hands or his legs. Once the shooting ceased Shane Kerr, who had been grazed in the back by a bullet, exited the vehicle. Ms. Penn was shot in the jaw, arm and leg and taken to the hospital. Messrs. McLaughlin and Lendell Kerr died as a result of **gunshot** wounds sustained by each man. Mr. Lendell Kerr had been shot 5 times and Mr. McLaughlin had fourteen bullet wounds, although testimony indicated some of those could have been caused by fragmented bullets. Shane Kerr stated that the individual he observed **[***13]** shooting from the driver's side of the vehicle was wearing a multi-colored "Coogi" sweater. The individual he observed shooting from the passenger side of the Sable, he also said, had been wearing a white t-shirt. He acknowledged that "Everything happened so quick. I can't sit up here and say it was one millisecond, two seconds. . ." [9]

FOOTNOTES

[9] Tr., p. 988, ll. 23-24.

Ms. Penn initially testified that the men who shot into the car wore dark clothes, but then on cross-examination admitted that she had not been wearing her glasses at the time, was groggy, was not sure what the shooters had been wearing and that her description of dark clothing might have been a silhouette. Later in the hospital, Ms. Penn talked to a friend who had been at the Tunnel nightclub on the morning of the shooting, Patrick Mitchell, and was told by him that Mr. McLaughlin had gotten into a fight at the club on the morning of the shooting.

Officers Anselmo and Polstein at the time were in an unmarked police van with a civilian named Sahil Azziz who had informed the police that a person had earlier entered the deli he worked at, stolen candy and tried to sell him a gun. The officers and Mr. Azziz were looking for the person **[***14]** whom Mr. Azziz said had committed those crimes. Officer Anselmo, the driver of the police vehicle, said that as the van approached 10th Avenue after traveling on West 27th street and was turning left on 10th Avenue he heard popping noises. As he traveled south on Tenth Avenue, against the flow of traffic, he observed two black males firing handguns into a vehicle on West 26th Street. The individual firing into the driver's side of the green vehicle was wearing dark clothes and a black hat. The individual shooting into the passenger's side was also wearing dark clothing without a hat.

Defense **witness,** Mr. Syed Rahmen, stated that he observed the white vehicle pull in front of the Sable. He said two black males exited the white vehicle and proceeded to shoot into the Sable. A third man who remained in the car also shot into the Sable. He said one of the shooters was wearing a white t-shirt and that both were tall. He initially said the shooter without the white t-shirt was "like six feet tall" but then said, in response to whether the shooters were both six feet tall: "Yes, something. Exactly I don't know, I'm thinking maybe something like that". [10] Mr. Sahil Aziz (who was in the police **[***15]** van canvassing with the police) stated that the person who shot into the driver's side of the victim's car was black, wearing dark jeans, a dark coat and a hat. (The testimony of Mr. Azziz at the second trial was read to the jury at the third trial because Mr. Azziz was out of the country during the third trial).

FOOTNOTES

[10] Tr., p. 1669, ll. 20-21.

Officers Anselmo and Polstein testified that the shooters then proceeded to run towards the police van. When Officer Anselmo exited his vehicle he said, he drew his gun and ordered the shooters to stop. The individual closest to Officer Anselmo, the one wearing the hat and later identified as the Defendant, pointed his gun towards the officers. Officer Anselmo fired his weapon and said the Defendant fell, got back up and continued running. Officer Anselmo fired five times and Officer Polstein fired twice. Officer Anselmo pursued both shooters. Officer Polstein at this point fell and injured himself.

The Defendant fled along West 26th Street across 9th Avenue into a nearby housing project. During the pursuit, Officer Anselmo testified, he lost sight of the Defendant for two seconds. Noraime Torres, a resident of a building on West 26th Street, after **[***16]** hearing shots saw two men wearing dark clothing being pursued by a police officer. She said that one of the men wore a "black or navy blue or some type of dark t-shirt". [11]

FOOTNOTES

[11] Tr., p. 951, ll. 15-16.

Officer Anselmo observed both suspects under a floodlight. The suspect without the hat was making a tugging motion to the male with the hat who was pulling a jacket down. Officer Anselmo then saw something get thrown over a fence. When he later went back to the scene where he observed that, he recovered a black denim jacket which was "right over the fence" [12] in a grassy area. Mr. Azziz identified the jacket as belonging to the man who had fired into the driver's side of the car. Officer Anselmo lost sight of the man without the hat. The chase of the man with the hat continued and the Defendant eventually began jogging and then walking on Tenth Avenue, off West 27th Street. At this point, Officer DiCarlantonio drove up and Officer Anselmo identified the Defendant to Officer DiCarlantonio who placed the Defendant under arrest. Officer DiCarlantonio described the Defendant as a male black, wearing a dark shirt, dark pants and a baseball cap. The Defendant initially failed to stop in response **[***17]** to ten commands which Officer DiCarlantonio testified he gave him. Officer Anselmo identified the individual detained by Officer DiCarlantonio, the Defendant, as the same individual he had been chasing. Officer Polstein was able to corroborate that the Defendant was the same man whom he had seen at the time of the initial shooting only to the extent that he was a black man wearing dark clothing. The Defendant was then treated for three **gunshot** wounds. Two guns were recovered from the scene, a 9 mm Glock pistol and a .40 caliber Glock semi-automatic pistol. DNA tests indicated that blood on the jacket recovered at the scene belonged to the Defendant.

FOOTNOTES

[12] Tr., p. 435, l. 4.

Mr. Robert Davis, the recantation **witness** with respect to the Instant Motion, testified at the first and second trials. His testimony was introduced into**evidence** at the third trial, over the objection of the Defendant, under Article 670 of the Criminal Procedure Law. The People presented **evidence** at a hearing that the **witness** had absconded from his parole supervision and could not be located. At the time of the shooting, Mr. Davis lived in an apartment overlooking the area where Officer Anselmo testified he chased the **[***18]** Defendant. Mr. Davis did not see the actual shooting of the civilian victims but did corroborate much of the account given by Officer Anselmo about his chase of the Defendant. Mr. Davis said he saw two individuals being pursued by a police officer who were black and wearing black clothing. He said that he saw one of the individuals was firing at the police officer as the individual ran. He also said that he later saw an individual struggling to take his jacket off but was not sure if this was one of the same men he had earlier seen running from the police officer. He saw that this man wore dark clothing but could not tell his race.

As discussed in more detail *infra*, the denim jacket was tested at the FBI laboratory and found to contain **gunshot residue evidence** (hereafter "GSR"). The People presented two **expert witnesses** at trial who had analyzed this **evidence** and offered opinions about it: Cathleen Lunde [13] and Alfred Schwoeble. Since the handling of this GSR **evidence** is the subject of Defendant's ineffective assistance of counsel motion, the testimony of these two **witnesses** is recounted in detail here.

FOOTNOTES

13 Ms. Lunde's name was referenced throughout the trial and post-judgment proceedings **[***19]** in this case. Transcripts of the proceedings spell her name "Lunde", "Lundy", and "Lunday". This decision will use the spelling "Lunde" based on the spelling that appears to have been provided to the court reporter at the time she took the stand on May 5, 2003.

Expert Testimony of Cathleen Lunde

(Direct, Volume II of trial testimony-pp. 796-884; Cross, pp. 884-920).

Cathleen Lunde testified that during 2001 she was employed as a member of the materials analysis unit of the FBI laboratory where she had been working since January of 1986. As part of her work Ms. Lunde performed comparative bullet lead analysis as well as **gunshot** primer **residue** analysis. She said that she resigned from her position at the FBI laboratory on April 24, 2003 because of testimony she had provided in a case unrelated to the instant matter. In that unrelated case, she said, she testified at a pre-trial hearing, found out information she testified to was incorrect and did not correct her own error at a subsequent pre-trial hearing at which she also testified. She said that she later corrected the information when she testified at trial and brought the issue to the attention of her supervisor. Upon further investigation **[***20]** of the incident Ms. Lunde was given the option to either resign or be fired. Though Ms. Lunde stated that she truthfully answered questions at the trial of the unrelated case, she also stated that a misdemeanor charge in Kentucky was pending against her at the time of her testimony in the instant matter. She described comparative bullet lead analysis as the process of determining whether cartridges or expended bullets had been manufactured by the same manufacturer at the same time. With respect to GSR analysis Ms Lunde testified:[A]ny time a firearm is discharged, there's a

whole variety of material that is admitted from the firearm, and this is because of the way a shell works, a projectile. It's made up of a primer cup, which has an explosive in it and in the shell casing itself, there's powder and a bullet, that's loaded on the end. And when a firearm weapon strikes the primer cup it causes to detonate or explode. And the explosion starts the gun powder burning? And as the powder burns, gas is built up in the cartridge case behind the bullet, and eventually the pressure of these gases forces the bullets out of the cartridge case and down the barrel and out the muzzle of the gun. **[***21]** And there would be vaporized material and particular materials not completely vaporized that is released into the atmosphere around the discharging firearm. And that could be on, land on a shooter's hands, face, clothing or it could land on anyone standing close to the shooter, which in some cases can include a victim, if someone is shot at close range. [14]

FOOTNOTES

14 Tr., p. 804, ll. 3-21.

Ms. Lunde received a B.S. in Metallurgy from Pennsylvania State University and then began working at the FBI laboratory where she received daily on-the-job training from other experienced chemists and examiners. Ms. Lunde took courses in atomic absorption instrumentation offered by the FBI Academy and scanning electron microscopy offered at a local university. She also took courses offered by the manufacturers of tools used at the lab and visited various manufacturers. Ms. Lunde estimated that she had been assigned to approximately 300 cases while working at the FBI lab.

