likely source of the jacket's GSR. A contamination study was introduced by the People through Mr. Schwoeble at Trial 2. When Mr. Walters requested the raw data underlying the study Mr. Schwoeble revealed that the study was ongoing. Mr. Walters indicated his intent to seek preclusion of testimony regarding this study at Trial 3. The motion *in limine* to preclude this testimony was not in fact filed by Mr. Walters prior to Trial 3. Mr. Walters added that he did not "abandon" attacking the testimony of Mr. Schwoeble stating that he "thought R.J. Schwoeble was not credible in a lot of respects and [he] thought [he'd] pursue that through cross examination." [43]

FOOTNOTES

[43] Id., p. 23, ll. 12-14.

Mr. Walters acknowledged on cross-examination that the preclusion motion would have been predicated upon his failure to receive the raw data underlying Mr. Schwoeble's fabric-to-fabric transfer studies and that there would have been no basis to move to preclude Ms. Lunde's testimony. Had the data been **[***81]** provided to Mr. Walters, Dr. Kubic could have helped him to make meaningful use of it at trial. Mr. Walters said he understood that Dr. Kubic would have agreed to assist him in analyzing Mr. Schwoeble's testimony at trial and agreed with Defendant's counsel's statement that it would have been "extraordinarily helpful to have [SIC] **expert** in GSR to assist you in that cross-examination" [44] Mr. Walters testified that he recalled having drafted a preclusion motion on the subject before Justice Fried [who handled the case before it was referred to Justice Torres to conduct Trial 3] but did not recall the issue carrying over to Justice Torres. He said that he was not a "prodigious writer" but did speak on issues and said that "a motion is a motion whether it's written or oral". [45][As noted *supra*, Mr. Walters did, in fact, make an oral motion to preclude any testimony by Mr. Schwoeble about his fabric to fabric transfer studies because Mr. Walters had not received the data underlying those studies until shortly before Mr. Schwoeble's testimony but that motion was denied by Justice Torres].

FOOTNOTES

[44] Id., p. 24, ll. 2-4.

[45] Id. p. 44, ll. 11-13.

Mr. Walters said that he read an affidavit prepared by **[***82]** Dr. Kubic which was submitted in this case and substantially agreed with statements Dr. Kubic had made in that affidavit concerning discussions they had related to this case. Mr. Walters did not recall whether Dr. Kubic agreed to assist him by analyzing the testimony of Mr. Schwoeble, however Dr. Kubic's affidavit asserted that this was in fact the case. Mr. Walters said that it would have been helpful to have had Dr. Kubic assist in his cross -examination of Mr. Schwoeble and the fact that this did not happen was Mr. Walters's decision.

Mr. Walters discussed with both the Defendant and Dr. Kubic calling Dr. Kubic as an **expert witness**. However, Dr. Kubic was not called to testify at Trial 3. Dr. Whitehurst, who testified at Trial 2 was unavailable to testify at Trial 3. Mr. Walters initially stated that Dr. Whitehurst, in addition to being out of state, informed him that he did not wish to testify at

Trial 3. Upon reflection Mr. Walters was unsure whether he sought to secure Dr. Whitehurst's presence by subpoena and was unable to explain his failure to seek introduction of Dr. Whitehurst's Trial 2 testimony at Trial 3. Mr. Walters stated that in retrospect he would have been able to **[***83]** establish that Dr. Whitehurst was in North Carolina at the time of Trial 3. Mr. Walters said that GSR **evidence** was more prominent at Trial 3 than at Trial 2. Although he had discussions with the Defendant, Ms. Robertson and Dr. Kubic prior to the commencement of Trial 3 with respect to attacking the GSR **evidence,** Mr. Walters was unable to recall his decision-making process in not presenting such **evidence** at Trial 3.

Prior to the commencement of Trial 3, Mr. Walters testified that he had handled more than 10 murder cases and been a practicing attorney for 17 years. Mr. Walters, on cross-examination, confirmed that he was aware of the critical importance of GSR **evidence** in this matter and acknowledged discussing the matter on several occasions with Ms. Robertson and Dr. Kubic. He met with Dr. Kubic for one hour on April 16, 2003. They also spoke on April 18, 2003, though it was unclear at the hearing whether this was a face-to-face meeting. A number of phone conversations between Dr. Kubic and Mr. Walters also took place, some lasting as long as 45 minutes. Mr. Walters stated: "I consulted with him so that I could learn the science so that I could be meaningful in my representation." **[***84]** [46]

FOOTNOTES

46 Id., p. 33, ll. 12-13.

The subjects discussed between Mr. Walters and Dr. Kubic included an overview of the science related to GSR and the reports prepared by Ms. Lunde and Mr. Schwoeble. Mr. Walters said that he wanted to have certain charts explained to him. Although Dr. Kubic did inform him of the significance of the charts and educate him "as much as he could" regarding the science of GSR, Mr. Walters felt it was not possible to learn the science in an hour or two. With respect to his cross-examination at Trial 2 of Mr. Schwoeble regarding his lack of membership in the American Academy of **Forensic** Sciences, studies he conducted on fabric transfer, instrument calibration in his lab and conclusions about finding tin in the weapon alleged to have been fired by the Defendant, Mr. Walters had a vague recollection and deferred to the transcript.

Other sources of information Mr. Walters consulted with respect to GSR were journals of **forensic** science, discussions with colleagues and a book written by Mr. Schwoeble. Based on this information Mr. Walters adopted a theory that the jacket alleged to have been worn by the Defendant had been contaminated with GSR. Under cross examination by **[***85]** Mr. Walters at Trial 2 Ms. Lunde stated that it was possible that the jacket may have been contaminated. Mr. Walters also attacked Ms. Lunde with respect to her conduct at the FBI lab leading to the criminal charge brought against her. Mr. Schwoeble was confronted with questions by Mr. Walters espousing the contamination theory. Mr. Walters further advanced the contamination theory by discussing it in his opening statement and summation.

The following colloquy took place on the issue of Dr. Kubic not being called to testify at Trial 3:

Mr. Casolaro: Now, you said that you did not call the doctor as a **witness,** Doctor Kubic, I'm sorry—

Mr. Walters: Right.

Mr. Casolaro:- why didn't you do that

Mr. Walters: You know, I can't say why — the question is why didn't I call him?

Mr. Casolaro: Correct.

Mr. Walters: Frankly I didn't think I needed him.

Mr. Casolaro: And that was because why?

Mr. Walters: That the FBI **expert** was sufficiently wounded and had backed away from some of her obvious conclusions and R.J. Schwoeble [sic] given his lack of credentials and, of course, always present about the shifting of the burden of proof. [47]

FOOTNOTES

[47] Id., p. 39, ll. 11-23.

In hindsight, Mr. Walters said that if he had **[***86]** the opportunity to go back in time he would have sought to call multiple **expert witnesses**. However, he also stated that at the time he thought he had adequately attacked Ms. Lunde and Mr. Schwoeble. With respect to Dr. Whitehurst, Mr. Walters stated that he was not a GSR **expert** and would have been called to testify to procedural deficiencies at the FBI lab.

When questioned by the Court as to why Mr. Walters did not ask Dr. Kubic to be present at the trial, Mr. Walters said that he felt Dr. Kubic's presence was not necessary. When asked why he opted to immediately commence his cross-examination of Ms. Lunde and Mr. Schwoeble upon conclusion of their direct-examinations and not consult Dr. Kubic, Mr. Walters responded: "Because I had spoken to him prior to trial and I thought I drew from him the limits of analysis." [48]On the question of why he did not call an **expert** GSR **witness** Mr. Walters also said: I don't know. I sometimes think, you know, my mentor, Jerry Spence, said, you don't go into a cage with a lion you take the stick and you poke him. And that was my sense that you poke but you don't go in if you do bring your other lion sometimes you lift the burden of proof. Now, hindsight **[***87]** is always 20/20. If I had to do it over again there is no question that I would have brought more expertise to bear then [sic] I would be able to bring to the subject matter. INK"http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=CITE&fpDocs=&fpNodeId=&fpCiteReq=&expNewLead=id%3D%22expandedNewLead%22&brand=ldc&_m=44329b0e42c6f79d786ffb10af26bb6c&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=652d31d702304019ec1d9e9fc577bed0&focBudTerms=&focBudSel=all"\l"fnot

e49"\t"_self"[49]

FOOTNOTES

[48] Id., p. 45, ll., 10-11.

[49] Id., p. 47, l. 21-p. 48, l. 4.

Hearing Testimony of Robert Davis

Robert Davis testified on behalf of the People at the Defendant's second trial. The transcript of that testimony was then introduced at Trial 3. Mr. Davis was called as a **witness** by the Defendant at the hearing for the purpose of recanting part of his trial testimony. Prior to his testimony an odd interlude occurred. The Court had appointed an attorney to represent Mr. Davis (Howard Jaffee) to ensure that the **witness** was aware of the fact that by recanting his prior sworn testimony he might become subject to a perjury charge and to ensure that the **witness** understood his right against self-incrimination. Immediately prior to his testimony, Mr. Jaffee reported that Mr. Davis planned to assert his Fifth Amendment privilege with respect to any question other than basic pedigree information. Without objection, the Court then indicated that it would proceed to additional **witnesses** and hear argument about whether an affidavit **[***88]** from Mr. Davis would be considered in lieu of his testimony. Mr. Davis exited the courtroom and at this point the Court became aware of loud conversations taking place in the hall outside.

Mr. Davis then re-entered the courtroom and, on the record, asked to speak to the Court. Mr. Michelen reported that Mr. Davis's brother had said that Mr. Davis did, in fact, want to testify. Mr. Davis's counsel, Mr. Jaffee then said that there had been a "misunderstanding" for which he, Mr. Jaffee, would take responsibility and that the **witness** did, indeed wish to testify. [50] His testimony was then taken.

FOOTNOTES

[50] Id., p. 51, l. 2.

Mr. Davis acknowledged that he was being supervised by the Department of Parole in Pennsylvania and that his parole officer had approved his appearance. On the date of the shooting underlying the Defendant's conviction, September 13, 1999, Mr. Davis was living in Manhattan in the vicinity of the shooting at 466 West 26th Street, apartment 10C. He stated that on that date he heard gunfire while in his apartment. When he went to the window of his apartment he saw several individuals scatter in various directions. Mr. Davis was contacted by police detectives the following day. He **[***89]** initially testified that he told the police he saw nothing. When specifically asked about whether he told the police that he had seen someone running and taking off a jacket he testified that "Umm, I believe so, yes". [51]

FOOTNOTES

[51] Id., p. 54, l. 22.

