Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH G. MIDDLETON,

Petitioner,

vs.

RONDA PASH, Superintendent,
Crossroads Correctional Center

Respondent.

On Petition For A Writ Of Certiorari
From The Supreme Court of Missouri

VOLUME II

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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VOLUME II

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

KENNETH G. MIDDLETON, Movant	)	
v.	)	Case No. CV91-23437
STATE OF MISSOURI, Respondent,	)	Division 12

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NOW on this 26th day of May, 2005, the Court takes up and considers Movant's Motion to Reopen Previously Filed Rule 29.15 Motion, filed on July 16, 2003 and Movant's Motion for Post-conviction relief, also filed on July 16, 2003, and issues the following Findings of Fact and Conclusions of Law as to both motions:

FINDINGS OF FACT – JURISDICTION

A hearing was held on December 18, 2003 solely to address the issue of this Court's jurisdiction to re-open Mr. Middleton's 1991 "29.15" proceeding. The following facts precede the Court's Conclusions of Law:

1. Movant Kenneth Middleton is currently incarcerated at Crossroads Correctional Center in Cameron, Missouri, following his convictions in case number CR90-0348 for Murder in the First Degree, in violation of RSMo. 565.020, and Armed Criminal Action, in violation of RSMo. 571.015. He was sentenced on April 5, 1991 to terms of confinement in the Missouri DOC for concurrent periods of life without parole and 200 years. (Court file.)

2. The precise date Mr. Middleton was delivered to the Department of Corrections is unknown. However, that date is jurisdictionally irrelevant because Movant timely filed a *pro se* motion for post-

Exhibit A

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conviction relief on September 9, 1991. His amended Rule 29.15 motion was timely filed on November 25, 1991. (Court file.)

3. The Missouri Court of Appeals, Western District, affirmed Mr. Middleton's convictions on April 6, 1993, and issued its mandate on July 1, 1993. (*State v. Middleton*, 854 S.W.2d 504 (Mo. App. W.D. 1993).)

4. Thereafter, Mr. Middleton applied for habeas corpus relief, pursuant to 28 U.S.C. 2254, in the United States District Court for the Western District of Missouri. That petition was denied on April 29, 1998 on the basis of procedural default by post-conviction counsel. (Movant's Ex. 55 - Order Denying Petitioner's Second Amended Petition for Writ of Habeas Corpus.)[1]

5. Mr. Middleton was represented at preliminary hearing, arraignment, and trial by Robert G. Duncan, now deceased. Mr. Duncan also represented Mr. Middleton on direct appeal, acting as co-counsel with Gerald Handley, who handled Mr. Middleton's original Rule "29.15" proceeding. (Court file; *Middleton*, 854 S.W.2d at 504.)

6. Following the timely filing of his own *pro se* motion on September 9, 1991, Mr. Middleton received an order from the trial court appointing the Appellate Public Defender's office to prepare an amended motion for him. Through the granting of time extensions permissible under Rule 29.15, the deadline for the latest possible filing of the amended motion was fixed at Monday, November 25, 1991. (Ex. 4 - Circuit Court docket sheet.)

7. After the appointment of the public defender, Mr. Middleton sought to hire private counsel, and did so by retaining Gerald Handley some time in late October, 1991. But Mr. Handley did not

[1] "Ex." is abbreviated for "Exhibit," followed by the document number in the binder accompanying Movant's Motion to Re-open Previously Filed Rule 29.15 Proceeding, which was submitted to this Court July 16, 2003. The State offered no exhibits through the pendency of this proceeding, so all exhibits are those provided by Movant.

thereafter meet with Mr. Middleton. (Ex. 1 – Affidavit of Kenneth Middleton; Ex. 2 – Affidavit of Sean D. O'Brien.)

8. Mr. Handley did not enter his appearance as counsel of record until Friday, November 22, 1991, the last business day before the jurisdictional deadline for filing the Rule 29.15 motion. (Ex. 4 – Circuit Court docket sheet; Ex. 1 – Affidavit of Kenneth Middleton.)