Ms. Lunde testified that included in the data maintained by the FBI's database on bullet lead analysis was information concerning Remington Peters and Sphere ammunition. She said she had been qualified to testify as an **expert** in the area of **[***22]** bullet lead analysis approximately 75 times in various jurisdictions and had only been denied **expert** qualification one time due to her inexperience. Since 1996 Ms. Lunde said she had always qualified as an **expert witness** and that she was so qualified approximately 80 times since the one denial. With respect to analyzing **gunshot residue** from clothing Ms. Lunde stated she had performed such work "probably somewhere between one and two dozen times". [15]

FOOTNOTES

15 Id., p. 809, ll. 24-25.

Prior to being qualified as an **expert** Mr. Walters conducted a voire dire of Ms. Lunde. The **witness** was unable to verify whether any of the earlier cases she worked on was being reviewed, but she did admit that she had been placed on administrative leave. When confronted about the existence of a case in Colorado dealing with the same subject matter as the Kentucky case Ms. Lunde stated that it was possible that such a case was being reviewed. Over defense objection, specifically to Ms. Lunde being qualified as an **expert** in the field of bullet lead comparative analysis, the Court qualified her as an **expert** in that field as well as in the field of **gunshot** primer **residue** analysis. Ms. Lunde stated that the FBI laboratory **[***23]** was accredited by the American Society of Crime Laboratory

Directors board. Ms. Lunde was tested yearly under a peer review process for proficiency with respect to both **gunshot residue** and bullet lead comparison. She prepared a report in this case which was subject to the peer review process prior to its issuance. Ms. Lunde explained to the jury how she examined **gunshot** primer **residue** through an electron microscope.

Ms. Lunde said that primer exists inside the case of the cartridge. She stated that it is "a small metal top and it's basically a mixture and can either end up looking like play-do or like a wet gritty sand, but basically what it is, is a small amount of explosives." [16] She went on to explain that the purpose served by the primer was to initiate the burning of the gunpowder which in turn caused a build up of pressure of gases in the cartridge propelling the bullet out of the barrel, and that the scientific term for the cloud that forms as a result of the primer explosion is "plume". **Gunshot** primer **residue** is what can be found on the hands of an individual who has fired a weapon. **Residue** will be found on the muzzle of a gun and if the object being shot at is close enough, **[***24] residue** may also be found on it. Ms. Lunde stated that the "play-do" substance referred to above could reach a temperature of approximately two thousand degrees Fahrenheit, after which a vaporizing process cools and condenses the gases into particles. With respect to ammunition manufactured by Remington Peters, Ms. Lunde stated that tin was not used in the manufacturing of their bullets.

FOOTNOTES

16 Id., p. 821, ll. 11-15.

The main components of this play-do-like material are lead stifling (an explosive), sulfides which act as a fuel, and barium nitrates which keep the fuel burning. Ms. Lunde stated that, due the high temperature, a portion of the cartridge case itself or the heel of the bullet may be ejected with the primer **residue.** Further, oils or **residue** from prior discharges of the weapon might also be found in the mix if the weapon had not been cleaned. With respect to the weapon at issue in this case Ms. Lunde testified that the shell casing would come out of the top of the weapon and fall to the right, the same direction that the plume or **residue** would move in.

Regarding the testing of clothing, Ms. Lunde stated that the item to be tested would be taken to a room where no other firearm **[***25]** examinations are taking place and placed on a table previously cleaned with a detergent. A barrier between the item and the table is created by layers of paper. After samples of the portion of the clothing to be tested are taken they are then examined under the microscope which provides a computer-generated report.

Ms. Lunde stated that **gunshot** primer particles on clothing would tend to remain there unless an externality like windy air caused them to be dislodged. She also pointed out that the type of clothing impacted the likelihood that particles would adhere to the garment. A coarse fiber (i.e. cotton) would more likely have particles cling to it than say nylon. Though the amount of **residue** likely to be found on clothing increases with the number of times a weapon is fired, Ms. Lunde indicated that there is an upper limit where the firing of additional shots would not result in more **residue** adhering to the item of clothing. The particles which are measured in the analysis are generally about one micron in diameter

which is one millionth of a meter.

When shown the black denim jacket alleged to have been worn by the Defendant during the shooting Ms. Lunde testified that she had conducted **[***26]** testing on it. She also stated that she tested three spent cartridge casings and another gun. Ms. Lunde said she received the jacket in a sealed plastic bag. When the jacket was not being tested it remained in this plastic bag and while in the custody of the lab would be stored in an **evidence** locker. At the time she received the bag containing the jacket Ms. Lunde testified that it was sealed. Ms. Lunde stated that the jacket, received on May 14, 2001, was the first piece of **evidence** provided to her in connection with this case.

Ms. Lunde testified that it was important not to have an item of clothing being tested for GSR and a gun or expended ammunition out at the same time and said such items would be in sealed packages if they were kept in a locker. At the time she tested the jacket Ms. Lunde did not have either of the two firearms that were subsequently tested. She stated that she took a total of 13 samples from the jacket. The first nine samples were taken on August 3, 2001 from the right and left cuff, the right and left pockets, the right and left chest area, and the collar. She said the jacket was tested on a cleaned table using a paper barrier and then dabbed with adhesive **[***27]** tape to attempt to pick up GSR particles. Ms. Lunde stated she would repeat the process of pressing the dabber on the fabric until she felt it lose its "stickiness". Once a sample was taken, the **witness** labeled it and placed the sample in a container.

On September 19th the **witness** stated that she took four samples: one from each of the lower left and right front areas of the jacket and the right and left sleeves of the jacket. The **witness** identified the 13 samples taken in court and they were introduced into **evidence.** On voire dire by Mr. Walters the **witness**acknowledged that she did not memorialize her testing of the jacket by video or audio tape.

Of the initial nine samples taken in August, the **witness** said they contained particles which are components of **gunshot residue** including lead, barium and antimony. She also found particles of tin "which is not something that is commonly found in **gunshot residue**, produced by the discharge of American made ammunition." [17] Ms. Lunde stated that she contacted Remington Peters and PMC Eldorado (who referred her to CCI-the company that manufactured PMC's primer mixes), the manufacturers of the specimens tested, and they verified that tin was not **[***28]** a component used in their respective cartridge cases or primers. On September 10, 2001 Ms. Lunde submitted for analysis three cartridge cases she had received from the District Attorney's office. Each was representative of the type of ammunition that had been fired in connection with this case. After analyzing the samples, Ms. Lunde concluded that there was no source of tin in any of the three cartridges. The samples were then resealed and returned to an **evidence** locker.

FOOTNOTES

[17] Id., p. 851, ll. 11-13.

On October 4, 2001 the two weapons alleged to have been used in the shooting were received by the FBI laboratory and remained in a sealed condition at the**evidence** control

center until they were picked up by Ms. Lunde on October 9, 2001 and placed in an **evidence** locker. One weapon was a 9 mm Glock and the other weapon was a .40 caliber semiautomatic handgun. Ms. Lunde testified that she tested the weapons on November 16, 2001. Ms. Lunde explained that particles were removed from the guns by using adhesive tape to take samples from the guns' muzzles and ejection ports.

