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

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

7581/99

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

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

February 25, 2011, Decided

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

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

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

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

OPINION BY: Daniel P. Conviser ▼

OPINION

Daniel P. Conviser ▼, J.

Introduction

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

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

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

Procedural History

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

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

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

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

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

FOOTNOTES

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

2 Id, ¶ 4.

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

FOOTNOTES

3 Id., ¶ 7.

4 Adams Affidavit, ¶ 10.

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

FOOTNOTES

5 *See* Rodriquez Affirmation., ¶5.

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

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

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

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

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

Facts of Underlying Incident

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

FOOTNOTES

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

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

FOOTNOTES

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

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

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

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

FOOTNOTES

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

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

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

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

FOOTNOTES

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

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

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

FOOTNOTES

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

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

FOOTNOTES

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

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

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

FOOTNOTES

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

Expert Testimony of Cathleen Lunde

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

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

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

FOOTNOTES

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

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

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

FOOTNOTES

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

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

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

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

FOOTNOTES

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

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

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

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

which is one millionth of a meter.

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

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

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

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

FOOTNOTES

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

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

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

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

FOOTNOTES

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

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

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

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

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

FOOTNOTES

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

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

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

FOOTNOTES

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

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

recently discharged weapon picked up by an individual wearing gloves could transfer material which might end up on a subsequently handled jacket by the individual wearing the same gloves. When asked whether the floor of a room in which many armed police officers gather several times a day would be a good location to place a jacket that was to be tested for GSR, Ms. Lunde said it would not. Ms. Lunde was shown a photograph of the jacket recovered in this case on what appeared to be a dirty floor. The following colloquy ensued:
Q: [by Mr. Walters]. . . Had you seen that picture before you started to examine the front of that jacket, wouldn't you have told the District Attorney that this would have no **forensic** value because of the collection process, wouldn't you have told, as an objective scientist, wouldn't you have told that to the District Attorney's Office?

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

Mr. Nuzzi: Objection, Your Honor.

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

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

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

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

Mr. Nuzzi: Objection, Your Honor.

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

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

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

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

A: Yes.

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

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

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

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

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

FOOTNOTES

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

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

Expert Testimony of Alfred J. Schwoeble

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOOTNOTES

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

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

FOOTNOTES

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

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

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

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

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

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

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

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

FOOTNOTES

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

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

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

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

FOOTNOTES

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

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

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

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

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

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

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

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

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

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

FOOTNOTES

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

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

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

FOOTNOTES

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

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

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

FOOTNOTES

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

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

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

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

FOOTNOTES

32 Id., pp. 227-230.

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

34 Id., pp. 505-506.

35 Id., p. 649-657.

36 Id., p. 793-794.

TRIAL SUMMATIONS

Defendant's Argument

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

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

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

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

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

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

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

FOOTNOTES

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

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

FOOTNOTES

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

People's Argument

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

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

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

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

FOOTNOTES

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

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

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

FOOTNOTES

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

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

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

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

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

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

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

FOOTNOTES

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

Jury Notes:

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

HEARING CONDUCTED BY THIS COURT IN 2010

Evidence Considered at Hearing

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

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

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

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

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

Testimony of Defendant's Former Counsel, Robert Walters

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

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

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

FOOTNOTES

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

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

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

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

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

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

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"\!"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 or 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.

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

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

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

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

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

Deficiencies in Evidence Presented by Defendant Not Ineffective Assistance of Counsel

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

The People's GSR Evidence Was Significantly Impeached at Trial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Arose From the Court's Limiting Rulings at Trial

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

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

FOOTNOTES

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

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

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

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

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

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

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

Analysis of Second Strickland Prong Under Federal and State Law

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

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

FOOTNOTES

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

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

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

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

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

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

FOOTNOTES

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

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

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

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

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

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

February 25, 2011

Daniel Conviser

A.J.S.C.

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

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

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Appellate Division, Fourth Department

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

December 20, 1989

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

DISPOSITION: Judgment unanimously affirmed.

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

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

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

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

HEADNOTES

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

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

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

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

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

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

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

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

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

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

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

Crimes -- Jurisdiction of Offenses -- Formation of Intent

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

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

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

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

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

COUNSEL: Mark Mahoney for appellant.

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

OPINION BY: GREEN

OPINION

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

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

DEFENDANT'S PLAN

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

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

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

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

INVESTIGATION AT THE SCENE

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

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

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

DEFENDANT'S ACTIONS

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

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

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

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

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

THE VAN

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

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

DISCUSSION OF LEGAL SUFFICIENCY OF THE **EVIDENCE**

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

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

Cleague, 22 NY2d 363, 367).

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

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

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

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

1. Did a human die?

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

the wound was fatal.

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

2. Did Mark Seifert die?

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

3. Did defendant kill Mark Seifert?

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

of physical **evidence.**

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

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

GEOGRAPHICAL JURISDICTION

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

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

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

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

FAIR TRIAL

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

The remaining issues raised by defendant were no preserved

CIRCUMSTANTIAL EVIDENCE–ENTIRE CASE [1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

guilty.[8]

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

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

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

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

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

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

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

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

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

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

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