While Mr. Davis was incarcerated at the Levinton County Jail he was contacted by an investigator for the Defendant, Michael Race. He initially testified that when he spoke to Mr. Race he told him that he had not [as he had testified during the Defendant's second trial] seen a person running and taking off his jacket. Shortly thereafter during his hearing testimony, Mr. Davis denied that he had just made that same statement. [52] Mr. Davis recalled informing Mr. Race that he was willing to prepare an affidavit. He stated that he brought an affidavit to a notary while he was incarcerated and was shown a copy of it on the stand. He said that his affidavit was truthful.

FOOTNOTES

[52] Id., p. 54-56.

Mr. Davis said that prior to testifying at the instant hearing he had spoken with defense counsel and told him that it was not true that on the evening of the shooting he saw someone fleeing while removing a jacket. The following colloquy took place with regard to the information **[***90]** Mr. Davis provided defense counsel:

Mr. Michelen: Okay. And now you are changing your mind about that, right?

Mr. Davis: No, I am not changing my mind. I am here to clarify my name as far as what's been said. I feel as though that I am here because they trying to put words in my mouth that wasn't been said. Now, as far as a person taking off his jacket, it was dark, I didn't see nothing, they brung the words up saying that did you see somebody taking off their jacket, or whatever, like that. At the time I told them, look, it's been a while, I don't know, I can't remember. So I am not really sure and that's the honest truth. That's why I am here to clear my name. I didn't see someone take their jacket off and that's the truth. But at the time when they tried to tell me that's exactly what I said that's not exactly what I said. So that's why I am here today to clarify that situation. That I did not see someone take off their jacket. Because when I first testified I am saying that I seen somebody take of their jacket, correct?

Mr. Michelen: Right.

Mr. Davis: But I was coerced in saying that this is exactly what I saw but I wasn't sure. I wasn't sure at the time. So when he questioned me **[***91]** to tell me is that what you seen I wasn't sure. That's the honest answer I could give you. I wasn't sure if I seen it, a person take off his jacket or not at that time, so—

Mr. Michelen: That wasn't your testimony but that would havebeen the truth?

Mr. Davis: Yeah. But I am telling you the truth. Look, this is my first time going through all this shit. I don't even want to be here. Period. [53]

FOOTNOTES

[53] Id., p. 57, l. 18- p. 58, l. 23.

On cross-examination Mr. Davis said that he felt coerced to testify about seeing someone fleeing the scene of the shooting while removing his jacket. Though nobody "put a gun" to Mr. Davis's head, he stated that the testimony he gave at Trial 2 was the result of insinuations which were made to him. Mr. Davis did not testify at Trial 3. At the time of Trial 3 a warrant for Mr. Davis's arrest was outstanding. Mr. Davis explained that he was unable to remain in New York due to family matters and explained to his parole officer that he wanted his paperwork sent to Pennsylvania. Mr. Davis went to Pennsylvania without permission from his parole officer.

The individuals who purportedly told Mr. Davis what to say at Trial 2 were two Caucasian males. He first testified that **[***92]** he did not know who these males were other than that "I know they authority" [54] When reminded about the fact that the **witness** had asserted in his affidavit that the men were detectives, he responded: "All right, thanks for reminding me. They detectives. Then what? I told you I'm not sure. You are helping me out. You are refreshing my memory now. So they detectives." [55] They spoke in the New York County Criminal Court building at 100 Centre Street. Mr. Davis stated that he initially informed the detectives that he did not wish to speak to them and that he wanted to be sent back upstate to serve his sentence. Mr. Davis said the information he testified to at trial came from the detectives. Mr. Davis repeated that he "felt" coerced and that the detectives were "insinuating" what he was expected to say.

FOOTNOTES

54 Id., p. 63, l. 11.

55 Id., p. 63., ll. 18-21.

Asked to truthfully say what he observed, Mr. Davis said after he heard the **gunshots** he went to the window where he saw many people fleeing the scene in different directions. He said it was dark because the street light was not illuminated. Mr. Davis was reminded that he also stated at the trial that he saw a black van pull up to the location, **[***93]** police officers exit the van and two males in dark clothing being shot at by the police. Mr. Davis stated that he recalled that portion of his testimony, that the testimony was truthful and he was not told by anyone to testify to those facts. Mr. Davis further recalled stating that the two males entered the intersection of the block where he resided where one of them pointed and fired what he believed was a gun at the police and then fled into an alleyway at 441 Hudson Guild. Again, Mr. Davis stated that he was not told by anyone to testify to those facts. [56]

FOOTNOTES

56 As noted immediately *supra*, Mr. Davis testified at the hearing that the affidavit he submitted in support of the Defendant's motion in 2007 was true. That affidavit, however, was not only radically different from his trial testimony but also from his testimony at the hearing. At the hearing, Mr. Davis recanted his testimony about seeing the Defendant take off his jacket but confirmed that the remainder of his trial testimony, in which he described multiple visual observations relevant to the case, had been truthful and accurate. In his

sworn affidavit, however, while acknowledging that he had heard shots from his apartment, he **[***94]** recanted virtually all of the remainder of his trial testimony stating: "I was interviewed by Detectives to see if I had any knowledge of the events of the shooting. I told the Detective that I did not observe the shooting nor did I have any knowledge of the shooting. The statement made on that day is true." *See*, Affidavit of Robert E. Davis, February 16, 2007, third unumbered paragraph, attached to Defendant's Instant Motion. In concluding his affidavit, Mr. Davis said he was "sorry for making a mockery of the criminal justice system".

Although Mr. Davis admitted to stating at trial that he saw the shooter who had fled remove his jacket, at the hearing Mr. Davis stated that he did not in fact see this. When Mr. Davis was asked by the Court why he testified about the jacket at Trial 2, he repeated that a detective had been "insinuating" [57] what his testimony should be and that Mr. Davis had "never been on a stand before". [58] When asked about the discrepancy between his trial testimony and his instant hearing testimony, the following exchange ensued between Assistant District Attorney Casolaro and the **witness:**

Q: . . . you knew that people are supposed to come into court and tell the **[***95]** truth, didn't you?

A: I don't know none of that. You can't tell me what I know.

Q: You mean at the time [of the **witness's** testimony at the second trial] you didn't realize that people were supposed to tell the truth under oath, is that you testimony?

A. I am telling the truth today. I am telling the truth back then too. So you calling me a liar?

Q: Mr. Davis, you said that you testified to something that was untrue, isn't that correct?

A: Look, am I done?

The Court: No. No. Please answer the question please.

A: Repeat the question

Q: Didn't you just say that you testified to a fact that wasn't true at the trial?

A: No.

Q: You didn't say that? You didn't testify that you saw a guy take off his jacket when you really didn't see that?

A: Look, I am shaking my head in disbelief. You are trying to change everything around. You got your answer and you are coming at me a different perspective about the same situation. [59]

FOOTNOTES

[57] Transcript, September 27, 2010, p. 71, l. 23.

58 Id., p. 72, ll. 1-2.

59 Id., p. 72, l. 25-p. 73, l. 23.

Mr. Davis admitted that he lied to the Department of Corrections about being a drug dealer in order to gain acceptance into the Shock Incarceration program. When asked by Mr. Casolaro **[***96]** about the details of the preparation of his affidavit, Mr. Davis at one point answered: "No. You tell me. We having a conversation about what's been taking place so now you tell me." [60] Shortly thereafter he initially refused to answer an additional question on that subject then said that he didn't remember any details about it. [61] Aside from the Defendant's investigator, Mr. Davis was not contacted by the Defendant's family or anyone else associated with the Defendant prior to signing the affidavit. Mr. Davis stated that he was not offered any money or other benefit in exchange for signing the affidavit. Mr. Davis admitted that he was convicted by plea of guilty in Pennsylvania to indecent assault, corruption of a minor, endangering the welfare of a child and simple assault stemming from an incident in which the complainant was his 12-year old stepdaughter. He further admitted to convictions for criminal possession of loaded gun and selling crack cocaine to an undercover police officer.

FOOTNOTES

60 Id., p. 78, ll. 3-4.

61 Id., p. 78-79.

Hearing Testimony of Dr. Thomas Kubic

Dr. Thomas Kubic was called as a **witness** by the defense. He testified that he holds a B.A. in chemistry from C.W. Post College, **[***97]** a masters of science chemistry degree from Long Island University, a law degree from St. John's University and a Ph.D. in **forensic** science from the City University of New York. He worked for 23 years in the Nassau County police crime lab analyzing trace or transfer **evidence.** His duties there included the examination of GSR using electron microscopy. He said he had published many articles, given numerous presentations, and been qualified in several jurisdictions as an **expert** in GSR and **forensic**science in general. Dr. Kubic is also a certified member of the American Board of Criminalistics and holds several teaching positions. He was qualified as an **expert**in **forensic** science **gunshot residue** without objection.

Dr. Kubic was first contacted in connection with this case in 2003 by Mr. Walters. After an initial half-hour phone conversation which resulted in Dr. Kubic being retained by Mr. Walters, the two spoke five or six times on the phone on the subject of GSR. Some of the conversations lasted as long as 45 minutes. Mr. Walters and Ms. Robertson visited with Dr. Kubic at his lab for approximately two hours. They spoke about GSR in general and specifically in relation to the Defendant's **[***98]** case. Their discussions included what Dr. Kubic referred to as continuity and contamination issues related to the photographing of the jacket alleged to have been worn by the Defendant at the time of the shooting while on the floor of the police precinct. After meeting with Mr. Walters, Dr. Kubic was left with the

impression that he would be called as a **witness** at Trial 3 and that he would hear the **expert** testimony of the People's **witnesses.**

Dr. Kubic stated that the type of GSR **evidence** relevant to the instant case involved analyzing primer **evidence.** He explained the different components of ammunition, the fact that primer is the primary explosive at the bottom of a cartridge and the fact that very small particles are expelled from the barrel and chamber of a gun. He explained that particles can settle on the hand of a shooter. Particles can be lifted by an adhesive from clothing, a face, hair or in a room. The particle is then analyzed in an electron microscope to determine its composition. He testified that: "Everybody has particles on their hands. Almost nobody has **gunshot residue** particles." [62] Dr. Kubic explained that particles of **gunshot residue** were composed of burnt organic **[***99]** metallic elements - mainly barium, antimony and lead. Upon firing a weapon hot gases are released from the weapon. Once released the gases condense as they cool down and form GSR. Dr. Kubic stated that the intricacies of GSR **evidence** could not be learned over a couple of phone calls or meetings lasting up to three hours.