In order to eliminate contamination from one gun to the other Ms. Lunde said she tested them one at a time, making sure that she **[***29]** was working on a clean surface. She also put the first gun tested away and "removed anything associated with" that weapon prior to setting up a clean area for the testing of the other weapon. The samples taken were then analyzed using the electron microscope. With respect to the .40 caliber weapon Ms. Lunde found, as expected,**residue** of lead, rust, barium, antimony, copper, zinc and aluminum. She did not find any tin on this weapon. However, with respect to the 9 mm Glock, in addition to the particles she expected to find, there was "a significant amount of tin" [18] The samples taken from the barrels of each weapon were preserved. After that, she obtained representative samples of the three kinds of ammunition which had been fired in this case. No source of tin was found in any of these representative samples. She then made telephone calls to two American manufacturers of the subject ammunition and learned from them that tin was not a component of the ammunition. The final portion of the testing of the weapons required them to be fired to see what kind of particles would be produced from the shooting. Ms. Lunde described how this test firing had been conducted by having a person fire **[***30]** each gun and then having that person's hands tested for GSR. She also described the contamination safeguards which were employed in conducting these tests.

FOOTNOTES

18 Id., p. 858, ll. 19-20.

From the test-firing of the 9mm Glock Ms. Lunde concluded that a significant portion of the particles analyzed by her contained tin. With respect to the .40 caliber semiautomatic weapon, of the 28 particles identified, 2 particles contained tin. Of the 16 particles retrieved from the firing of the Glock, half contained tin. She said the small amount of tin recovered after the test firing of the .40 caliber semiautomatic (where no source of tin had been found in the swabbing of the gun itself) could have resulted from two possibilities. The first was that in her initial examination of the .40 caliber weapon she did not take the weapon completely apart so there may have been a small amount of tin in the weapon which she had not detected. The other possibility was that the test shooter wasn't as thorough as he should have been when he washed his hands between shootings, thereby resulting in some contamination from the test of the 9 mm Glock to the test of the .40 caliber weapon.

Ms. Lunde stated that the significance **[***31]** of discovering the tin from the testing of the weapons, as opposed to the ammunition, is that it permitted her to associate the jacket with the **gunshot residue**. Prior to learning this, the **residue** from the jacket could not have been linked to the shooting because tin was not something the **expert** would have expected to find in conducting GSR testing. After testing the thirteen adhesive lifts and learning that the 9 mm Glock was a potential source of the tin found on the jacket, Ms. Lunde stated that those findings rendered it consistent that the jacket was present in an environment of **gunshot** primer **residue.** She said that the results were consistent with someone either wearing the jacket and firing the gun or handling the gun or being in the

vicinity of someone firing the gun. The People introduced various samplers, samples, charts and reports reflecting Ms. Lunde's work into **evidence.** Ms. Lunde stated that the FBI lab report was peer reviewed by an examiner named Charles A. Peters and that he agreed with her findings.

On cross-examination Ms. Lunde acknowledged that she had recently tendered a letter of resignation to the FBI where she had been employed for 17 years. Prior to tendering **[***32]** her resignation, Ms. Lunde stated that there were other cases she had worked on in which she was prepared to testify, but that she understood that the FBI could not "compel" her to testify in those cases. When asked what she meant by that, she stated that prosecutors had decided not to call her as a **witness** in some cases. When Mr. Walters sought to continue his examination of the **witness,** attacking the FBI lab she had worked at "as a bastion of shoddy science, prosecutorial bias..." [19] he was admonished by the Court and told to move on to another topic.

FOOTNOTES

19 Id., p. 886, ll. 24-25.

At the time that some charges were pending against Ms. Lunde she stated that the FBI lab where she worked had received "publicity". The lab made changes which included receiving accreditation from the American Society of Criminal Lab Directors and either updating or implementing new protocols. When asked whether the science of comparative bullet lead analysis itself had come under attack from the scientific community Ms. Lunde responded that certain individuals had attacked the science, but she could not say whether these individuals represented the scientific community at large.

On cross-examination Ms. Lunde **[***33]** also testified that this case had been the third time she was called to testify regarding GSR and clothing. Questions put to the **witness** about the inadequacy of the physical location in which the laboratory testing was conducted were not allowed by the Court. When she was asked about the manner in which her proficiency was tested, Ms. Lunde admitted that the lab employed an open, as opposed to blind, testing scheme and that she was made aware in advance that she was going to be tested with respect to a particular item. Ms. Lunde was then asked to explain the "Locard exchange principle" to the jury. She stated: Well, the Locard exchange principle has to do with the fact that when any two objects or people come in contact, there will be some sort of transfer that takes place. It could be hairs. It could be fibers. It could be skin cells. It could be something. Whenever there is contact, there is transfer. [20] GSR, Ms. Lunde testified, was subject to this principle. Ms. Lunde acknowledged the potential problems raised by cross-contamination stating it was a concern in working in the lab. She further said that if an item had been contaminated prior to her receiving it for testing she would **[***34]** not be aware of it and the test results could be effected.

FOOTNOTES

20 Id., p. 892, l. 25- p. 893, ll. 1-5.

With regard to the instant matter, Ms. Lunde stated that it was theoretically possible that a

recently discharged weapon picked up by an individual wearing gloves could transfer material which might end up on a subsequently handled jacket by the individual wearing the same gloves. 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. Ms. Lunde was shown a photograph of the jacket recovered in this case on what appeared to be a dirty floor. The following colloquy ensued:
Q: [by Mr. Walters]. . . Had you seen that picture before you started to examine the front of that jacket, wouldn't you have told the District Attorney that this would have no **forensic** value because of the collection process, wouldn't you have told, as an objective scientist, wouldn't you have told that to the District Attorney's Office?

A: I would have had a lot of questions as to where this was — where the jacket was taken where this place was, what kind of environment it was **[***35]** in.
Q: And if they told you that it's in a police muster room where policemen gather for roll call twice a day and perhaps clean their guns . . .

Mr. Nuzzi: Objection, Your Honor.

The Court: Sustained. All of this. Sustained. Don't answer that. The jury will disregard.

Q: Ms. Lunde, what questions would [SIC] have liked the District Attorney to answer?

The Court: Sustained. Don't' answer that. This whole line is out of line. This hypothesizing as to what she would have asked under the circumstances, no, improper. Go to something else.

Q: All right. Ms. Lunde, in this case there were some victims, the victims clothing having bullet holes and the like on the clothing, laid down on that floor.

Mr. Nuzzi: Objection, Your Honor.

The Court: Sustained. It's not for her to characterize, okay, the police investigation under these circumstances. No. I am disallowing it and you have an exception. This whole line I am disallowing.

Mr. Walters: Your Honor, may I ask her a hypothetical?

The Court: You can ask her whatever you like but I have already instructed you that you are to decease [SIC] and desist to try to make her — to try to characterize the nature of the investigation, per se. That's not what she's **[***36]** here for. Why don't you adhere to some of letter [SIC] so called expertise, if you will. You have plenty of room there. All right. That's it. You have an exception.

Q: Madam, your expertise is in **forensics**; correct?

A: Yes.

Q: And part of **forensics** is the collection or proper collection of **evidence;** correct?

A: It's not something that I do on a general basis but I am aware of the proper procedures.

Q: And looking at that jacket and you being aware of proper procedures, what would you say about the procedure that you see in that picture?

The Court: All right. Sustained. Same thing. We're spinning wheels now, counselor.

Mr. Walters: All right. I will move on, Your Honor. [21]

FOOTNOTES

21 Id. p. 904, l. 12- p. 906, l. 25.

With respect to the origin of the tin found in the GSR, Ms. Lunde stated that she did not ask the District Attorney's office to provide the weapons fired by the police officers for testing. Ms. Lunde was not aware of any testing performed on the weapons fired by the police. Ms. Lunde further testified that no samples for testing were taken from the back of the denim jacket although she admitted that GSR might have been found there.

Expert Testimony of Alfred J. Schwoeble

(Direct, Volume III **[***37]** of Trial testimony- pp. 1025-1103; cross- pp. 1103-1137; re-direct- pp. 1137-1139)

Prior to the **witness** taking the stand Mr. Walters argued that Mr. Schwoeble should be precluded from discussing fabric to fabric or garment to garment transfer studies he had conducted because the underlying data supporting Mr. Schwoeble's conclusions about that subject had been provided to the defense only the day before. He argued to Justice Torres that he did not "know what to make of this", that he could not make "heads or tails of this" and that his **expert** would not have the time to analyze it in a timely fashion. The Court denied this request but agreed that the defense would have an overnight recess prior to conducting its cross-examination of the **witness.**

Mr. **[***38]** Schwoeble stated that he was employed by the R.J. Lee Group for the past 18 years as the manager of the **Forensic** Sciences Department. The company is an analytical laboratory consisting of various departments in **forensic** sciences, environmental analysis, general materials analysis, chemistry, software development and litigation. A sister company manufactures electron microscopes. The company is a private concern not connected to law enforcement.