9. It is not clear whether the Public Defender appointed to represent Movant had performed any work on Movant's behalf up to that point, but even if he did, he failed to provide Mr. Handley with any file materials. (Ex. 2 – Affidavit of Sean D. O'Brien; Ex. 1 – Affidavit of Kenneth Middleton.)

10. On Friday, November 22, 1991, the last business day before the jurisdictional deadline for filing the Rule 29.15 motion, Mr. Middleton received from Mr. Handley, some time after 4:30 p.m., a one-page affidavit with instructions in the cover letter that Kenneth *"must"* sign it and return it immediately. (Ex. 6 – Letter from Mr. Handley to Mr. Middleton – p. 10; Ex. 1 – Affidavit of Kenneth Middleton; Ex. 2– Affidavit of Sean D. O'Brien.)

11. Although the attestation form states that it is appended to an amended Rule 29.15 motion containing all claims known to Mr. Middleton for relief from his conviction and sentence, the affidavit was *not* accompanied by the amended motion. (Ex. 6 – Letter from Mr. Handley to Mr. Middleton; Ex. 1 – Affidavit of Kenneth Middleton; Ex. 2 – Affidavit of Sean D. O'Brien.)

12. Mr. Middleton was unable to read the amended motion prior to its filing on Monday, November 25, 1991, much less contribute to its contents. Movant's signed affidavit was delivered by fax to Mr. Handley's office at 9:55 a.m. on Monday, November 25th, so the motion could be filed that day. (Ex. 6 – Affidavit of Mr. Middleton; Ex. 1 – Affidavit of Mr. Middleton; Ex. 3- Affidavit of Lynn Middleton.)

13. Although Mr. Handley claimed he sent a draft of the issues to be included in the amended motion to Mr. Middleton on November 22, 1991, he did so separately from the affidavit, and prison records reflect that Mr. Handley's package was not received by a Potosi Correctional Center employee until 2:29 p.m. on Monday, November 25, 1991. (Ex. 7 – Affidavit of Mitchell A. Jensen; Ex. 2 – Affidavit of Sean D. O'Brien.)

14. Mr. Handley actually filed the pleading just over an hour later, at 3:41 p.m. Thus, Mr. Handley's mailing of the draft motion was too late for Mr. Middleton to read and comprehend its contents, much less contact Handley to offer suggested modifications. (Ex. 8 – Movant's Amended Motion for Post Trial Correction.)

CONCLUSIONS OF LAW – JURISDICTION

As a general rule, Missouri courts will not entertain successive motions under Rule 29.15. However, the Missouri Supreme Court has recognized exceptions in two categories of cases, the first being abandonment by post-conviction counsel. In "abandonment" cases, a movant is entitled to a full and fair post-conviction proceeding with new counsel if the original post-conviction attorney either failed to comply with the precise jurisdictional mandates of Rule 29.15, see *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991), or if the original post-conviction attorney failed to file a timely amended motion through no fault of the movant, see *Sanders v. State*, 807 S.W.2d 493 (Mo. 1991). The case at bar presents the type of error addressed in *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991).

Additionally, the Supreme Court also recognizes as a separate and distinct category those cases in which the record displays a fundamental miscarriage of justice. *Clay v. Dormire*, 37 S.W.3d 214 (Mo. 2000) (characterization as a "miscarriage of justice" case denied because issue was one of sentencing error, not movant's innocence); *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. 1993)

("miscarriage of justice" claim considered and denied; conviction nevertheless set aside on jurisdictional grounds). Because this Court finds Mr. Middleton was abandoned by his Rule 29.15 counsel, this Court does not address the alternative basis urged for jurisdiction, namely that the record reflects a gross miscarriage of justice. See *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210 (Mo. 2001); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003).