FOOTNOTES

62 Transcript, September 29, 2010, p. 92, ll. 22-23.

Had he been called as a defense **witness** at Trial 3, Dr. Kubic said he would have addressed the issue of contamination from the jacket having been placed on the floor of the precinct at the time it was photographed. He would have challenged Mr. Schwoeble's assertion that contamination was unlikely by pointing out that studies done by R.J. Lee, which supported the notion that contamination was not likely to occur, were inapplicable here. Dr. Schwoeble added that the R.J. Lee lab was unaccredited at the time Mr. Schwoeble conducted his analysis.

On the issue of GSR transfer from a person's hands, Dr. Kubic testified that studies conducted by the FBI and the ATF established that 90 per cent of particles are lost within the first two hours of a weapon's firing. They fall off naturally. In contrast, fabrics tend to hold particles **[***100]** for a longer period. The more coarse the fabric the greater the likelihood that particles of GSR will be found on the fabric over time. Dr. Kubic pointed out that particles placed on a smooth surface would be much more likely to transfer onto fabric than the transfer of particles from a coarse fabric (i.e wool) to another fabric. Transfer studies done by Mr. Schwoeble involved fabric to fabric transfers. But the issue in the Adams case was whether there had been a transfer from a smooth surface (the muster room floor) to a fabric. This would be much more likely to result in a transfer. Dr. Kubic explained this to Mr. Walters.

Dr. Kubic also opined that the testing performed by Mr. Schwoeble in his study was incomplete. Specifically, he felt that Mr. Schwoeble drew conclusions from too small a sample. In addition to not having sufficient data, Dr. Kubic noted that Mr. Schwoeble's data was never published. In **forensic** science, Dr. Kubic said, one's studies should be peer-reviewed. Dr. Kubic said that Mr. Schwoeble's fabric-to-fabric testimony was irrelevant to the instant matter in that no such transfer occurred.

Dr. Kubic also took issue with Mr. Schwoeble's qualifications, noting that **[***101]** he had not earned a degree of any kind in science. He noted that Mr. Schwoeble's resume, provided to him by Mr. Walters only after the Defendant was convicted, failed to indicate his having taken a single science course at the college level. Referring to Mr. Schwoeble, Dr. Kubic said: "I don't believe he qualifies as a scientist." [63] In support of this contention Dr. Kubic noted that Mr. Schwoeble was not a member of any national associations. Reviewing Mr. Schwoeble's testimony that he was not a member of the American Academy of**Forensic** Science because of his age, Dr. Kubic, a member of the organization who had served on its Executive Board, stated his age would not have been a bar to Mr. Schwoeble's joining the group. However, he would not have qualified for membership because he lacked the requisite academic degrees.

FOOTNOTES

[63] Id., p. 99, ll. 20-21.

Prior to the commencement of Trial 3 Dr. Kubic requested that Mr. Walters provide a c.v. for Mr. Schwoeble as well as a copy of the standard operating procedures of the lab where Mr. Schwoeble worked. This information was relevant to determine whether the lab employed valid methods of testing. Dr. Kubic added that he was a consultant with the **[***102]** National Institute of Standards and Technology and the federal Department of Commerce where he examined standard operating procedures for microscopies, including electron microscopy and test particles. He received neither item from Mr. Walters prior to the commencement of Trial 3. Similarly, the photograph of the jacket on the floor of the police precinct and the testimony of Ms. Lunde were not provided to him until after the Defendant was convicted.

Dr. Kubic opined that jurors expected to hear scientific **evidence.** However, he also acknowledged that not all cases in which scientific **evidence** was presented required calling an **expert witness** and that it may in fact be improper to call a defense **expert witness**. He said that he had understood the initial plan with respect to Mr. Adams' defense was for him to review materials, participate in the trial if possible, prepare Mr. Walters for cross examination and then testify as a defense **expert.** He opined that where there are scientific issues where a defense **expert witness** may be helpful it is incumbent on a defense attorney to call such an **expert.**

Had he been called as a **witness** he would have stated that the conclusion that the tin found **[***103]** in the GSR came from the Glock 9 mm was "highly, highly speculative." [64] He added that he was unaware of any **expert** who would testify that a given GSR sample came from a specific firearm. Equally speculative, in Dr. Kubic's opinion, were the conclusions regarding the GSR on the jacket. Due to contamination issues raised by the placement of the jacket on the floor, Dr. Kubic said he would not have tested samples taken from the jacket. He noted that Ms. Lunde had testified that had she been aware that the jacket had been placed on the floor and photographed at a location where guns from the case had also been placed and photographed, the **evidence** would not have been tested because of the strong possibility of contamination. He agreed with her testimony in that regrard. All opinions reached by Dr. Kubic were to a reasonable degree of scientific certainty.

FOOTNOTES

NK"http://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=CITE&fpDocs=&fpNodeId=&fpCiteReq=&expNewLead=id%3D%22expandedNewLead%22&brand=ldc&_m=44329b0e42c6f79d786ffb10af26bb6c&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=652d31d702304019ec1d9e9fc577bed0&focBudTerms=&focBudSel=all"\l"ref64"\t"_self"[64] Id., p. 104, l. 6.

Dr. Kubic stated that issues were also raised regarding the physical condition of the jacket throughout the chain of custody. He indicated that there was testimony that the jacket had first been observed on the ground laying inside out. There was also testimony that it had been recovered hanging from a fence post, **[***104]** right-side out. Dr. Kubic stated he reviewed testimony where the detective who recovered the jacket was shown the jacket while on the stand and said that there was a tear in it which was not present when the **evidence** was collected.

The defense introduced two photographs, replicas of which Dr. Kubic said were shown to him by Ms. Robertson after Trial 3. The photographs were of the jacket alleged to have been worn by the Defendant while in custody of the police. Dr. Kubic stated that it was his understanding that the photographs had been provided to Mr. Walters as part of the discovery process. One photograph showed the jacket on the floor of the police precinct. Dr. Kubic noted that the photo showed there to be a significant amount of dirt, a sneaker print and some red stains which he speculated could be blood where the jacket was laid down. He again stated that this raised significant issues with respect to contamination of the jacket. The other photo depicted the jacket hanging from a fence where one police **witness** stated it was recovered. Dr. Kubic noted that there was conflicting testimony from another police **witness** of the jacket having been recovered 60 to 70 feet away from the **[***105]** fence laying on the ground and turned inside out. This raised continuity problems.

Documents purporting to be the standard operating procedures of how **evidence** was handled at R.J. Lee were also not provided to the **witness** until after the Defendant's conviction at Trial 3. Dr. Kubic was critical of the procedures in that there was no explanation of how the lab actually performed its analyses. Specifically, the procedures did not "talk about what it is they [the R.J. Lee lab] identify for **gunshot residue**, what are the specific, what do you have to find in order to say there's **gunshot residue** present..." [65]

FOOTNOTES

[65] Id., p. 111, ll. 6-9.

Dr. Kubic stated he had no particular issue with the testimony of Ms. Lunde and characterized her testimony as "straight forward". [66] He said that although Ms. Lunde had testified that her lab was not subject to external proficiency testing, he believed that lab had been subject to such testing but that Ms. Lunde was not aware of it. External proficiency testing involves tests prepared by outside laboratories where the results of the test are

already know. He had been retained and was prepared to testify as a **witness** for the Defendant and has never learned anything **[***106]** which has changed his views about the efficacy of the People's GSR **evidence.**

FOOTNOTES

66 Id., p. 112. l. 8.

On cross-examination Dr. Kubic stated that he prepared an affidavit with respect to this case in 2007 referring to events relevant to his testimony here, which took place in 2003. The affidavit was prepared by Ms. Robertson, but Dr. Kubic reviewed it and had it notarized only after he had made certain corrections. He was aided in recalling the events discussed in the affidavit by referring to a file he had maintained. Dr. Kubic surmised that this file was in storage and it had not been provided to the People.

Dr. Kubic verified that he had a three-way phone conversation with Ms. Robertson and Mr. Walters lasting approximately 45 minutes on April 16th during which he provided an overview of GSR. Dr. Kubic re-iterated that other conversations between the three ensued. Dr. Kubic's total fee was $2,500. His best estimate was that he spent 10 to 15 hours consulting with Mr. Walters and Ms. Robertson. He also spent 10 to 15 hours reviewing documents, looking in text books and doing literature searches. On April 18th Dr. Kubic said he met with Mr. Walters and Ms. Robertson in his office for over **[***107]** 2 hours to discuss various aspects of GSR. He stated of the meeting: "And we spent a lot of time on a lot of detail." [67]

FOOTNOTES

67 Id., p. 121, l. 11.

In discussing the facts of this case Dr. Kubic immediately identified contamination of the jacket as a potential issue and informed Mr. Walters of this. After the initial meeting Dr. Kubic had 3 to 12 other conversations with Mr. Walters by phone. More than half of these calls were initiated by Mr. Walters. The total time of these conversations was estimated by Dr. Kubic to be 2 to 3 hours. When asked if he was aware that Mr. Schwoeble had published a book on GSR, Dr. Kubic said he had a copy of the book in his library and stated he had looked through it. He was also aware that Mr. Schwoeble had been deemed an **expert witness** with respect to GSR in many jurisdictions.

Dr. Kubic stated on cross-examination that he himself had never tested the jacket at issue in this case. Dr. Kubic also stated that with respect to Ms. Lunde's testimony it was his recollection that she stated the FBI would not have tested the jacket after she was shown the photograph of it on the floor at the police precinct. When asked whether it was not in fact true that she only **[***108]** said that this would have raised some questions, Dr. Kubic stated that he did not recall that to be her testimony. Dr. Kubic did recall that Mr. Walters confronted Ms. Lunde regarding the handling of the jacket prior to it being received by the FBI lab.