The department managed by the **witness** performed **gunshot** primer and **gunshot** powder testing and the **witness** stated he had lectured on the subject numerous times. Mr. Schwoeble stated that he was the author of a book, Foreign Methods of **Forensic** Analysis of **Gunshot Residue**, published in 2000. He had testified in various state courts as an **expert witness** on approximately 70 prior occasions, 80% of the time as a prosecution **witness** and was never denied**expert** qualification by any court in the area

of **gunshot residue**. He had testified in 13 states. He further stated that he had provided **expert** testimony in the area of **gunshot residue** deposits on skin and clothing approximately 70 times. Mr. Schwoeble was qualified as an **expert** in the field of **gunshot [***39] residue** without objection.

Mr. Schwoeble said that the microscope he used to examine **gunshot residue** was originally designed by his company but that a separate division took over the manufacturing of the microscope. The **witness** stated that it was a state-of-the-art microscope used internationally and in about 37 crime laboratories. When asked to explain the differences between that microscope and the one in use at the FBI lab in 2001, Mr. Schwoeble stated that his company's instrument had a greater sensitivity and an improved particle relocation feature which allowed a flagged component to be placed in the center of the screen for rapid confirmation of **gunshot residue**.

At the time of his testimony Mr. Schwoeble stated that the FBI had purchased one of the microscopes manufactured by his company. The **witness** also said that his company's microscope allowed for a more rapid analysis at a lower cost than the "scan cam" type used by the FBI in 2001. Looking at the same adhesive sample, the **witness** stated, he could potentially find more **gunshot** powder **residue** using his company's microscope over the FBI's. Mr. Schwoeble also said that the dabbers his company used to extract particles from **[***40]** a sample were more effective than those used by the FBI because his instruments retained their adhesive properties for more dabs at a fabric.

Mr. Schwoeble stated that his company had been hired by the District Attorney's office with regard to this matter on May 9, 2002. Expenses paid by the District Attorney's office to R.J. Lee were summarized as follows: $295 per particle extraction sample, $200 per normal sample and $175 per hour for Mr. Schwoeble's testimony plus expenses, travel, meals and lodging. Those expenses are paid to the company and Mr. Schwoeble is paid a salary by the company.

Evidence received for testing by R.J. Lee, Mr. Schwoeble said, was logged in, photocopied and placed in a locked cabinet until ready for analysis. In order to minimize cross-contamination, each sample is examined separately under sterile conditions with testers wearing lab coats and gloves. At no time is more than one sampling exposed. Separate pieces of butcher block paper were placed on the table where each sample was prepared. The protocol of examining one sample at a time was adhered to by the **witness** with respect to each piece of **evidence** he handled in this case. Mr. Schwoeble testified to **[***41]** having received the 13 samples taken by the FBI of the denim jacket alleged to have been worn by the Defendant, three spent cartridge casings, a 9mm firearm, a .40 caliber firearm and the denim jacket itself.

Mr. Schwoeble said the 13 samples and primer material from the three spent cartridge casings were examined with the electron microscope. He said he brushed the barrel and ejection port of both the 9 mm Glock and the .40 caliber weapon. He also said he took samples from the jacket with adhesive from the right sleeve, right side front, left side front and left sleeve and analyzed them with the electron microscope. He said that he had taken four samples of the jacket and analyzed them with the microscope. He said that the testing performed with respect to the three cartridge casings was conducted by using a needle probe and also described the process of taking samples out of the guns and analyzing them

under the microscope. Mr. Schwoeble was handed the 9 mm Glock alleged to have been used in this case and stated that if he were to fire the weapon from in front of his body the shell casing would discharge out over his shoulder and to the right. He said most semiautomatic weapons like **[***42]** the 9 mm would eject the casing to the right. The **gunshot** primer **residue,** he added, would follow the path of the ejected cartridge and the plume would taper off into a three to five foot radius. Mr. Schwoeble hypothesized that if he were wearing a jacket while shooting the firearm 18 times he would probably have **gunshot** primer **residue** all over himself.

With regard to tin as a component of primers, Mr. Schwoeble said that foreign manufacturers used it, but not American manufacturers. He said a study at the University of Lausanne had been performed by Swiss law enforcement agencies to compare the amount of GSR on a person's hands over time between American and foreign made ammunition. He said the differences between the two categories of ammunition was the presence of tin in the foreign made ammunition.

With respect to the testing of a newly police-issued 9mm Glock Mr. Schwoeble stated that no tin was present when such a weapon belonging to a member of the Monroeville Police Department was tested by him. The same was true for a weapon Mr. Schwoeble tested which belonged to an FBI agent. In both instances Mr. Schwoeble collected hand samples from the officers and analyzed them under the **[***43]** electron microscope. As part of the manufacturing process Glock handguns, Mr. Schwoeble stated, were test-fired prior to distribution. The **witness** was, however, unsure whether the weapons were cleaned subsequent to such test-firing.

Mr. Schwoeble said that he was conducting a study "of fabrics and their ability to retain **gunshot residue**". [22] He said that coarser fabrics were more likely to retain GSR. Using as an example a spectrum of nylon as an extremely smooth fabric and wool as a very coarse one, Mr. Schwoeble said denim would be considered to a have a medium to higher retention because of the texture of the weave.

FOOTNOTES

22 Tr., p.1053, ll. 16-18.

With respect to the jacket in this case, Mr. Schwoeble was asked whether the fact that it had been handled several times subsequent to its recovery and taken in and out of the bag in which it was stored would cause it to lose **gunshot residue** assuming the individual wearing the jacket fired the weapon 18 times while holding it in front of him. He said that "depending on the amount of physical activity, such as shaking and violently shaking, you're going to lose more particles than if you just take it out of the bag, look at it and put it back in **[***44]** the bag." [23] Assuming it was just taken in and out of the bag he said he would expect the jacket to have retained some of the **gunshot residue** particles.

FOOTNOTES

23 Tr., p.1054, ll.23-25; p. 1055, l. 1.

Regarding the testing Mr. Schwoeble conducted on the 13 samples originally tested by the FBI, he stated that he retrieved much more **gunshot residue**particles because the microscope he used allowed for higher magnification. Going through his report, computer-generated images of particles and graphs were presented and explained by Mr. Schwoeble. The elements recovered from the particles consisted of chromium, aluminum, silica, lead, sulphur, tin, antimony and barium. Mr. Schwoeble was also able to identify for the jury which images were of samples created by his company as opposed to having been provided by the FBI. With respect to a particle sample taken from inside the 9 mm Glock, Mr. Schwoeble stated that it was composed of lead, antimony, barium and tin. Tin was not present in the particles retrieved from the .40 caliber weapon.

The primer extraction from the three shell casings, two of which were manufactured by Remington Peters and the other by PMC, showed no source of tin. Mr. Schwoeble stated **[***45]** he was aware that both companies' primer composition was American manufactured ammunition. He identified both companies as American firms that did not use tin in the manufacture of their ammunition. After testing the thirteen samples, Mr. Schwoeble concluded that the samples contained **gunshot residue**. Mr. Schwoeble's report included a chart indicating the number of particles under each sample which were consistent with and unique to **gunshot residue**. Samples taken from the 9 mm Glock contained tin while samples taken from the .40 caliber weapon did not contain tin. There was no tin found in any of the shell casings. Mr. Schwoeble re-analyzed the 13 samples taken by the FBI of the jacket and was able to determine whether those samples were consistent with and unique to **gunshot residue**.

Mr. Schwoeble commenced his analysis of the FBI samples on May 11, 2002. He stated that the microscopic testing, depending on the number of particles on the surface, would take a minimum of hour and fifteen minutes and that the process was completely automated. The results obtained by Mr. Schwoeble from testing the FBI samples were charted and introduced into **evidence.** Mr. Schwoeble testified that he was **[***46]** familiar with the type of microscope, referred to as the "cam scan" microscope, used by the FBI in 2001 to originally test the 13 samples. He said that, unlike the microscope he used, the cam scan was unable to test the entire surface area of a given sample.