The procedural requirements and time limits under Missouri Rule 29.15 are mandatory and jurisdictional. *Day v. State*, 770 S.W.2d 692 (Mo. 1989). The Court has no jurisdiction to proceed on a motion that is not properly verified by the movant. *State v. Davis*, 814 S.W.2d 593 (Mo. 1991). Here, the amended motion Gerald Handley attempted to file in 1991 did not confer jurisdiction on the Court because it was improperly verified, through no fault of Mr. Middleton. This case is indistinguishable from *White v. Bowersox*, 206 F.3d 776 (8th Cir. 2000) (summarizing and correcting *State v. White*, 873 S.W.2d 590 (Mo. 1994) ("*White II*"), which examined circuit court findings issued after the remand ordered in *State v. White*, 813 S.W.2d 862 (Mo. 1991) ("*White I*"), where the Supreme Court initially recognized the possibility that White's Rule 29.15 proceeding was infected with irregularities occasioned by post-conviction counsels' abandonment.[2]

The attorney in *White* had his client execute a blank affidavit nine days prior to the deadline for filing the Rule 29.15 motion, and counsel then stapled it to the amended motion he filed with the court. The Court of Appeals opined, "Mr. White was presented with a very difficult decision when his attorneys abandoned him: to lose all of his claims in an untimely motion or to sign an improper verification and hope that the motion would be at least timely." *White*, 206 F.3d at 782. Here, Mr.

[2] White's claims in his first motion were rejected in *White v. State*, 939 S.W.2d 887 (Mo. 1997) ("*White III*"), and the Eighth Circuit did not disturb the Missouri Supreme Court's conclusions as to those few matters. Remand was for evidentiary development of those issues in the amended motion filed late by the attorney, who had only 14 days to complete all responsibilities. Compare *White*, 206 F.3d at 779-782 with *White*, 206 F.3d at 782-783.

Middleton had even less time than Mr. White, as his attorney forwarded to him the verification page only the weekend before the Monday filing deadline, rather than nine days beforehand.

Regardless of the contents of the motion, and through no fault of Mr. Middleton, the amended motion was filed without an original verification signed by Mr. Middleton as required under Rule 29.15. At the time Mr. Middleton's amended motion was due to be filed, the Missouri Supreme Court enforced strict requirements that the amended motion be accompanied by the movant's original verification of its contents. As such, this Court had no jurisdiction to proceed on such an improperly verified amended motion. See *Boydston v. State*, 26 S.W.3d 845, 848 (Mo. App. W.D. 2000) (Rule 24.035 proceeding addresses lack of verification before considering counsel's alleged professional deficiencies; footnote 4 acknowledges that the verification requirements of Rule 24.035 and Rule 29.15 "are identical.").

Where the movant is personally without fault in the defective filing of an amended motion, the failure of the Rule 29.15 attorney to properly file a correctly verified amended motion constitutes abandonment such as that first recognized in *Luleff, supra*. *White*, 206 F.3d at 779. A circuit court in such instance is required to conduct a hearing to determine whether the movant is at fault for the failure to file a properly verified amended motion. This Court has done so, and finds Mr. Middleton is not at fault. With that said, the Court is then obligated to appoint new counsel. Thereafter, the time deadline within which to file an amended Rule 29.15 motion begins anew. *Boydston*, 26 S.W.3d at 850. This procedure should have been followed in Mr. Middleton's case, but was not.[3] However, the issue of

[3]Technically, the public defender also abandoned Mr. Middleton pursuant to *Luleff, supra*, and *Sanders, supra*, because he also failed to file an amended motion prior to November 25, 1991, as he was not released from representing Mr. Middleton by virtue of this Court granting him leave to withdraw until November 26, 1991. In this regard, it is axiomatic that an attorney's duties to the client are not suspended by the mere act of filing a withdrawal motion, but continue until such time as a judge grants the motion. See *Luleff*, 807 S.W.2d at 498 (record that does not indicate whether counsel made determinations regarding the *pro se* Rule 29.15 motion creates presumption of counsel's non-compliance with professional obligations mandated by Rule 29.15).

timeliness is moot, because Movant has elected to proceed with retained counsel, Jonathan Laurans, and Mr. Laurans filed a brief setting forth all claims Mr. Middleton wished to raise earlier at the same time he filed Movant's Motion to Re-open the original Rule 29.15 proceeding.