When asked whether tin was an element commonly found in American-manufactured

ammunition at around the time of the shooting, Dr. Kubic responded: "I don't claim to be an **expert** on manufacturer and supply of various ammunitions. It's really the purview of a fire examiner." [68] However, he did state that tin was an infrequent component of primer **residue** based on his reading of the reported literature on the subject. Dr. Kubic stated that he formed the impression that he would be called to testify at trial as a **witness** for the Defendant but did not have a recollection of contacting Mr. Walters when the trial was going on. When asked whether he felt he had been successful in educating Mr. Walters on the subject of GSR, Mr. Kubic stated: "I think I succeeded in a lot of it but not all of it." [69]

FOOTNOTES

[68] Id., p. 130, ll. 12-14.

[69] Id., p. 133, ll. 2-3.

Testimony of Retired Detective James Rice

The People called retired NYPD detective James Rice. Mr. **[***109]** Rice stated that he was employed as a detective in 1999 when he was assigned to the case underlying the Defendant's conviction. He met the recantation **witness,** Robert Davis, when he went to retrieve him from the custody of the New York City Department of Correction to accompany him to the District Attorney's office in preparation for Trial 1. Aside from introducing himself to Mr. Davis and informing him that he was being taken to the District Attorney's office, Mr. Rice said he had no substantive communications with him.

Mr Rice was present during the interview conducted of Mr. Davis by Assistant District Attorney Rodriguez. His recollection was that Mr. Davis was asked questions about what he had seen on the evening of the shooting. Mr. Rice did not participate in the conversation. He stated that, to the best of his knowledge, a second Assistant District Attorney was also present for the interview. Mr. Davis remained calm during the interview. Mr. Rice said he never threatened the Defendant, nor did he discuss potentially enhancing his sentence if he did not cooperate. Mr. Rice did not recall ADA Rodriguez make any threats to Mr. Davis. The interview lasted 1 to 2 hours. Once the interview **[***110]** was complete Mr. Rice said he returned Mr. Davis to the custody of the Department of Correction.

On cross-examination Mr. Rice stated that at the time he went to retrieve Mr. Davis he was aware of a statement made by Mr. Davis pursuant to a police canvass. Mr. Rice acknowledged that there was nothing in that original statement about anyone removing a jacket. Finally, Mr. Rice stated that there was nothing that would have prevented the District Attorney's office from using other detectives to interview Mr. Davis subsequent to the meeting he attended. Whether this in fact occurred was unknown to Mr. Rice, who said it would not be unusual to have more than one meeting with a **witness** prior to a **homicide**trial.

Court's Credibility Determinations With Respect to Hearing Witnesses

The Court found the testimony of Robert Davis to be patently incredible. The Court found

the testimony of Mr. Rice to be credible. The Court believed that Mr. Walters testified honestly. It was clear, however, that he did not have a clear memory about many of the events related to the Defendant's trials. The Court also did not agree with a number of the conclusions he reached about his prior representation. The Court **[***111]** found Dr. Kubic's testimony to be credible. The Court also did not fully agree, however, with a number of the conclusions he reached. All of these issues are more fully discussed *infra*.

ALLEGED PROCEDURAL BAR TO CONSIDERATION OF DEFENDANT'S MOTION

The People assert that the Defendant's Instant Motion (the Supplemental Motion) should be denied on procedural grounds. As noted *supra*, the Supplemental Motion was initially filed on July 19, 2007. Justice Torres decided Defendant's initial motion on December 10, 2007 but retired from the bench without ruling on Defendant's Supplemental Motion. The People never responded to Defendant's Supplemental Motion. Defendant then refiled his Supplemental Motion on February 19, 2010.

During that time, according to the Defendant, the Appellate Division denied his application to appeal the denial by Justice Torres of his original CPL 440.10motion. Defendant's original counsel, Mr. Zeno, submitted affirmations with the Appellate Division, First Department on May 12, 2008 and May 11, 2009 requesting an enlargement of time to perfect the Defendant's direct appeal until after the Supplemental Motion had been decided. Mr. Zeno also wrote a letter to the Defendant **[***112]** on February 1, 2008 indicating that he was anticipating a response from the People to his Supplemental Motion.

The People also make a second application to preclude a portion of Defendant's motion on procedural grounds. In his Reply Affirmation, dated September 22, 2010, Defendant's counsel for the first time in this litigation asserted that it was error for Mr. Walters not to call Dr. Fredrick Whitehurst as an **expert** at Trial 3. Dr. Whitehurst had testified at Trial 2 about deficient procedures which had been used at the FBI laboratory where Ms. Lunde worked.

With respect to their general preclusion application, the People assert that the Defendant should have asked Justice Torres to issue a decision on the Supplemental Motion at the same time that the original motion was decided. The People argue that they have been severely prejudiced by not having Defendant's Supplemental Motion decided by Justice Torres, who was obviously in the best position to rule on Defendant's motion, and by the additional passage of time which has resulted from these delays. They argue that the Defendant effectively "abandoned" his claims and that the equitable doctrine of laches forecloses them now. The People **[***113]** also argue that various sections of CPL Article 440 authorize this Court to deny Defendant's claims on procedural grounds.

With respect to Defendant's recantation **evidence,** the People argue that this **evidence** did not meet the standard provided by CPL 440.10 (1) (g), that a motion alleging newly discovered **evidence** must be made with due diligence after the discovery of such **evidence.** Yet there is no assertion that the Defendant's initial motion was not made with due diligence as provided by the statute. What is alleged is a lack of due diligence *after* the motion was filed. For that reason, in the Court's view, CPL 440.10 (1) (g) cannot act as a bar to Defendant's newly discovered **evidence** claim.

The People also cite CPL 440.10 (3) (a), which allows a court to deny a 440.10 motion where a defendant does not use due diligence to create a record prior to sentencing which would allow a defendant's claims to be determined on a direct appeal. *See People v. Friedgood*, 58 NY2d 467, 448 N.E.2d 1317, 462 N.Y.S.2d 406 (1983). That section, however, explicitly excludes motions alleging the ineffective assistance of counsel at trial, the primary basis of Defendant's motion here. Moreover, there is no assertion here that the Defendant's **[***114]** recantation **witness** had recanted his prior testimony prior to the imposition of the Defendant's sentence. Thus, this section, in the Court's view, also is not applicable here.

The People cite CPL 440.10 (3) (c) which requires that a 440.10 motion may be denied by a court where a Defendant was in a position to raise a claim on a previous 440.10 motion but did not do so. In this case, however, Defendant's instant claim came as a supplement to Defendant's initial motion and was submitted before that initial motion was determined. In the Court's view, Defendant's initial 440.10 application was not a "previous motion" as envisioned under that portion of the statute. In sum, in this Court's view, the People have not presented any controlling authority which would authorize the Court to deny the Defendant's claims on procedural grounds.

In this Court's view, however, the People's argument to deny Defendant's motion on procedural grounds must fail for an even more significant reason. The delays in this case were not only the fault of the Defendant. They were also occasioned by the actions of the People and the Court. Although the Defendant's Supplemental Motion was filed on July 19, 2007, the **[***115]** People apparently did not respond to this motion in any form for three years, until 2010 when the case was assigned to this Court. The People complain of the prejudice they now suffer from the delay in hearing Defendant's claims. But they did nothing to alleviate that potential prejudice over the past three years.

Even more significant, in the Court's view, however, were the actions which the Court itself took with respect to Defendant's motion. When Justice Torres retired from the bench at the end of 2007 without deciding the Supplemental Motion (which had been filed six months earlier) no provision was apparently made to transfer this pending motion to another Court. It is, of course, a hallmark of our justice system that a cognizable claim should be considered and ruled upon by a Court in a timely manner. Here, Defendant's pending motion apparently simply fell through the cracks and was never considered by any Court for two years.

In this Court's view, the responsibility for that failure was shared by the Defendant's former counsel (for apparently not taking any meaningful steps to press for a resolution of the motion), the People (for simply never responding to the motion) and the **[***116]** Court (for not arranging for the motion to be adjudicated by anyone following Justice Torres's retirement). The Court agrees with the People that a portion of this neglect can be attributed to the Defendant. But there is also ample blame to go around. Under these circumstances, it would be manifestly unjust, in the Court's view, to bar Defendant's motion on procedural grounds. Defendant should have his claims fully and fairly considered. Thus, in addition to the fact that there is no clear authority which would allow this Court to bar Defendant's claims, barring those claims on procedural grounds would also be inequitable. For all of these reasons, the People's application to bar Defendant's overall motion on procedural grounds is denied.

The Court has a different view concerning the People's application to preclude Defendant's claim that it was ineffective for Mr. Walters to not call Dr. Whitehurst as an **expert witness** at Trial 3. A party may not raise a claim for the first time in a reply affirmation. *People v. Ford*, 69 NY2d 775, 505 N.E.2d 615, 513 N.Y.S.2d 106 (1987), *rearg denied*, 69 NY2d 985, 509 N.E.2d 363, 516 N.Y.S.2d 1028. That is what was done by Mr. Michelen here. The facts here, moreover, would make it particularly inappropriate to allow **[***117]** this new claim to be raised for the first time in a reply affirmation. Mr. Michelen was retained by the Defendant only in 2010. But this case appeared on this Court's calendar for the first time in March of 2010. Mr. Michelen, upon his initial appearance in this case, was given the opportunity to move to supplement or amend the earlier filings and claims made by Defendant's former counsel, Mr. Zeno, which were refiled in February of 2010. He declined to do so. Having failed to avail himself of that opportunity it would be inappropriate to allow him to raise a new claim through a reply affirmation more than four years after the Instant Motion was initially filed. For that reason, the Court holds that the claim that Mr. Adams was denied the effective assistance of counsel because he failed to call Dr. Whitehurst as an **expert witness** at Trial 3 is procedurally barred. In the Court's view, that application should also be denied on the merits. The merits of this claim are addressed *infra*.