With respect to the four samples that he had taken from the jacket, Mr. Schwoeble said he found **gunshot residue** on each of them. Mr. Schwoeble then prepared a chart summarizing the results obtained from the testing of those samples along with the re-analysis of the FBI samples, including particle counts and elemental composition. A single chart showing the testing performed by Mr. Schwoeble and the FBI was introduced into **evidence.** A separate chart was introduced compiling the results obtained from Mr. Schwoeble's testing of the two weapons and the three primer cups corresponding to the shell casings. Mr. Walters objected to the introduction of a portion of this **evidence** but the objection was overruled.

Mr. Schwoeble stated that in using the microscope he followed proper protocols set forth in his company's laboratory protocol sheet with respect to both his analysis of the samples and the calibration of the microscope. Prior to the **[***47]** protocol sheet being received into **evidence,** on voire dire by Mr. Walters, the **witness** said he was not sure whether the protocols set forth by R.J. Lee matched those of the International Standards Organization. Mr. Walters also established that R.J. Lee was not accredited by the American Society of Criminal Lab Directors. Mr. Schwoeble noted that the protocols his laboratory followed were

the same ones followed by the FBI and other law enforcement organizations. Mr. Schwoeble testified that particles of tin were present in the 9 mm Glock and that no tin was present in the .40 caliber weapon. He also said there was no tin present in the primer material of any of the three shell casings.

Comparing the samples of the jacket provided by the FBI to those he took himself, Mr. Schwoeble stated that the FBI took multiple samples of the sleeves and front sides of the jacket whereas his covered each sleeve from shoulder to cuff. He also used one sampler for the entire right side of the jacket and another for the entire left side of the jacket. The right sleeve contained 9 particles unique to **gunshot residue** and were "confined in led, antimony and barium and a presence of tin". [24] There were also **[***48]** 36 particles characteristic to **gunshot residue** and a rich population of over 100 lead particles, which Mr. Schwoeble said was normal for a particle population related to **gunshot residue**. Mr. Schwoeble, in similar fashion, proceeded to articulate the type and number of unique, characteristic and lead-rich particles found on the left sleeve and the right and left sides of the jacket. This analysis also indicated the extensive presence of particles unique and characteristic of **gunshot residue** and the presence of lead rich particles. The results from the four samples taken by Mr. Schwoeble were introduced into **evidence.** Using the charts which reflected the FBI lab results, Mr. Schwoeble again testified to the type and number of unique, characteristic and lead-rich particles found from those samples. Mr. Schwoeble then testified about the extensive number of unique, characteristic and lead-rich particles which had been derived from the jacket samples taken by the FBI.

FOOTNOTES

[24] Tr., p. 1082, ll. 14-15. During his testimony, Mr. Schwoeble repeatedly distinguished the particles he found as being "unique" (to **gunshot residue**), "characteristic" (of **gunshot residue**) or "lead rich". He attempted to explain **[***49]** the differences between these types of GSR particles during his testimony. *See* Tr., pp. 1065-1066.

When the FBI samples were combined with those of the four samples gathered by Mr. Schwoeble the results of the quantity and types of particles were as follows:
. . . on the right sleeve we see 22 unique particles, 74 characteristic particles, greater than 266 particles, and additional 400 lead rich particles. On the right side front were 24 unique particles, 94 characteristics particles, greater then (SIC)328 lead rich particles and additional 150 lead rich particles detected. The left side front, 48 unique particles, 74 characteristic particles, greater than 302 lead rich particles, and additional 200 lead rich particles. The left sleeve had 11 unique particles, 69 characteristic particles, greater than 302 lead rich particles, and additional 200 lead rich particles. The left sleeve had 11 unique particles, 69 characteristic particles, greater than 295 lead rich particles and additional 100 particles.

Given a total of 105 unique particles, 311 characteristic particles, 1191 lead rich particles and additional 850 particles detected, and that's the overall particle population on the jacket. **[***50]** [25]
Mr. Schwoeble said that the results of the testing were consistent with an individual firing the 9mm Glock, holding the gun in front of him, while wearing the jacket. He based that conclusion on the presence of "the heavy population of **gunshot residue** related

particles." [26] Mr. Schwoeble said it was possible that the person wearing the jacket could have been right next to someone who fired the weapon. When asked if the person wearing the jacket could have fired the .40 caliber weapon Mr. Schwoeble pointed out that there was no tin found on that weapon.

FOOTNOTES

[25] Tr., p. 1090, l.12-p. 1091, l. 5.

[26] Id., p. 1091, ll. 15-16.

Mr. Schwoeble stated that, in his opinion, a police officer who fired a weapon which had never fired foreign-manufactured ammunition and then handled the jacket involved in this case could not have been the cause of the tin in the samples. He further stated that it was his opinion that the presence of tin came from the Glock. When shown the photograph of the jacket on the floor at the police precinct Mr Schwoeble stated that because most of the area of the jacket tested (i.e. the front) was not in contact with the area making contact with the floor (i.e. the back) the results **[***51]** he obtained would not have been tainted even if **gunshot residue** was present on the floor where the jacket was placed.

Mr. Schwoeble testified about studies he had conducted on GSR transfer. He said these tests involved firing a gun in a closed container with various fabrics and then exposing those fabrics to other fabrics which did not contain GSR under three conditions: casual contact, weighted contact and contact where the donor fabric is rubbed against the recipient fabric to simulate two people in close contact. He said the study also reviewed donor fabrics exposed to GSR which had not been exposed to recipient fabrics to compare these to donor fabrics which had been exposed to recipients. He said the study involved various degrees of fabric coarseness including not only coarse fabrics but fabrics like satin or nylon. He testified that his tests indicated GSR transfers between fabrics of less than 3% and in some cases less than 1%. He explained the difference between the primer **residue** he analyzed in this case and the material which comes out of the muzzle of a gun.

Mr. Schwoeble testified that the test results he found in this case would not have been obtained from a person picking **[***52]** up the Glock, putting it down and then handling the jacket. He further stated that this would be true even if more than one person handled the jacket in the same manner. The number of particles found on the jacket would not have derived from a handling process like that. Each time an object is handled, it could be expected that particles would be lost.

Here, Mr. Schwoeble's opinion was that casual handling of the jacket would not have resulted in the population of **gunshot residue** particles observed in the samples tested. Mr. Schwoeble stated that tin was commonly used to seal the primer cap found in foreign ammunition, but that aluminum or paper was used by American manufacturers for the same purpose because tin contains corrosive properties. Finally, Mr. Schwoeble testified that he had trained personnel from several law enforcement jurisdictions on how to use the scan electron microscope and with respect to collection analysis.

On cross-examination Mr. Schwoeble was confronted with inconsistencies between the number of particles that were found on some of the FBI samples and the number of particles

he found in his own analysis. He explained that Ms. Lunde had done her own testing on **[***53]** the samples at the FBI lab and that once he received the samples he conducted his own independent testing. The charts and other documentation introduced into **evidence** through Mr. Schwoeble demonstrated these separate findings. Mr. Schwoeble acknowledged that Ms. Lunde, after seven hours of analysis using the FBI cam scan, had found no particles on the jacket's left sleeve, left cuff, left shoulder, left front and left pocket areas where his testing showed the presence of particles. Mr. Schwoeble attributed the discrepancies to the use of different microscopes. He stated the microscope he used was a "superior instrument" and added that the microscope used by Ms. Lunde was taken off the market because it could not compete with the one he was using.

Mr. Schwoeble agreed that a sound **forensic** examination of **evidence** ought to be precipitated by the proper collection of **evidence** and be maintained as it is transferred throughout the chain of custody. He admitted to writing as part of his summary in this case that the handling of contaminated weapons or ammunition can contribute to the presence of particles unique to or characteristic of GSR. No test-firing of any weapon was conducted by Mr. **[***54]** Schwoeble. When a weapon is fired the plume primarily escapes from the ejection port although plume will also escape from any available opening in the gun. Mr. Schwoeble further stated that upon discharge of a weapon, plume could travel between three to five feet and that the likelihood of finding plume on the victim of a close-range shooting would be impacted by the presence of a glass or metal object between the victim and the shooter.