In light of the above and foregoing facts and legal conclusions, this Court holds that Mr. Middleton was abandoned by post-conviction counsel in his first Rule 29.15 proceeding in 1991. Because the defects arising therefrom are jurisdictional in nature, this Court will allow Mr. Middleton to proceed anew with his motion under Rule 29.15, with the aid of counsel, Jonathan Laurans.

Mr. Middleton's 1991 Rule 29.15 proceeding having been re-opened, and evidence having been presented during a hearing on June 24 and 25, 2004, the Court now issues the following findings of fact and conclusions of law.

FINDINGS OF FACT – INEFFECTIVE ASSISTANCE OF COUNSEL

1. At trial, police testified that Mr. Middleton provided them the following information: On February 12, 1990 Kenneth Middleton was home alone in his Blue Springs residence, ill. At approximately 1:30 p.m. he telephoned his wife, Katherine, at her Lee's Summit job (AT&T) and asked her to come help him. (Tr. 41, 104-05, 469.)[4] Mr. Middleton had taken medication earlier in the day for an infection. (Tr. 58.) Movant told police that, when his wife arrived home some 15-20 minutes after having been called, he was sitting in a living room chair, wiping down a handgun. Mrs. Middleton decided to call the doctor, and on her way to the telephone in the dining room, she took the gun from Movant. As she got near the phone, she dropped the pistol and it misfired, the bullet striking her in the face. Mr. Middleton called 911, screaming for help. The time was 1:51 p.m. Mrs. Middleton was dead by the time police arrived. (Tr. 41-42, 53-55, 104-105, 115-17, 167, 470.)

[4] "Tr." is abbreviated for "Trial Transcript," followed by the page number(s) therein to which the preceding sentence(s) refers.

2. The first officer on the scene was John Gale. Mr. Middleton met him in the driveway, hysterical, distraught, and demanding to know why no paramedics had yet arrived. (Tr. 39-40, 101-03, 114, 158, 250.) Mr. Middleton was able to tell Officer Gale what had just happened, as summarized above. Soon thereafter, a second officer, Mark Spartz, arrived. He observed Mr. Middleton to be frantic, so he conducted a frisk of Mr. Middleton's person for officer safety. As Officer Spartz began to do this, Movant exclaimed that he was going to be sick. Movant then ran into the bathroom and splashed water onto his face as he wretched over the sink. Gale and Spartz thought Movant was washing his hands rather than vomiting, so Gale pulled him away while Spartz gave him a hand towel to dry himself. (Tr. 43, 54-55, 134, 158, 162-64, 190-91.)

3. Mr. Middleton was then taken outside and seated on his front stoop, where he was examined by paramedics who determined that his blood pressure was high, and he was hyperventilating. They urged him to go with them to a hospital. (Tr. 247-48.) In his anxiety, Mr. Middleton lay across a planter flower barrel and cried. He pounded his hands into the dirt, and the officers later characterized this action as Movant washing his hands in the dirt. Mr. Middleton was then taken to St. Mary's hospital, but just before the ambulance pulled away, one of the officers conducted a paraffin wax test for gun powder residue on both of his hands. (Tr. 56-57, 171-72.) No powder or blood was found on Mr. Middleton's hands or long sleeve shirt, or, for that matter, on the hand towel Spartz gave him back in the bathroom. (Tr. 333, 342.)

4. At St. Mary's hospital, Mr. Middleton was tested and treated, and thereafter transferred by ambulance for commitment to the mental health center at Independence Regional Hospital. (Ex. 33 – Medical Records.)

5. Mr. Middleton was taken to Western Missouri Mental Health Center from Independence Regional in the evening hours of February 12, 1990. Early the following morning, Mr. Middleton's brothers arrived from Arkansas and he was discharged into their care. (Ex. 33 – Progress Notes from Western Missouri Mental Health Center – p. 29.)