NEWLY DISCOVERED EVIDENCE: RECANTATION BY ROBERT DAVIS

When a defendant claims that newly discovered **evidence** requires that a new trial be held the **evidence** must meet the six requirements set forth by the **[***118]** Court of Appeals in *People v. Salemi*, 309 NY 208, 128 N.E.2d 377 (1955), *cert denied*, *Salemi v. State of New York*, 350 U.S. 950, 76 S. Ct. 325, 100 L. Ed. 827 (1956). It must be of the type that would probably change the result if a new trial were granted; it must have been discovered after the trial that resulted in conviction; it could not have been discovered by the defendant prior to trial with the exercise of due diligence; it must be material to the issue; it must be noncumulative and it cannot merely be impeachment **evidence.**

There is a presumption of regularity which attaches to judicial proceedings and the burden to overcome that presumption where a defendant seeks to present recantation **evidence** rests with the defendant by substantial **evidence.** *People v. Williams*, 11 AD3d 810, 784 N.Y.S.2d 185 (2004), *lv denied*, 4 NY3d 769, 825 N.E.2d 145, 792 N.Y.S.2d 13 (2005). In both federal and state courts recantation testimony has been viewed with great suspicion. *See Sanders v. Sullivan*, 863 F2d 218 (2d Cir 1988); *People v. Cintron*, 306 AD2d 151, 763 N.Y.S.2d 11 (1st Dept 2003), *lv denied*, 100 NY2d 641, 801 N.E.2d 428, 769 N.Y.S.2d 207; *People v. Donald*, 107 AD2d 818, 484 N.Y.S.2d 651 (2d Dept 1985). Indeed, it has been held that "there is no form of proof so unreliable as recanting testimony". *People v. Donald*, 107 AD2d 818, 484 N.Y.S.2d 651 (2d Dept 1985), *quoting* **[***119]** *People v. Shilitano*, 218 NY 161, 112 N.E. 733, 34 N.Y. Cr. 358 (1916).

In the Court's view, Mr. Davis's testimony was patently incredible for multiple reasons which go far beyond the great skepticism which must be afforded to any**witness** who seeks to recant his previous sworn testimony. Mr. Davis has been convicted of multiple felonies, has absconded from parole supervision and admitted during the hearing that he lied to the State Department of Correctional Services in order to gain entry into the Shock Incarceration Program. He is a person who has often put his own interests above the interests of society, the obligation to tell the truth and the obligation to follow the law. There is no reason to

believe he followed a different course during his hearing testimony.

His recantation affidavit came more than four years after his sworn trial testimony. Most significantly, for the Court, his testimony at the hearing was obviously not credible. As outlined *supra*, during his testimony at the hearing, Mr. Davis not only recanted a portion of his prior sworn testimony at trial. He testified in a manner which was flatly contradictory to his own affidavit. In his affidavit, he recanted virtually all of his trial testimony. **[***120]** At the hearing, he testified that his trial testimony, in which he described multiple observations he had made which were relevant to the shooting, was truthful and accurate in every respect except one: that his testimony about seeing the Defendant remove his jacket had been inaccurate and untruthful. His demeanor at the hearing was combative and obviously deceptive. He refused to answer certain questions or acknowledge indisputable facts (like the fact that he was testifying in a manner which was different from his trial testimony). He contradicted his own statements at the same hearing. He appeared to have a pre-determined goal: to say that he did not see the Defendant remove his jacket, while asserting that the remainder of his testimony had been truthful. This Court cannot know what was in Mr. Davis's mind. The Court's impression, however, was that Mr. Davis's testimony was tailored to recant the critical fact he believed he needed to recant, while asserting his general veracity in a manner which he apparently hoped might insulate him from a perjury charge.

His testimony was further undermined by the testimony of retired Detective James Rice. Mr. Rice testified that, at least in **[***121]** his interactions with Mr. Davis, it was the district attorney's office rather than the police (as Mr. Davis claimed) who questioned Mr. Davis and that Mr. Davis was not coerced or given any promises in return for his statement. The overall credibility of Mr. Davis's testimony, in the Court's view, was also compromised by the strange events which preceded it, in which his attorney first reported that Mr. Davis would not testify and then, following apparently loud conversations outside the courtroom, reported that his representation to the Court moments earlier had all been a misunderstanding.

Mr. Davis's recantation, in the Court's view, also had little significance, even if credited. The key claim the Defendant made at trial was that Officer Anselmo had mistakenly identified the Defendant as one of the shooters. Mr. Davis never claimed to have seen the shooting and offered no **evidence** at trial on that point. The testimony which Mr. Davis recanted during the hearing simply corroborated the fact that the Defendant took off and discarded his jacket during the chase. The chase, however, occurred *after* this alleged misidentification. DNA **evidence** conclusively linked the jacket to the Defendant. **[***122]** The fact that Mr. Davis corroborated the fact that the Defendant took off and discarded his jacket was not, in the Court's view, a fact which if not testified to at trial would have had any potential to change the verdict in this case. It primarily concerned the undisputed fact that the jacket had been worn by the Defendant.

The testimony of Shahil Azziz corroborated the police testimony on the crucial subject of whether the *shooter* was wearing the jacket on the night of the shooting. Mr. Azziz identified the jacket as belonging to the shooter. Mr. Davis simply said that the person being chased by the police (who, according to the defense, had by that time already been misidentified by the police) took off a jacket which DNA **evidence** conclusively linked to the Defendant in any event. For all of these reasons, Defendant's motion to vacate the judgment against him because new **evidence** has been discovered which would likely have favorably changed his

verdict is denied.

CLAIM THAT DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Federal and state law provide two related but distinct standards for determining whether a defendant has received the ineffective assistance of counsel at a criminal **[***123]** trial. Under the federal standard, ineffective assistance of counsel requires both that counsel's performance fall below "an objective standard of reasonableness" and also that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674; 694 (1984), *rehearing denied*, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Strickland*, at 694.

While New York law applies the first of these tests, New York case law has departed from the second "but for" *Strickland* prong and adopted "a rule somewhat more favorable to defendants". *People v. Turner*, 5 NY3d 476, 480, 840 N.E.2d 123, 806 N.Y.S.2d 154 (2005). Under this New York rule, a defendant need not "fully satisfy" the *Strickland* prejudice test. Prejudice, under the New York standard, is "a significant but not indispensable element in assessing meaningful representation." *People v. Stultz*, 2 NY3d 277, 284, 810 N.E.2d 883, 778 N.Y.S.2d 431 (2004), *rearg denied*, 3 NY3d 702, 818 N.E.2d 671, 785 N.Y.S.2d 29. A court must review whether counsel's conduct deprived a defendant of a fair trial. *People v. Benevento*, 91 NY2d 708, 697 N.E.2d 584, 674 N.Y.S.2d 629 (1998). Counsel provides effective assistance "[s]o **[***124]** long as the **evidence,** the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation'". *Id.*, 91 NY2d at 712, *quoting, People v. Baldi*, 54 NY2d 137, 147, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981). ". . . New York state courts have repeatedly asserted that the New York standard is, in practice and in intent, more generous to defendants than the federal standard." *Rosario v. Ercole*, 601 F3d 118, 125 (2d Cir 2010), *rehearing in banc denied*, 617 F3d 683. [70]

FOOTNOTES

70 In their denial of an *en banc* rehearing in the *Rosario* case, in four opinions by ten justices, the Second Circuit explored the question of whether, notwithstanding the generally more stringent ineffective assistance standard under state law, the application of the state standard could lead to results which would be unconstitutional under *Strickland*. These results could arise, according to a number of the justices, because a lawyer who committed a prejudicial error under *Strickland* might nevertheless be found effective under the New York standard where that lawyer's overall representation was meaningful. In this case, as discussed *infra*, however, this Court has **[***125]** found counsel's performance effective under both the federal and state constitutions. Therefore, the significant questions discussed in the *Rosario en banc* ruling are not implicated here.

The Defendant makes a number of claims as to why Mr. Walters's handling of the GSR **evidence** deprived him of the effective assistance of counsel. He generally asserts that Mr. Walters, the Defendant and their outside **expert,** Dr. Thomas Kubic, had developed an

effective strategy for combating the GSR **evidence** at Trial 3 and that Mr. Walters departed from that strategy without consulting Mr. Adams in a manner which was professionally unreasonable and deprived Mr. Adams of a fair trial. Specifically, Defendant asserts that it was professionally unreasonable for Mr. Walters to fail to:
- Make an *in limine* motion to preclude the introduction of GSR **evidence** because a proper chain of custody had not been maintained;

- Have Dr. Kubic present with defense counsel during the questioning of Ms. Lunde and Mr. Schwoeble;

- Call Dr. Kubic as an **expert witness** to testify on the Defendant's behalf;

- Challenge the admissibility of the GSR tests done at Mr. Schwoeble's lab because the lab was not accredited by the American **[***126]** Society of Crime Laboratory Directors Laboratory Accreditation Board;

- Argue against Mr. Schwoeble being deemed an **expert** because he was not a scientist and did not have minimum educational credentials;

- Obtain and provide Dr. Kubic with copies of the standard operating procedures ("SOP's") normally followed by the R.J. Lee laboratory and actually followed by the lab in analyzing the GSR **evidence** in this case and obtain uncompleted studies and their underlying data relied upon by Mr. Schwoeble in testifying about the likelihood of GSR contamination;

- Challenge the admissibility of ongoing GSR contamination studies which Mr. Schwoeble relied upon to the extent those studies were ongoing, were not peer-reviewed and had not gained acceptance in the scientific community; and

- File an *in-limine* motion which counsel had drafted which sought to preclude Mr. Schwoeble from testifying about GSR contamination based on incomplete studies.
The Defendant also generally attacks the manner in which Mr. Walters handled testimony by Ms. Lunde and Mr. Schwoeble which linked the Defendant's jacket to the gun used in the shooting because of the presence of tin in the jacket's GSR.

These claims are analyzed **[***127]** in two parts. First, the claim that various deficiencies in Mr. Walters's work made his representation professionally unreasonable is reviewed. Second, the question of whether the alleged errors in Mr. Walters's representation resulted in prejudice to the Defendant (under federal law) or the deprivation of meaningful representation (under state law) is analyzed.