With respect to particle exchange, Mr. Schwoeble said that: "Any time two objects come in contact, there is particle exchange, depending on the texture of each particle". [27] Mr. Schwoeble admitted that GSR **evidence** may be found on the back of a person shooting a gun but that no samples were taken from the back of the jacket. He said he had been told that the shooter who was alleged to be wearing the jacket fired the weapon 18 times. He said that he had assumed that the shooter was firing in front of him. He stated he did not know whether the shooter may have fired using one hand or whether the shooter's arm or arms were extended. With respect to fabric to fabric transfer, Mr. Schwoeble testified that he was preparing to submit for publication a study **[***55]** on the subject which he worked on. He characterized the study as "ongoing" in that there were several phases to the study. He acknowledged that the study had not yet been peer reviewed because such a review would not occur until the study was completed. When asked whether he had conducted any studies of police department gathering rooms for the presence of airborne GSR, Mr. Schwoeble said he had not. He said he was aware of an Italian study, performed in collaboration with American investigators, from the late 1990's which showed concentration levels of GSR in places where policemen gather regularly to be "relatively nonexistent".[28] Mr. Schwoeble agreed that the American Academy of **Forensic** Scientists was the top **forensic** science organization and that he was not a member. When asked if he could become a member Mr. Schwoeble replied that he was too old. He also added that he trained individuals who were members of the organization.

FOOTNOTES

27 Tr., p. 1115, ll. 20-22.

28 Id., p. 1122, l. 23.

Mr. Schwoeble was then asked about GSR deposits on the hands of an individual who fires a weapon. He stated that he would expect to find GSR on the hands of a person who had fired a high-powered weapon five. **[***56]** times. When an individuals hands are "dabbed" to determine whether GSR is present both the palms and the top or back of the hands are usually swabbed. If after firing the weapon this same person then picked up a jacket it is possible that GSR could be transferred from his hands to the jacket. He said it was also possible for crime scene detectives wearing gloves to pick up a recently discharged weapon and have GSR transferred onto those gloves, and in turn transferred to objects subsequently touched by the gloves. He admitted that he could not say that the GSR on the jacket was the same GSR which was found in the gun; that would be "taking a conclusion too far". [29] He could only say that the jacket had been in an area where GSR was present.

FOOTNOTES

[29] Id., p.1128, ll. 23-25

Mr. Walters showed a visual display of a chemical spectrum in the courtroom on a television monitor relating to the .40 caliber weapon and asked Mr. Schwoeble whether the spectrum indicated that tin was present. Mr. Schwoeble explained that what Mr. Walters believed showed the presence of tin was in fact "noise" (reflected on the spectrum by a peak or spike) which was common. In order to verify whether an element is present **[***57]** in a given sample, Mr. Schwoeble said, a confirmed live analysis must be performed. In this case live confirmations were not conducted by Mr. Schwoeble with respect to each particle tested, including those from the 9 mm Glock and the .40 caliber handgun. Mr. Schwoeble stated that he took a representative sample of approximately 100 particles from the two weapons to determine whether there was any tin present.

On the issue of contamination related to the placement of the jacket on the floor of the police station, Mr. Schwoeble stated that his viewing of the photograph showed the jacket to have been facing up with the back of the jacket making contact with the floor. He further added that he had been told that the floor on which the jacket had been placed was a linoleum floor, which would not readily grab particles from the fabric of the jacket. He said with respect to an alleged transfer of particles from the floor to the jacket, "you are talking casual contact from a fabric to a smooth surface". [30] Mr. Schwoeble agreed with Mr. Walters, however, that he had no idea of the "level of contamination that may or may not have emanated on the jacket" [31] On redirect examination, he said that **[***58]** while handling of firearms and ammunition can contribute to the transfer of GSR onto an item, that would not account for the majority of the particles he found on the jacket.

FOOTNOTES

[30] Id., p. 1136, ll. 3-5.

[31] Id., p. 1136, ll. 11-12.

Additional Cross-Examination Regarding GSR Contamination by Defendant's Counsel

In addition to the GSR **witnesses,** Mr. Walters also cross-examined other **witnesses** about the possible contamination of the GSR **evidence.** He questioned ballistics detective Dunne about the use of foreign made ammunition by the police department and the precautions he used when handling potential GSR**evidence.** [32] He questioned crime scene Detective Bettenhauser about the way in which the Defendant's jacket was safeguarded, the presence of GSR on the precinct room floor where the jacket was photographed and the precautions he took to avoid GSR contamination. [33] He asked Officer Anselmo if he had touched the jacket. [34] He questioned Ms. Briones, the DNA **expert,** about the potential contamination of the jacket from being placed on the precinct room floor. [35] His questioning of ballistics examiner Freese revealed that there was a filtering system in his laboratory to avoid the potential for **[***59]** airborne contamination of**evidence.** [36]

FOOTNOTES

32 Id., pp. 227-230.

33 Id., pp. 320-322, 327-335, 342.

34 Id., pp. 505-506.

35 Id., p. 649-657.

36 Id., p. 793-794.

TRIAL SUMMATIONS

Defendant's Argument

During his summation, Mr. Walters emphasized the burden of proof and described the People's case as **circumstantial,** arguing that no one had actually seen the Defendant shoot the victims. He said that Shane Kerr's identification of the shooters was inconsistent with the appearance of the Defendant. He said that the police testimony could not be credited because they had invoked the "48 hour rule" and refused to answer questions about the incident until two days had passed. He argued that the police had a motive to testify that Mr. Adams was the shooter because Mr. Adams had been shot by the police. He said that Zenobia Penn was coached by the police to describe the shooter in general terms that matched the Defendant. He argued that **witnesses** Syed Rehman and Syed Hameed corroborated Shane Kerr's description of one of the shooters wearing a white shirt.

Mr. Walters said that officers Anselmo and Polstein were initially unable to give any precise description of the shooters or the location of the shooting. He **[***60]** said that it was implausible that the shooters had run towards rather than away from Officers Anselmo and Polstein after the shooting and that the police contention that there were not a lot of people on the street coming from the Tunnel nightclub at the time of the shooting was not credible because of the large numbers of people who could be expected to have been walking away from the nightclub and be in the vicinity of the shooting at the time. He also argued that it was not credible that the police were unable to give a detailed description of the unapprehended shooter.

Mr. Walters argued that the fact that Sherman Adams may have been seen running from the scene was not inculpatory because a young, innocent, minority male will typically run from the scene of a shooting involving police. He also said it was implausible to believe Mr. Adams stopped under a streetlight while being chased by the police to remove his jacket at a place he would obviously be easily visible. He argued that Officer Polstein did not fail to chase the alleged shooters because of an injury, but because he did not want to expose himself to danger.

Mr. Walters said that Officer DeCarlantonio had originally said **[***61]** in an affidavit that he saw Officer Anselmo come out of a park rather than a housing development. He said that Officer Polstein had testified in the Grand Jury that the apprehended shooter was 5' 11" tall but that Sherman Adams was 5' 5" to 5' 6" tall. He said that Officer Anselmo recognized the Defendant only to the extent that he saw a black man. He said that Anselmo had believed the shooter had a jacket and had seen him throw something. When the Defendant was apprehended, however, he was not wearing a jacket so Officer Anselmo had to construct a story that the Defendant had been wearing a jacket and then discarded it. Mr. Walters also said that the shooter was originally seen wearing a hat, but that Mr. Adams was not wearing a hat when he was apprehended.

Mr. Walters argued that the fact that Officer Polstein was unable to identify Mr. Adams at the scene, given Officer Polstein's opportunity to observe the shooter at the time of the shooting, strongly argued that Mr. Adams was not one of the shooters. He said that the failure of the police to take the civilian **witness,** Mr. Azziz, and two taxi drivers who were present near the scene to make an attempt at a prompt on-the-scene show-up **[***62]** identification of Mr. Adams was a serious error by the police. He also discussed a discrepancy which arose during the testimony about where the police van was located when Officers Anselmo and Polstein arrived at the scene. He said that EMT driver Carver did not see the police van at the scene when he arrived at the scene to provide medical treatment after traveling on West 26th Street. He argued that Officer DeCarlantonio's behavior at the time he apprehended Mr. Adams was also inexplicable because in response to Officer Anselmo's communication that Officer DeCarlantonio had passed him, Officer DeCarlantonio did not turn around. He said that while Officer Anselmo had testified that he was running on the street rather than the sidewalk during the chase, **witness** Noraime Torres testified that there was no one on the street but that people were on the sidewalk. He also said that Ms. Torres did not testify to seeing anyone wearing a hat during the chase.