6. Following his release from Western Missouri Mental Health Center, police located Mr. Middleton at a hotel in Blue Springs. Upon their request, Mr. Middleton agreed to go to the police station for questioning. Once at the station, Movant was interrogated by Detective Dan Curby, who testified that Mr. Middleton told a slightly different version of events. According to Detective Curby, Mr. Middleton said that as his wife was walking to the dining room telephone, he rose to hand the gun to her, but blacked out. When he awoke, they were both lying on the floor, and she had been shot. (Tr. 71-72.) The Court deemed this entire statement to be inadmissible at trial because Mr. Middleton had asked for the presence of counsel, and even tried to call a lawyer, prior to Detective Curby eliciting this version of events. (Tr. 94-95.)

7. During the course of the trial, the State attempted to corroborate its theory that Mr. Middleton shot his wife by reference to certain pieces of physical evidence: The prosecution elicited testimony from the coroner that Mrs. Middleton was shot just above her left eye at close range. (Tr. 261, 384.) However, testimony was never presented to show that decedent had powder burns or soot on her hands, which, if found, may have been indicative of a defensive posture common to most gunshot victims struggling with their purported assailant, as the State suggested occurred in this case. The State also introduced evidence that Mrs. Middleton had small bruises on her chest "consistent with being pushed" against a wall. (Tr. 275-276.) The defense attempted to elicit testimony suggesting that it was possible that this bruising may have occurred when Mrs. Middleton fell after being shot. (Tr.

270.) A stipulation read to the jury made clear that bruises found on Mrs. Middleton's thighs were caused by carrying large boxes at her job. (Tr. 470.)

8. Detective Dave Link took pictures of the scene prior to the removal of Mrs. Middleton's body. However, these pictures did not develop properly, so the scene had to be "recreated" and new pictures taken. This occurred after the body had been removed from the house and parts of the walls had been cut out. Furniture had also been moved, so officers attempted to move items back where they had been at the time of Mrs. Middleton's death. The photographs of the recreated crime scene were then introduced by the State at trial. (Tr. 149.)

9. The State offered evidence that Mr. Middleton left a boot print on the wall next to where Mrs. Middleton died, suggesting some sort of altercation. Photographs were introduced at trial showing the location of the boot print, but as noted before, the original crime scene pictures were unavailable. The state instead introduced photos of the reconstructed scene. At the time of Mrs. Middleton's death, a vase and a statue were positioned in front of the wall where the boot print was located. The photographs introduced at trial, however, do not show the vase and statue in front of the boot print. (Tr. 153.)

10. Mr. Middleton's boots were seized at the hospital by Officer Spartz, and were later tested for the presence of sheetrock. No sheetrock was detected on Mr. Middleton's boots. (Tr. 173, 339; Ex. 23- Report of Findings from Regional Criminalistics Laboratory.)

11. The prosecutor also argued during closings that there was no telephone in the dining room, contrary to what Mr. Middleton said. At the sentencing hearing, however, the State stipulated that the phone, previously mentioned in a police report, indeed existed as Mr. Middleton had said. (Tr. 572.)

12. No blood was found on Mr. Middleton's long sleeve shirt, and no gun powder or residue was found in the dirt from the front stoop planter or on the hand towel given to Mr. Middleton by Officer Spartz. (Tr. 333, 337-339, 342)