Claim That Walters's Representation Was Professionally Unreasonable Failure of Counsel to Make In-Limine Motion to Preclude GSR Evidence

Defendant claims first that Mr. Walters was ineffective in failing to make an *in-limine* motion to preclude the admission of GSR **evidence** on chain-of-custody grounds. He argues that as a fungible item, the GSR **evidence** required a demonstration of the chain of custody which was maintained throughout its handling and that this was not done. He notes, *inter alia*, the fact that the jacket at one point was placed on the floor of the muster room at a police precinct where it could have become contaminated, that it was moved at the crime scene,

that it was transferred from one bag to another by an unknown person at some point and that it was not ripped when it was originally recovered but was ripped **[***128]** prior to the second trial. [71]

FOOTNOTES

[71] *See* Defendant's Supplemental Memorandum at 94-95.

In determining whether Mr. Walters was ineffective for failing to bring this preclusion motion, however, it must be determined whether such a motion would have had any likelihood of success. A defense counsel's failure to bring a motion which is without merit or unlikely to succeed cannot be considered ineffective assistance of counsel. *In re Hui H.*, 232 AD2d 248, 648 N.Y.S.2d 438 (1st Dept 1996); *People v. Ferreiras*, 222 AD2d 202, 635 N.Y.S.2d 470 (1st Dept 1995), *app denied*, LINK"http://www.lexis.com/research/buttonTFLink?_m=4059a091f309947b9d8f4b21f78a1113&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b30%20Misc.%203d%201228A%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=47&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b87%20N.Y.2d%20921%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=c93cf5af1aa9df9f012117bc41c4effd"87 NY2d 921, 664 N.E.2d 514, 641 N.Y.S.2d 603; *Luparella v. United States*, 335 Fed. Appx. 212 (3d Cir 2009); *People v. Leteiza*, 241 AD2d 306, 659 N.Y.S.2d 38 (1st Dept 1997), *app denied*, 91 NY2d 875, 691 N.E.2d 646, 668 N.Y.S.2d 574; *People v. Ennis*, 41 AD3d 271, 839 N.Y.S.2d 720 (1st Dept 2007),*affd*, 11 NY3d 403, 900 N.E.2d 915, 872 N.Y.S.2d 364 (2008), *cert denied, Ennis v. New York*, 129 S. Ct. 2383, 173 L. Ed. 2d 1301 (2009). Here, it is clear in the Court's view, that any motion to categorically exclude all of the GSR **evidence** which was introduced at the trial would have been without merit and would have been denied. For that reason, Mr. Walters was not ineffective in failing to make such a motion.

Where an item of real **evidence** is sought to be introduced the offering party must show that the item is identical to that involved **[***129]** in a crime and that it has not been tampered with. *People v. Julian*, 41 NY2d 340, 342-343, 360 N.E.2d 1310, 392 N.Y.S.2d 610 (1977). A party seeking to introduce real **evidence**must "provide reasonable assurances of the identity and unchanged condition of the **evidence**" at trial. YPERLINK"http://www.lexis.com/research/buttonTFLink?_m=4059a091f309947b9d8f4b21f78a1113&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b30%20Misc.%203d%201228A%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=55&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b41%20N.Y.2d%20340%2c%20343%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzV-zSkAb&_md5=edf1796c739e407d071ce89cc2956a49"*Id.*, at 343. A unique item does not require a demonstration that a chain of custody has been maintained because the item can be readily identified by its characteristics. A party seeking to offer a fungible item however (like a plastic bag containing narcotics) must demonstrate that the proffered **evidence** is, indeed, the same as that purported to be associated with a crime. One means of doing that is to show that a chain of custody was maintained for the item, but that is not the only way in which the required showing can be made. *Id.*

Defendant's claim here concerns the People's alleged failure to demonstrate the identity and unchanged condition of the GSR particles prior to the time those particles were removed from the Defendant's jacket. It is important initially to understand, however, what his claim does *not* concern. The claim does not concern the jacket itself. The jacket was indisputably a unique item at trial. It had the Defendant's blood **[***130]** on it and was identified at trial as the same jacket which was worn by the person who shot the victims or the person who was chased by the police after the shooting. There is no claim that the Defendant's jacket (as opposed to the GSR particles on the jacket) should have been inadmissible at trial.

The chain of custody issue raised by the Defendant also does not concern the handling of the particles at the time or after they were removed from the coat and analyzed. Ms. Lunde and Mr. Schwoeble both testified in detail about the steps they took to safeguard the jacket from contamination. There is no claim that Ms. Lunde or Mr. Schwoeble failed to maintain a proper chain of custody with respect to the GSR particles at the time or after they were taken off the Defendant's jacket or that the prosecution failed to adequately care for such **evidence** after it was extracted and analyzed. Defendant apparently posits that in order to be admissible, the People were required to demonstrate that a proper chain of custody was maintained for the thousands of microscopic GSR particles which were analyzed in this case from the time those particles were deposited on the jacket until the time they were **[***131]** removed. Ms. Lunde testified at trial that these particles are roughly one millionth of a meter in size. They can only be detected with the use of an electron microscope.

In the Court's view, had that claim been made at trial, it would have properly been denied for two reasons. First, where there is proper assurance of the identity and unchanged condition of a unique item of **evidence** (like the jacket), at least one appellate court in New York has recently held that a claim concerning the possible contamination of microscopic **evidence** which can be detected on that unique item goes to the weight and not the admissibility of that **evidence.** A claim closely analogous to the one raised here was analyzed last month by the Second Department in *People v. Ortiz*, 80 AD3d 628, 914 N.Y.S.2d 281 (2d Dept 2011). In that case, a child who was allegedly sexually assaulted deposited her underpants in a clothes hamper which also contained clothes worn by non-suspect family members. Twenty days after the underpants were deposited in the hamper, the police contacted the family, had them remove the underpants and tested them. Tests revealed both a DNA sample from the defendant and a second DNA sample which could have come **[***132]** from the victim's father's clothing which had been mixed with the victim's clothing in the hamper. The Court held the admission of the underpants was proper:

The testimony at trial gave reasonable assurances that the *underpants* admitted into **evidence** were the same underpants the complainant had worn at the time of the incident and were substantially unchanged. (citations omitted). Moreover, once the People properly authenticated the underpants, any **evidence** that the *DNA* on the underpants could have been contaminated goes to the weight of the **evidence,** not to the admissibility of the**evidence** (*see People v. Klinger*, 185 Misc 2d 574, 586, 713 NYS2d 823; *see also People v. Ko*, 304 AD2d 451, 452, 757 NYS2d 561, *remanded on other grounds* 542 U.S. 901, 124 S. Ct. 2839, 159 L. Ed. 2d 265 (parallel citations omitted)(emphasis added).

The *Ortiz* holding makes sense, in this Court's view, because requiring a chain of custody to be maintained for any microscopic particle (like the one-millionth of one meter sized particles here) which is contained on a unique item of real **evidence** would present insurmountable barriers to the admission of highly probative**evidence** in many cases and will not be necessary in many cases because a fact **[***133]** finder can properly consider the extent to which possible contamination should affect the weight rather than the admissibility of that **evidence.** That principle is illustrated by the GSR **evidence** here. Unless a defendant shooting a gun is instantly apprehended and has his clothing taken from him and placed in a suitable sealed receptacle by a person who does not himself have the potential to contaminate the clothing with GSR, such **evidence** on clothing will *always* be subject to some degree of possible loss or contamination.

This case is distinguishable from *Ortiz* because here the potential contamination of the jacket arose in large part *after* the jacket had been seized as **evidence**by the police and should have been safeguarded. On the other hand, the reason the jacket was not initially kept in a sealed container is because when the case was first developed there was apparently no consideration given to testing the jacket for GSR. There is no question that the jacket in this case should have been better protected from potential contamination and that the manner in which it was handled subjected it to contamination. But that did not, in the Court's view, result in the **evidence** being so **[***134]** unreliable as to justify its complete exclusion.

That is not to say that the doctrine which the *Ortiz* court articulated should be given unlimited application. One might well imagine an infinite number of circumstances where microscopic particles or genetic **evidence** deposited on a unique item of **evidence** might be subject to such a degree of contamination as to warrant that **evidence's** outright exclusion. The **evidence** in this case should not have been excluded because the People presented persuasive **evidence** of the identity and unchanged condition of the GSR particles at trial.

Mr. Schwoeble's testimony made clear that the GSR **evidence** he obtained was highly probative of the fact that the person wearing the Defendant's jacket had fired a gun, been very close to a person who had fired a gun or fired a gun identified as the Glock possessed by the Defendant. He explained in detail why he believed the possible sources of contamination which had been posited by the Defendant could not have accounted for the findings he made. Mr. Schwoeble testified that simply taking a jacket in and out of a bag would not cause the jacket to lose all of its GSR particles. He said that a police officer who had **[***135]** fired his weapon using non-foreign made ammunition and then handled the jacket would not have deposited the tin particles he found.

Mr. Schwoeble said that placing the jacket on the muster room floor would not have accounted for the particles he detected because those particles had been recovered from the front and sides of the jacket and only the back of the jacket had apparently been placed on the floor. He said that simply handling the jacket, even if that had been done by multiple people, would not have accounted for the amount of GSR he found. He further recounted a study he was aware of which had been conducted in the late 1990's by Italian and American investigators which had concluded that the presence of GSR in areas where police officers gather was "relatively non-existent" *See* n. 28 *supra*.

Mr. Schwoeble admitted that any time two objects come into contact there may be a particle exchange between them. He did not demonstrate that every one of the thousands of microscopic particles he recovered from the jacket came from the gun which was fired in this case and not from contamination. His testimony did conclusively demonstrate however, thatthe GSR **evidence** he recovered was highly **[***136]** probative and reliable of the basic fact it was offered to support: that the Defendant was in close proximity to a shooting (or the firing of the Glock identified as his gun at trial, if the **evidence** that the presence of tin in the GSR was probative of that fact was credited).