Mr. Walters argued that **gunshot residue** was subject to cross-contamination and that this was why people handling microscopic **evidence** wore gloves and took other precautions. He briefly said that Zenobia Penn's testimony was slightly disingenuous. **[***63]** He said that false identifications were the primary source of wrongful convictions. He said that the Locard exchange principle was operative with respect to the GSR on the jacket and that the jacket could have been contaminated by officers handling it, particularly an officer who had just fired his gun. He argued that the People had not presented **evidence** about how the jacket had been handled prior to being tested. He said that Cathleen Lunde had testified that she would reject doing an analysis of an item where its prior handling history was unknown or where a prior lab had conducted an analysis and an item was being brought to her in an attempt to get a different opinion. He said that in collecting the jacket at the scene the police took no precautions to prevent GSR contamination because at the time there was no thought to collecting GSR **evidence.** Mr. Walters argued that: "This jacket has

no **forensic** value as an educative tool for you all because contamination is ever present". [37]

FOOTNOTES

37 Id., p. 1777, ll. 17-19.

Mr. Walters said that Mr. Schwoeble's contention that his lab had discerned particles which the FBI had not uncovered was not credible. He said that the fact that the **forensic** **[***64] evidence** had no value, combined with the lack of identification of Mr. Adams and with the fact that the identifications of the shooter did not match Mr. Adams mandated an acquittal. He said that Mr. Azziz had originally told Detective Rice that the shooter with the jacket had been on the passenger side but at trial testified that he was on the driver's side. He said that **witness** Joey Dulzac, who was ill and had an impaired memory, had been driving in a cab near the scene and had not seen the interaction between the gunmen and the police. He said that this could not possibly be squared with the testimony of Officers Anselmo and Polstein. He said that his investigator had reviewed the spot where the police van was located in the crime scene photographs and that it was not possible to see in to the block where relevant events occurred. He concluded by briefly reviewing several legal instructions which would be given by the Court which he believed supported an acquittal. He was at this point interrupted sua-sponte by the Court who said: "Why are you impinging on my area. Why don't you leave that to me." [38]

FOOTNOTES

38 Id, p. 1786, ll. 24-25.

People's Argument

Assistant District Attorney Steve Nuzzi **[***65]** presented the closing argument for the People. In beginning his argument in part by discussing the scientific method, he said that both Ms. Lunde and Mr. Schwoeble had testified that the GSR **evidence** found on the Defendant's jacket was consistent with someone who had fired a gun rather than consistent with contamination. He urged the jurors to follow the scientific method in analyzing all the **evidence** in the case. He said that it was clear that the Defendant had worn the jacket because his blood was found on it and that the GSR **evidence** on the jacket was consistent with a person firing a gun 18 times rather than with accidental contamination. He said the GSR **evidence** was important because it corroborated the testimony of the police officers and other **evidence.** He said the fact that the gun alleged to have been fired by the Defendant did not contain his **fingerprints** was unimportant since it simply meant he did not leave any **fingerprints** on the weapon. He also said that all of the **witnesses** had testified consistently that there were no other people in the area of the shooting other than those identified during the trial and that the argument that there must have been lots of other people **[***66]** in the vicinity was unsupported by any **evidence.**

Mr. Nuzzi said that **witnesses** in the case had seen events from different vantage points and that this explained discrepancies in their descriptions of events. He said that police officers Anselmo and Polstein, Shane Kerr, Zenobia Penn and Mr. Azziz were in the best

position to see the events which transpired. He said that the **witnesses** with the best opportunity to see the events were the two police officers and Mr. Azziz. He said that Mr. Kerr and Ms. Penn observed the relevant events for a briefer time than the other three **witnesses.** He argued that the officers and Mr. Azziz worked nights and were in the midst of a normal workday when the shooting occurred. He said that Mr. Kerr and Ms. Penn were tired, had been napping and were drinking. He pointed out that deceased victims Marcus McLaughlin and Lendell Kerr had high blood alcohol levels when their blood was tested. He said that Shane Kerr said he was drunk and also likely had a blood alcohol level close to .08%. He said that Shane Kerr and Zenobia Penn had suffered more trauma than the other three **witnesses.**

Mr. Nuzzi argued that Mr. Kerr's description of a person in the shooter's car **[***67]** wearing a white shirt or a sweater could have referred to a person other than one of the two shooters. He argued that Ms. Penn had initially testified truthfully about seeing shooters dressed in black but then the following day on cross-examination said she could not recall a description. He argued that her testimony had changed because she was afraid of testifying against the Defendant, given the fact that she was facing a long prison term of her own on a narcotics charge. He said the testimony of the officers and Mr. Azziz was "coherent, detailed and sensible". [39] He acknowledged that none of these **witnesses** could identify the Defendant in court or at the time of the shooting. He said that Officer Anselmo shot the person he saw fleeing from the car and only lost sight of him for two or three seconds.

FOOTNOTES

39 Id., p. 1819, l. 6.

Mr. Nuzzi said that, at a minimum, it was undisputed that the person whom Officer Anselmo shot was the same person, Mr. Adams, who was apprehended. He admitted that Officer Anselmo had been mistaken about the Defendant's height, but then said that when Mr. Walters had asked Officer Anselmo to estimate the height of his partner Officer Polstein, Officer Anselmo had **[***68]** also been mistaken by four inches. He argued that there was nothing to suggest Officer Anselmo had been mistaken about the fact that the Defendant was the shooter and extensive corroboration of the officer's testimony in that regard. He said Officer Anselmo was soft-spoken and self-effacing.

Mr. Nuzzi said that photographs and videotape introduced into **evidence** demonstrated the police were able to see what they testified to seeing. He said that the location of ejected shell casings from Officer Anselmo and Polstein's guns corroborated the location where they claimed to have been. Photographs introduced into **evidence** also demonstrated the lighting conditions at the time of the shooting, further indicating that the police were able to clearly see what they testified to. He said that Officer Polstein had radioed at the time that the shooters had "lit up a car" corroborating the fact that the officers witnessed the shooting. [40] He said that both officers had testified to seeing one gunman on each side of the car and had drawn a diagram to that effect.

FOOTNOTES

40 Tr., p. 1838, l. 3.

Mr. Nuzzi said that ballistics **evidence** indicated shell casings from one of the shooter's guns on one side of the car **[***69]** and casings from the other gunman on the other side of the car. Further, he argued that the 9 mm casings identified with the Defendant's gun were on the side of the car where the officers identified the Defendant. He said that pictures and diagrams introduced into **evidence** showed that the 9 mm gun was discarded by the Defendant at about the same spot where Officer Anselmo testified the Defendant stumbled during the initial part of the chase. He also argued that the angle at which ballistics **evidence**indicated Officer Anselmo had fired corroborated the officer's testimony about where he was when he shot. Officer Anselmo also made a radio transmission at the time that he had shot one of the perpetrators.

Mr. Nuzzi argued that the **evidence** indicated that the shooters had run towards the police because that was also the direction where they expected their white getaway car to be. The victim/**witnesses** saw the white car but the police did not because the white car had left the scene by the time the police had arrived. He said that Mr. Azziz, who was in the police van with Officers Anselmo and Polstein at the time of the shooting, corroborated what the police saw and described the apprehended **[***70]** shooter in a manner which was consistent with the testimony of the two officers. Mr. Azziz also testified that the jacket worn by Mr. Adams was the same jacket worn by one of the men shooting into the car. He argued that Mr. Azziz had no possible motive to lie. He said that his testimony was almost entirely consistent with his initial statements to the police and other **evidence** in the case. He said that one inconsistency identified by Mr. Walters during his summation was simply the result of Mr. Azziz's lack of proficiency in English. He also argued that the testimony of Robert Davis (the recantation**witness** at the instant hearing) and Ms. Torres corroborated many details of the information testified to by the police **witnesses.**

Mr. Nuzzi said the behavior of the Defendant in running away from the police after being shot was inconsistent with the behavior of an innocent person. He said that the police van was moved between the time the officers arrived and a later time when the scene was processed. He said that the prosecution had tried to figure out who moved the van and when it was moved but were unable to. He argued that the van had been moved by someone in the chaos of the rush of **[***71]** emergency vehicles and other activity. He said that it was implausible that the Defendant, who had been shot three times and was bleeding, would continue to flee from the police and remove his jacket if he was not a shooter. He said it was obvious that the Defendant removed his jacket during the chase in an attempt to disguise his identity.

Mr. Nuzzi criticized the "48 hour rule" on policy grounds but said the invocation of the rule by Officers Anselmo and Polstein did not create an inference that they were being untruthful. He said the two eyewitnesses presented by the defense should have testified with the aid of an interpreter. He said they were both poorly positioned to see the shooting, that their testimony was unclear and that the testimony was not inconsistent with the testimony of the three primary prosecution **witnesses.**

Mr. Nuzzi said that Mr. Schwoeble talked about how the GSR on the jacket was inconsistent with accidental transfer and talked about the studies Mr. Schwoeble had conducted which indicated that it was difficult to transfer material between fabrics. Mr. Nuzzi said that Mr.