13. It is possible that a gunshot residue test was performed on Mrs. Middleton's left hand, the results of which were never relinquished to the defense. Counsel for Movant received test results for only the right hand. The inventory report ordering the testing on both of her hands appears to have been altered to omit reference to her left hand. (Ex. 55 - Dave Link's deposition – pp. 15-16, 19-21, 32-33; Ex. 18 – Inventory Report for Katherine Middleton.) Under "number of articles" (which indicates the number of test kits used on Mrs. Middleton's hands), something has been covered with white-out and replaced with the number "1."[5] The following line states "gunshot residue *tests* for right hand", but a space appears between "right" and "hand," and it is apparent that a word has been whited-out. When comparing the inventory report filed for Mr. Middleton with the report filed for Mrs. Middleton, it is apparent that both reports were prepared by the same person, yet Mr. Middleton's report says "GSR test kits for right and left hand." (Ex. 18 – Inventory Report for Katherine Middleton; Ex. 20 – Inventory Report for Kenneth Middleton.) Detective Dave Link, who was employed by the Blue Springs Police Department at the time of Mrs. Middleton's death, testified during a deposition in 1997 in a related matter, that he would have been responsible for performing the residue tests on Mrs. Middleton's hands, and further that he never tested only one hand. (Ex. 55 – Deposition of Dave Link – pp. 19-20.) At the time of the trial, however, counsel for Movant failed to question any witness about the apparent alteration of the inventory

[5] See Ex. 18. When the original report is held to the light, the number "2" can be read underneath the white-out.

report as it concerned Mrs. Middleton's left hand or whether Detective Link did in fact perform such a test.

14. While officers claimed to have found a button missing from Mrs. Middleton's blouse (allegedly indicative of a struggle), they also admitted to undressing and re-clothing Mrs. Middleton's body at the scene. (Ex. 55 – Testimony of Dave Link in wrongful death trial – p. 31.)

15. Testing of the weapon to see if it could accidentally discharge occurred after someone from the police department removed, and then replaced, the grips from the firearm. (Tr. 405.)

16. Mr. Middleton was convicted and sentenced to life without parole. On September 9, 1991, Mr. Middleton filed a timely *pro se* Rule 29.15 motion. (Ex. 4 – Circuit Court docket sheet.) However, as discussed in the preceding section pertaining to this Court's assertion of jurisdiction, Mr. Middleton's attorney filed a fatally defective amended motion in November of 1991 which failed to confer jurisdiction on this Court. (Ex. 4 – Circuit Court docket sheet; Ex. 8 – Amended Rule 29.15 Motion for Post Trial Correction.)

17. Trial counsel Robert Duncan took no depositions, interviewed no witnesses, retained no independent experts to evaluate the State's scientific propositions, gave no opening statement, called no witnesses for the defense, advised the defendant not to testify, and had in his possession the altered inventory report omitting any reference to a gunshot residue test performed on the victim's left hand, but failed to present it to the jury or question a single witness about it. (Ex. 9 – Affidavit of Robert G. Duncan; Ex. 10 – Affidavit of Robert G. Duncan; Ex. 22 – Affidavit of Robert G. Duncan; Ex. 42 – Affidavit of Robert G. Duncan; Ex. 18 – Inventory Report for Katherine Middleton; Ex. 20 – Inventory Report for Kenneth Middleton; Ex. 21 – Report of Findings; Ex. 11 – Discovery Request.)

18. Although Mr. Middleton was facing life in prison without the possibility of parole, trial counsel Duncan failed to interview or depose any potential witnesses, and failed to challenge the integrity of circumstantial evidence on which the State based its case by hiring independent experts to evaluate such evidence. It should be noted, however, that during the sentencing hearing in 1991, Mr. Middleton indicated that trial counsel had done everything he had asked. It was not until the hearing in 2004 that Mr. Middleton testified he had asked Mr. Duncan to hire expert witnesses. (Ex. 9 – Affidavit of Robert G. Duncan; Ex. 10 – Affidavit of Robert G. Duncan.)

19. Had Mr. Duncan interviewed and/or deposed witnesses, he might have uncovered facts useful in his defense of Mr. Middleton.

20. Had Mr. Duncan consulted and retained experts, he might have uncovered facts and opinions useful in his defense of Mr. Middleton.

21. Mr. Duncan did little or nothing to challenge the manner in which the State collected and preserved evidence from the crime scene.