His testimony was further supported by the testimony of Ms. Lunde. She did not specifically refute the claim that contamination accounted for the GSR on the jacket. In fact, she expressed strong general concerns about the fact that the jacket had been placed on a police precinct floor. Her testimony, however, made clear that the presence of tin as part of the GSR on the Defendant's jacket was probative of the fact that this jacket had been in the proximity of the 9 mm Glock the Defendant was alleged to have fired. Her testimony further supported the importance of the GSR **evidence** and the fact that completely precluding the jury from hearing anything about it (as the Defendant here asserts his counsel should have sought) would have prevented the jury from hearing probative**evidence.**

Had Mr. Walters made a motion to preclude the GSR **evidence** and had the Court further conducted a hearing on the issue, Mr. Walters **[***137]** might have presented the testimony of Dr. Kubic who doubtless would have opined that there were significant potential contamination problems with the manner in which the jacket was handled. Having reviewed Dr. Kubic's instant hearing testimony and affidavit, however, his testimony, in the Court's view, would not have resulted in a proper ruling that the GSR **evidence** should have been excluded. The valid concerns raised by the Defendant here were properly addressed at trial by arguments concerning the weight rather than the admissibility of the GSR **evidence.** *See People v. Hawkins*, 11 NY3d 484, 900 N.E.2d 946, 872 N.Y.S.2d 395 (2008); *People v. Gilmore*, 72 AD3d 1191, 898 N.Y.S.2d 717 (3d Dept 2010). In the Court's view, the complete exclusion of the GSR **evidence** in this case was clearly unwarranted. Defendant's counsel was not ineffective for failing to make a suppression motion which had little chance of success. *People v. Washington*, 39 AD3d 1228, 834 N.Y.S.2d 407 (3d Dept 2007), *lv denied*, 9 NY3d 870, 872 N.E.2d 1206, 840 N.Y.S.2d 900.

Claim That the Failure of Mr. Walters to Have Dr. Kubic Present *During the Trial Constituted the Ineffective Assistance of Counsel*

In the Court's view, there was no reason for Mr. Walters not to have Dr. Kubic present during the examination of the State's **[***138]** GSR **witnesses** and consult with him prior to cross-examining those **witnesses.** During the hearing Mr. Walters agreed with a statement by Defendant's current counsel that it would have been "extraordinarily helpful" to have a GSR **expert** [like Dr. Kubic] assist him during his cross-examination of the GSR **witnesses** at trial. *See* n. 44, *supra*.

On the other hand, this is obviously not a case where Mr. Walters failed to consult with an **expert** or educate himself on the science behind **gunshot residue**. Both Mr. Walters and Dr. Kubic testified about the repeated conversations and meetings they had on the subject and Mr. Walters also testified about the other steps he had taken to educate himself about

GSR. Dr. Kubic testified that he believed he had been successful in educating Mr. Walters on the science behind GSR although not to a complete degree. Mr. Walters said that he did not seek to have Dr. Kubic present during the trial because he felt that this was not necessary and that he had obtained the limits of Dr. Kubic's analysis. On the other hand, Mr. Walters admitted that he had not been able to completely learn the science from the materials he had reviewed and his conversations with Dr. **[***139]** Kubic.

While consulting with Dr. Kubic during the trial would have been helpful, however, in the Court's view, the fact that this step was not taken did not make Mr. Walters's representation ineffective. This is because a large part of the impeachment material which Dr. Kubic would presumably have been present to assist Mr. Walters with was in fact elicited through Ms. Lunde's and Mr. Schwoeble's testimony. That information is summarized *infra*. The ultimate inquiry here, of course, is not the degree to which Mr. Walters should or should not have consulted with an **expert** during the trial. The inquiry is whether the **evidence** and argument Mr. Walters put before the jury was professionally reasonable. In the Court's view, as discussed *infra*, his representation clearly was.

Failure to Call Dr. Kubic as an Expert Witness

The Court does not believe Mr. Walters's representation was deficient because he failed to call Dr. Kubic as an **expert witness** for the defense. Mr. Walters testified about his reasons for not calling Dr. Kubic as an **expert witness** during the hearing. He explained that he did not call Dr. Kubic because he believed that he had sufficiently impeached both the credibility and conclusions **[***140]** of Ms. Lunde and Mr. Schwoeble on cross-examination and that calling Dr. Kubic might have had the effect of shifting the burden of proof. As Mr. Walters explained his reasoning: "you don't go into a cage with a lion you take the stick and you poke him". *See* n. 49 *supra*.

In retrospect, Mr. Walters testified, if he had to try the case again, he would have called multiple **expert witnesses**. The standard for judging whether an attorney's performance at trial is objectively reasonable, however, is not based on a 20/20 hindsight analysis of what steps might have been taken which could have resulted in a defendant's acquittal. The "most critical concern" in reviewing ineffective assistance claims "is to avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis. It is always easy with the advantage of hindsight to point out where trial counsel went awry in strategy." *Baldi, supra*, 54 NY2d at 146. In the Court's view, Mr. Walters's decision to not call Dr. Kubic as an **expert witness** was a reasonable one at the time.

A couple of points are worth noting in this regard. First, according to Dr. Kubic's testimony at the hearing, he **[***141]** never tested the Defendant's jacket and thus could not have offered any independent **evidence** on the subject. The purpose of his testimony would have been solely to impeach the testimony of Ms. Lunde and Mr. Schwoeble. A **witness** can also obviously be effectively impeached, however, on cross-examination. Second, during the hearing, Dr. Kubic said that he had no particular issues with the testimony of Ms. Lunde. He characterized her testimony as "straightforward". Indeed, he testified that Ms. Lunde had been mistaken about the fact that her laboratory was not subject to external proficiency testing and that, in fact, such testing was conducted at the FBI laboratory. During his cross-examination at the hearing, it was also clear that he did not correctly remember Ms. Lunde's

testimony at Trial 3. While he testified at the hearing that Ms. Lunde had said that the FBI would not have tested the jacket had they known prior to their tests that the jacket had been placed on the precinct floor, in her actual testimony at Trial 3, she said only that the placement of the jacket on that floor would have raised questions for her. Given these facts, it is difficult to see how Dr. Kubic could have **[***142]** been an effective impeachment **witness** against Ms. Lunde (as opposed to Mr. Schwoeble).

Finally, when he was asked whether tin was a common element found in American made ammunition, Dr. Kubic demurred, saying that he was not an **expert** in that field. Thus, although Dr. Kubic would have likely testified at trial, as he did at the hearing, that the conclusion that the Defendant's jacket contained GSR from the 9mm Glock by virtue of the presence of tin in the jacket's GSR was highly speculative, that conclusion might also have been undermined by his admission that he was not an **expert** on the critical issue of how likely it might be that the tin on the Defendant's jacket had come from a source other than the 9 mm Glock.

In the Court's view, there were thus potential pitfalls as well as advantages to calling Dr. Kubic as a **witness.** Once Mr. Walters made the decision not to call Dr. Kubic, it was incumbent on Mr. Walters to undermine the People's GSR **evidence** through other means. In the Court's view, as outlined both *supra* and *infra*, Mr. Walters was partially successful and partially deficient in that regard. But the threshold decision not to call Dr. Kubic, in the Court's view, was not objectively **[***143]** unreasonable. The failure to employ an **expert** defense **witness** does not constitute ineffective assistance of counsel where counsel may have reached a reasonable strategic decision not to do so. *See People v. Brunson*, 68 AD3d 1551, 892 N.Y.S.2d 261 (3d Dept 2009), *lv denied*, 15 NY3d 748, 933 N.E.2d 219, 906 N.Y.S.2d 820 (2010); *People v. Diaz*, 131 AD2d 775, 517 N.Y.S.2d 66 (2d Dept 1987); *People v. Loret*, 56 AD3d 1283, 867 N.Y.S.2d 649 (4th Dept 2008), *lv denied*, 11 NY3d 927, 874 N.Y.S.2d 12 (2009).

Failure to Call Dr. Whitehurst as an Expert Witness

In the Court's view, Defendant's claim that Mr. Walters was ineffective for failing to call Dr. Whitehurst as a **witness** at Trial 3 must be denied on procedural grounds. But the Court also believes that such a claim would have to be denied on the merits. First, the burden of proof issues which led to Mr. Walters's decision not to call Dr. Kubic would obviously also have been applicable to Dr. Whitehurst. Second, according to the testimony of Mr. Walters at the hearing, Dr. Whitehurst was not available to be called as a **witness** at Trial 3. The only way in which Mr. Walters apparently would have been able to present his testimony to the jury would have been by reading it (assuming an application to do that would have been granted). Engaging in **[***144]** a "battle of the **experts**" by reading the prior testimony of Dr. Whitehurst, however, and juxtaposing that with the live testimony, exhibits and graphs presented by of Ms. Lunde and Mr. Schwoeble might have been less than compelling.

As the Court understands Dr. Whitehurst's testimony, it would have been offered on the subject of the deficiencies in the FBI crime laboratory's procedures in order to impeach Ms. Lunde's conclusions. Her conclusions, however, were significantly impeached during her testimony at trial. The jury heard that she had been charged with a crime for giving false testimony in an unrelated case and been forced to resign. Finally, as noted *supra*, Mr.

Walters attempted to elicit additional information from Ms. Lunde about the deficiencies at the FBI lab during his cross-examination. These efforts, however, were rebuffed by Justice Torres. For all of these reasons, in the Court's view, the failure of Mr. Walters to call Dr. Whitehurst as an **expert** at Trial 3 was not deficient even assuming such a claim was not procedurally foreclosed.

Failure to Challenge the Admissibility of Tests Done by RJ Lee *Because the Lab Lacked a Specific Accreditation*

With respect to Mr. Walters **[***145]** failure to challenge the admissibility of tests done by the R.J. Lee laboratory because that laboratory lacked a specific accreditation, Defendant provides no authority which would suggest that any such preclusion motion would have been successful. There was no **evidence** at the trial or hearing which would indicate that the fact that the R.J. Lee lab was not accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board would have provided any basis for a court to preclude any tests done at the laboratory. Mr. Walters did elicit from Mr. Schwoeble on cross-examination that his laboratory did not have such an accreditation. But Mr. Schwoeble, in answering that question, also pointed out that the protocols his laboratory followed were the same protocols followed by the FBI and other law enforcement organizations.

Failure to Move to Preclude Mr. Schwoeble as an Expert Witness Because

He Did Not Have the Requisite Educational Credentials

With respect to Mr. Walters's failure to move to preclude Mr. Schwoeble as an **expert witness** because he was not a scientist and did not have the minimum educational credentials necessary to perform GSR analysis, in the Court's **[***146]** view, it is highly unlikely that such a motion would have been successful.