Schwoeble had discussed his studies and the fact that he had rubbed fabric with a brick **[***72]** and how hard it was to transfer GSR in that experiment. He said these studies related to transfers between a "smooth fabric to a courser fabric."[41] He said the defense had not presented any **evidence** that the precinct floor where the jacket had been placed contained GSR. He said there was no **evidence** that there was GSR on the clothing of the police officers. He said that although Ms. Lunde admitted during her testimony that she had provided incorrect information in an unrelated case and had been fired and prosecuted for that, there was no allegation that she fabricated **evidence** in this case. He said that to remove any doubt about the integrity of the GSR **evidence** testing, he had the GSR **evidence** analyzed by an independent lab through Mr. Schwoeble. He said Mr. Schwoeble was an **expert** in his field. He said that allusions by the defense that the prosecutor's office and Mr. Schwoeble were involved in a conspiracy to taint the GSR **evidence** was a desperate attempt to obtain an acquittal. He said that although Mr. Schwoeble testified that it was possible GSR on the Defendant's jacket could have come from accidental contamination the locations and number of GSR particles were not consistent **[***73]** with such a theory. In a very brief single sentence, Mr. Nuzzi said that there was tin from a foreign source in the 9 mm GSR and that this could not have come from a police weapon. An objection by Mr. Walters to this brief statement was overruled by the Court. He said that the fact that there were significantly more GSR particles on the right sleeve and right front of the jacket than on the jacket's left side was significant because that is what would be expected from the GSR plume ejected from a gun. He said the analysis done by Ms. Lunde was also inconsistent with accidental contamination.

FOOTNOTES

41 Tr., p. 1885, l. 6.

Jury Notes:

During deliberations, the jury requested re-instruction on a number of areas of the law and the partial read back of the testimony of some **witnesses.** They heard a partial read back of testimony from Ms. Lunde but no read back of Mr. Schwoeble's testimony was requested.

HEARING CONDUCTED BY THIS COURT IN 2010

Evidence Considered at Hearing

Before recounting the **evidence** which was presented at the CPL 440.10 hearing, an initial evidentiary issue which was raised by the People in their oral argument after the hearing should be addressed. Three of the four **witnesses** who **[***74]** testified at the hearing, Mr. Adams's former counsel Robert Walters, the **expert** consulted by Mr. Walters, Dr. Thomas Kubic and the recantation **witness,** Robert Davis, also submitted affidavits in support of Defendant's motion in 2007. It is the People's position that these affidavits may not be considered for their truth except to the extent that any portion of those affidavits would constitute an exception to the hearsay rule. The Court agrees with that contention.

CPL 440.30 allows a defendant to submit an affidavit in support of a motion to vacate a

judgment pursuant to CPL 440.10. That statute explicitly instructs, however, that with respect to such an affidavit and other **evidence** initially submitted by a defendant and the People in a CPL 440.10 motion "the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact." CPL 440.30 (1). If a Court decides to hold a hearing, however, the statute does not provide for any rule of **evidence** which would allow for a court's consideration of hearsay material. The statute simply provides that a defendant has the right to be present at the hearing, that the defendant **[***75]** bears the burden of proving facts asserted by him by a preponderance of the **evidence** and that the Court must make findings and conclusions following the hearing. *Compare*, CPL 710.60 (4) (hearsay information is admissible to establish any material fact at a suppression hearing).

An affidavit, even one made by a **witness** who testifies, of course, is a prior out-of-court statement. Such an affidavit would be allowed to be considered for its truth to the extent any of its contents were subject to an exception to the hearsay rule. Such an affidavit may also be considered to the extent it is not hearsay (as a prior inconsistent statement, for example). The People raised this point in particular with respect to the affidavit submitted by the recantation**witness,** Mr. Davis. They argue that this affidavit is not admissible under the declaration against penal interest exception to the hearsay rule because two of the four criteria for the exception are not present here. First, since Mr. Davis testified at the hearing, he was obviously not unavailable. Second, with respect to the recantation provided by his affidavit, "supporting circumstances independent of the statement itself must be present **[***76]** to attest to its trustworthiness and reliability". *People v. Settles*, 46 NY2d 154, 167, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978). In the Court's view, there were no such independent supporting circumstances with respect to Mr. Davis's affidavit here.

With respect to the affidavits of Mr. Walters, Dr. Kubic and Mr. Davis, the Court has not discerned any exception to the hearsay rule which would allow any of the contents of these affidavits to be considered by the Court for their truth. Nor did the Defendant during his argument after the hearing assert that there was any basis for considering any of this information for its truthfulness. For that reason, the Court considered these affidavits only to the extent that they were relevant for a non-hearsay purpose.

Testimony of Defendant's Former Counsel, Robert Walters

The first **witness** called by the defense at this Court's CPL 440.10 hearing was Mr. Robert Walters, the attorney who represented the Defendant at each of his three trials. He stated that he was admitted to practice law in New York in July of 1987. From law school he worked in the Kings County District Attorney's office for three years until going into private practice with a partner in 1988. From 1988 to 1999 Mr. **[***77]** Walters predominantly did criminal defense work on both an assigned basis through the county 18-b panel and as a privately retained attorney.

Mr. Walters testified that the subject matter of GSR was rare at the time he represented the Defendant. In the five or six years preceding his representation of the Defendant he had never introduced **expert** GSR testimony. The instant matter was the first case Mr. Walters tried in which the People sought to introduce such **evidence.** Though he was unable to recall making a formal request to any bar associations seeking guidance on GSR, Mr.

Walters did "put feelers out" [42] and spoke to a colleague regarding the issue.

FOOTNOTES

42 Transcript, September 27, 2010 ("Hearing Transcript"), p. 5, l. 11.

At Trial 1 no GSR **evidence** was introduced. The first time Mr. Walters became aware of GSR **evidence** in the instant case was at Trial 2. Mr. Walters recalled mentioning the absence of such **evidence** during his summation at Trial 1. Mr. Walters opined that the strongest piece of **evidence** favoring the People at Trial 1 was **circumstantial evidence** of the Defendant's presence. He also mentioned that a police officer testified at the trial consistent with his grand jury testimony **[***78]** that he had never lost sight of the Defendant, but that the defense had established that this could not be true and the People forwarded documentation to Mr. Walters stating the police **witness** acknowledged that he had lost sight of the Defendant.

Mr. Walters estimated that the gap in time between notification that GSR **evidence** would be used at Trial 2 and the trial itself was one year. He took no steps to introduce **expert** testimony on the Defendant's behalf. Mr. Walters was informed that Ms. Lunde, an **expert** employed by the FBI, would be testifying at Trial 2 regarding GSR **evidence.** Ms. Lunde did in fact testify and Mr. Walters cross-examined her. During Trial 2 Mr. Walters discussed with the Defendant calling his own **expert,** Dr. Frederick Whitehurst. Dr. Whitehurst was employed at the same FBI lab as Ms. Lunde and had written an article criticizing the lab. Mr. Walters contacted Dr. Whitehurst and Dr. Whitehurst agreed to testify for the defense. Mr. Walters said that he learned a number of damaging facts about Ms. Lunde's background (which she testified to at Trial 3). Dr. Whitehurst testified for the defense at Trial 2.

The People also called Mr. Schwoeble as an **expert witness** in **[***79]** Trial 2. Mr. Walters speculated that the prosecution called him to testify because Ms. Lunde had been impeached by the defense on the contamination issue. Specifically, Mr. Walters asserted that when the jacket alleged to have been worn by the Defendant during the shooting was photographed at the police precinct it was placed on the floor which, the defense argued, was an area likely to contain a high amount of GSR and therefore the GSR that the People attributed to the firing of the weapon may have in fact originated from the floor. Mr. Walters recalled becoming familiar with a book published by Mr. Schwoeble and that Mr. Schwoeble lacked certain credentials which Mr. Walters believed a scientist should have earned.

The introduction of GSR **evidence** at Trials 2 and 3, Mr. Walters opined, shifted the focus from the testimony of the police to the scientific **evidence.** Mr. Walters recalled speaking to a particular juror who sat on Trial 2, Ms. Robertson, an attorney. She identified herself as one of the jurors who believed the Defendant should have been found not guilty and provided assistance to Mr. Walters between Trials 2 and 3. Mr. Walters said that consulting with Dr. Kubic prior to **[***80]** Trial 2 would have helped him.

Dr. Kubic was consulted on the issue of how to deal with Mr. Schwoeble's opinion that contamination of the jacket from being placed on the floor of the police precinct was not the