22. The results of any gunpowder residue tests performed on Mrs. Middleton's left hand were requested by Mr. Duncan, but were never subpoenaed or otherwise obtained. (Ex. 11 – Discovery Request.) Mr. Duncan did not even ascertain whether such tests were performed.

23. Mr. Duncan failed to make use of the altered inventory report requisitioning the gunshot residue test for Mrs. Middleton's hands. He made no reference to this particular item of evidence at any time during the trial. He did not argue that the altered document weakened the State's case and strengthened Movant's assertion that that Mrs. Middleton accidentally shot herself. Nor did he argue that the document, at the very least, created reasonable doubt.

24. After the trial, Mr. Middleton discovered that Katherine Middleton's surviving sisters had hired the Blue Springs law firm where Prosecutor Pat Peters' father was of counsel. (Ex. 37 – Affidavit of Kathy J. Bixbie and article from the Kansas City Star.)

25. Three days after trial, Patrick Peters gave Detective Ray Vasquez permission to release certain items of jewelry, worth an estimated $18,700.00 at the time, to Mildred Anderson, Mrs. Middleton's sister. (Ex. 55 – Deposition of Ray Vasquez – pp. 25-26.)

26. While not necessarily probative of Mr. Duncan's ineffectiveness in this case, the Court notes that Mr. Duncan was found ineffective by a Special Master appointed by the Missouri Supreme Court in *State of Missouri v. Ed T. Reuscher, III.* (Ex. 48 – Findings of Fact, Conclusions of Law of The Hon. David Darnold in *State v. Reuscher*; Report of The Hon. Charles Blackmar in *State v. Reuscher*; Ex. 57 – Supreme Court Order setting aside Ed T. Reuscher's convictions.) Duncan was in trial with Mr. Reuscher from November 30, 1990 through January 15, 1991, just four weeks prior to beginning Mr. Middleton's trial.

27. On June 24 and 25, 2004, Movant's exhibits 11, 12, 14, 17-21, 23-34, 36-38, 41, 43-45, and 47-53, 55 and 57 were all admitted into evidence without objection.

28. On June 24, 2004 Movant's exhibits 9, 10, 22, and 42 (affidavits of deceased trial counsel Duncan) were refused after objection by the State on hearsay grounds, although the State did stipulate that the affidavits were in fact signed by Mr. Duncan.

CONCLUSIONS OF LAW – INEFFECTIVE ASSISTANCE OF COUNSEL

The benchmark for judging whether counsel is ineffective is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, at 686 (1984). To prevail on an

ineffective assistance of counsel claim, the movant must satisfy a two-prong test which requires proof by a preponderance of the evidence that: 1) trial counsel's performance did not conform to the degree of skill, care and diligence of a reasonably competent attorney under similar circumstances; and 2) Movant's defense was prejudiced as a result. *Strickland*, at 687-88. A Movant must satisfy both the performance prong and the prejudice prong to prevail on an ineffective assistance of counsel claim. *Sanders v. State*, 738 S.W. 2d 857 (Mo. Banc 1993).

To satisfy the performance prong of the *Strickland* test, a movant must overcome the presumptions that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *Vogel v. State*, 31 S.W.3d 130 (Mo App. W.D. 2000). Further, in connection with an allegation of ineffective assistance, counsel is presumptively competent. *Campbell v. State*, 721 S.W.2d 721, 722 (Mo. App. 1983). In order to satisfy the prejudice prong of the *Strickland* test, a movant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, at 694.

A reviewing court may examine the prejudice prong before the performance prong, and may dispose of a claim on the ground of lack of sufficient prejudice alone. *Sanders v. State*, 738 S.W.2d 856, 857 (Mo. Banc 1987). Prejudice is not presumed even upon a showing of deficient performance by counsel, but must be affirmatively proven. *State v. Parker*, 890 S.W. 2d 312 (Mo. App. 1994).