Mr. Schwoeble testified that he had been the manager of the **Forensic** Sciences department at R.J. Lee for 18 years, had written a book on GSR **evidence** and lectured on the subject numerous times. He said he had testified on about 70 prior occasions as an **expert witness** in 13 states and had *never been denied**expert** qualification with respect to GSR **evidence** by any court*. He further said that he had provided **expert** testimony on GSR about 70 times. Indeed, the People cite a recent case in which the First Department denied an appeal of a Defendant's conviction which was based in part on an argument that Mr. Schwoeble should not have been permitted to testify as a GSR **expert** in that case. *People v. Hayes*, 33 AD3d 403, 822 N.Y.S.2d 81 (1st Dept 2006), *lv denied*,7 NY3d 902, 860 N.E.2d 73, 826 N.Y.S.2d 611. That case did not concern Mr. Schwoeble's **expert** qualifications but whether the Court should have conducted a*Frye* hearing before admitting his **expert** GSR testimony. The Court held that a *Frye* hearing was unnecessary in that case and that the People had laid a proper foundation for the admission of Mr. Schwoeble's **expert** testimony. The People had argued at trial that **[***147]** Mr. Schwoeble was "basically the premier**gunshot residue expert** within the United States." [72]

FOOTNOTES

[72] *See* Brief of Defendant/Appellant Hafiz Hayes, submitted by the Legal Aid Society, at 12 (citing trial transcript); submitted to the Court with People's response to Defendant's Instant Motion.

An **expert witness** must have the "requisite skill, training, education, knowledge or experience" to make an opinion or imparted information reliable. *Matott v. Ward*, 48 NY2d 455, 459, 399 N.E.2d 532, 423 N.Y.S.2d 645 (1979) (citations omitted). There is no requirement that, in order to be qualified as an **expert,** a**witness** have any particular educational qualification or degree. *See People v. Lynch*, 85 AD2d 126, 447 N.Y.S.2d 549 (4th Dept 1982) (drug user qualified to opine on whether items he purchased were actually controlled substances). A **witness** whose expertise has been derived from "study, experience or observation" (as Mr. Schwoeble's expertise has) may qualify as an **expert** notwithstanding the absence of a particular academic degree. *Karasik v. Bird*, 98 AD2d 359, 470 N.Y.S.2d 605 (1st Dept, 1984). In the Court's view, any motion to preclude Mr. Schwoeble's testimony, like a motion to preclude any test done by his laboratory from being admitted into **evidence,** would **[***148]** have had little or no chance of success before Justice Torres. Those issues went to the weight rather than the admissibility of this **evidence.** Mr. Walters's failure to make those motions, therefore, did not constitute the ineffective assistance of counsel. *See Hui H.,Ferreiras, Luparella, supra*.

As noted *supra*, the Court found the testimony of Dr. Kubic largely credible. Based on that testimony, in the Court's view, Mr. Walters's examination of Mr. Schwoeble was deficient in failing to bring out a number of facts concerning Mr. Schwoeble's qualifications on cross-examination. Mr. Walters did not elicit the fact that (according to Dr. Kubic's review of Mr. Schwoeble's resume after the Defendant's conviction) Mr. Schwoeble had not earned a degree in science or even taken a science course at the college level. Mr. Walters did not elicit the fact that Mr. Schwoeble was not a member of any national professional associations. According to Dr. Kubic, Mr. Schwoeble also gave an incorrect answer with respect to the question of why Mr. Schwoeble was not a member of the American Academy of **Forensic** Science. Mr. Schwoeble testified on cross-examination that he was not a member of the organization **[***149]** because he was too old. However, according to Dr. Kubic, who said that he had served on the Executive Board of the Association, the Association did not have any age limit which would have disqualified Mr. Schwoeble from joining it. Rather, according to Dr. Kubic, Mr. Schwoeble would not have been able to join the organization because he did not hold the required academic degrees. In their response to Defendant's motion, the People assert that Mr. Schwoeble's testimony at trial about being too old to join the organization was a joke and that this is simply not apparent from a cold reading of the record. [73]

FOOTNOTES

[73] *See* People's Response, p. 61

The failure of Mr. Walters to offer significant impeachment of Mr. Schwoeble's qualifications was particularly striking because Mr. Walters testified at the hearing that he was aware, prior to Trial 3, that Mr. Schwoeble lacked certain qualifications, believed this made Mr.

Schwoeble less than credible and intended to vigorously attack Mr. Schwoeble's qualifications through cross-examination. Mr. Walters did, however, elicit the fact that the American Academy of **Forensic**Scientists was the world's premier **forensic** sciences organization and that Mr. Schwoeble **[***150]** was not a member of the organization. Mr. Schwoeble also stated, however, that although he was not a member of the organization, he had trained persons who were members.

Failure to Use Dr. Kubic's Analysis of the Standard Operating Procedures *of the R.J. Lee Lab in Cross-Examining Mr. Schwoeble*

The Court agrees with the Defendant's contention that Mr. Walters's cross-examination of Mr. Schwoeble would have been stronger had he followed the agreed-upon plan of using Dr. Kubic's analysis of the Standard Operating Procedures from the R.J. Lee laboratory in his cross-examination. As noted *supra*, Dr. Kubic had the opportunity to review the SOP's only after the Defendant's third trial. He was critical of the fact that those SOP's did not indicate what the laboratory actually required in order to detect GSR. As the Court understands Dr. Kubic's critique on this point, however, he did not find the SOP's to be incorrect in any manner. He found them to be lacking in the specificity which would be required for him to assess the procedures. Thus, as the Court understand's Dr. Kubic's point, had Mr. Walters used an analysis of the SOP's which had been conducted by Dr. Kubic, the jury would have **[***151]** learned, not that the R.J. Lee laboratory had followed improper procedures which might have led to a flawed result, but simply that the lab's written procedures did not provide sufficient details to allow an **expert** like Dr. Kubic to determine their efficacy.

Failure to Make an *In-Limine* Motion to Preclude Testimony by Mr. Schwoeble*Concerning On-Going Fabric to Fabric Transfer Studies*

Defendant assigns great significance to the manner in which Mr. Walters handled Mr. Schwoeble's testimony about fabric to fabric transfer studies he had conducted. The Defendant makes two arguments regarding these studies. The first is that the studies were not reliable because they had not been completed or peer-reviewed and, according to Dr. Kubic, were based on too small a sample size. The second argument is that Mr. Schwoeble's testimony was irrelevant and misleading. The Defendant posits that it was irrelevant because any results of a fabric to fabric transfer study would not be informative on the question of how likely it might have been that GSR would have been transferred from the precinct room floor to Defendant's jacket. He further posits that it was misleading because the transfer of GSR from **[***152]** a smooth surface like the precinct floor would have been more likely than the transfer of GSR from one fabric to another. These facts in combination, Defendant argues, should have resulted in the preclusion of any discussion by Mr. Schwoeble of these studies.

Defendant criticizes the failure of Mr. Walters to file an *in-limine* motion to preclude Mr. Schwoeble from testifying about these studies. As noted *supra*, however, Mr. Walters *did* make a motion (orally, rather than in writing) to preclude any testimony by Mr. Schwoeble about those studies until his **expert** (presumably Dr. Kubic) had a chance to review the material. That motion was denied by Justice Torres.

The Court also does not agree with Defendant's view of the significance of Mr. Schwoeble's testimony or that it was irrelevant or misleading. Mr. Schwoeble never asserted that his

fabric to fabric transfer studies were the basis for his conclusion that the GSR on the Defendant's jacket had not come from the precinct room floor. His conclusions about that potential contamination, he testified, were based on a number of other facts. As noted *supra*, he relied on the fact that the front of the jacket where most of the GSR had been **[***153]** recovered had not been shown to have been in contact with the floor and the fact that a study he was aware of showed a virtually non-existent presence of GSR in police muster rooms. Mr. Nuzzi argued in summation that the contention that there was GSR on the precinct floor was completely speculative. Dr. Kubic, in his hearing testimony, also did not indicate that he had any **evidence** to offer on that issue. Finally, Mr. Schwoeble concluded that the quantity of GSR on the jacket was indicative of its wearer having been in proximity to a shooting and would not have arisen from accidental contamination.

With respect to his fabric-to-fabric transfer studies, he acknowledged that the studies were ongoing and had not been peer-reviewed. Mr. Nuzzi argued during his summation that Mr. Schwoeble's study had shown how difficult it was to transfer GSR from a smooth fabric to a more coarse fabric. He also, however, did not argue that Mr. Schwoeble's studies were directly relevant to the question of whether GSR could be transferred from a linoleum floor to a denim jacket.

A couple of other points are worth noting. First, Mr. Schwoeble testified that his studies concerned not only fabric to fabric **[***154]** transfers between coarser fabrics but also concerned transfers from smooth fabrics like nylon which were more likely to easily transfer particles. Second, even assuming that Mr. Schwoeble's conclusion that fabric to fabric contact resulted in less than a 3% or less than a 1% transfer of GSR particles was inaccurate, his conclusion would have had to have been *wildly* inaccurate to be affirmatively misleading in this case (assuming those studies were used to assess fabric to fabric rather than floor to fabric transfers). That is, even if his data was off by a factor of 100%, his studies would still have been probative of the basic difficulty of transferring GSR from one fabric to another.

Dr. Kubic's point about the differences between a floor to fabric and a fabric to fabric transfer are fair enough. In the Court's view, however, the impeachment value of Dr. Kubic's point (had it been properly made either through cross-examination or Dr. Kubic's testimony) would have been lessened because, beyond simply saying that it would be easier to transfer GSR from a floor to a fabric than from a fabric to a fabric, Dr. Kubic, based on his hearing testimony, apparently had no information to offer **[***155]** on the degree of difference between such transfers.

This Court is obviously not a GSR **expert.** However, it also difficult to understand why a study which measured the degree to which GSR particles would be transferred from a smooth fabric, like nylon, to a jacket would not have any relevance to how easy it might be to transfer GSR particles from a smooth floor to a jacket. Obviously, the People and Mr. Schwoeble believed these studies had some relevance to the issues at the trial.

It might be argued that Mr. Walters's cross-examination of Mr. Schwoeble was deficient because he did not affirmatively elicit the fact that, (according to Dr. Kubic): (i) it would be easier to transfer GSR from a floor to a fabric than from one fabric to another, and (ii) that any information derived from a fabric-to-fabric transfer study might not be directly relevant to the question of how easily GSR would transfer from a floor to a jacket.