The Court has reviewed each of the claims made by Mr. Middleton in his motion for postconviction relief pursuant to Missouri Supreme Court Rule 29.15 and finds that, while no one claim is sufficient to warrant the granting of a new trial to Movant, the cumulative effect of trial counsel's omissions did in

fact amount to ineffective assistance such that Movant is entitled to a new trial. It should be noted that the Court has also considered Movant's allegations concerning certain actions by the prosecuting attorney, Patrick Peters, and finds that Movant's right to due process was not affected by any action of Mr. Peters. Therefore, no claim based on allegedly improper conduct of the prosecutor is the basis for the granting of a new trial to Movant. The Court will now consider each of Movant's claims individually.

A. Ground No. 1: Movant's trial counsel was ineffective, in violation of the Sixth and Fourteenth Amendments, for failing to conduct a reasonable investigation and produce evidence contradicting or discrediting the state's wholly circumstantial case.

As noted above, Movant must overcome the presumptions that counsel's actions were sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *Vogel*, at 135. While strategic decisions are usually accorded great deference, this is so only if they are made after a thorough investigation. *Yoksh v. State*, 75 S.W.3d 375, 379 (Mo.App. W.D. 2002). In Missouri, trial counsel has a duty to undertake reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *State v. Griffin*, 810 S.W.2d 956, 958 (Mo.App.1991). The failure to pursue even a single piece of important evidence may demonstrate ineffectiveness and prejudice sufficient to warrant a new trial. *State v. Wells*, 804 S.W.2d 746 (Mo. 1991); *Clay v. State*, 954 S.W.2d 344, 349 (Mo. App. E.D. 1997). Further, where the prosecution's case is built almost exclusively upon the interpretation by experts of circumstantial evidence, it may amount to ineffective assistance not to consult with an independent expert. *Cravens v. State*, 50 S.W.3d 290 (Mo. App. S.D. 2001) (counsel's failure in murder trial to investigate propriety of obtaining experts to testify regarding distance from which shot was fired is unreasonable and constitutes incompetence).

In the case at bar, Movant points to 12 separate instances of trial counsel's failure to conduct a reasonable investigation. The Court will take up each allegation separately.

1) Mr. Duncan failed to pursue the theory of defense supported by the evidence.

Mr. Middleton's defense at trial was that Mrs. Middleton dropped the gun and it discharged, accidentally killing her. Mr. Duncan, however, failed to offer any evidence in support of this defense, according to Movant. The State offered expert testimony at trial that the weapon would not fire unless the trigger was held back, suggesting that an accidental misfiring was impossible. (Tr. 389-415) Mr. Duncan made no effort to find an expert in the field who could challenge the State's assertion.

The Court notes that Movant proffered two experts at the June, 2004, hearing, Charles Gay and Robert Tressel, who testified they were available at the time of Movant's trial and could have offered opinions favorable to Movant's position. However, the Court makes no determination as to the qualifications of these two witnesses to provide expert testimony, nor does the Court pass on their credibility. The Court does note, however, that one of Movant's experts, Charles Gay, testified that he conducted no empirical research himself, but rather derived his theory of the shooting based upon the work of another expert in the field specializing in bullet trajectories and bullet ricochet angles. No evidence was presented concerning the general scientific acceptability of the theories upon which Mr. Gay's opinion was based, nor was it made clear that the sort of testimony given by Mr. Gay would have been available at the time of trial. Despite this, it is safe to conclude that counsel for Movant likely would have been able to locate an expert willing to test the weapon and offer an opinion at trial had he made an effort to do so.

That being said, the Court does not find that trial counsel's failure to investigate the availability of an expert witness to testify on behalf of Movant, standing alone, rises to the level of prejudice necessary for a finding of ineffective assistance of counsel.

2) **Mr. Duncan failed to alert the jury that no gunpowder residue test was performed on Mrs. Middleton's left hand. Mr. Duncan failed to alert the jury that either no gunpowder residue test was performed on Mrs. Middleton's left hand, or that such a test was performed but the report was altered and results were not relinquished to Movant.**

Evidence presented at trial showed that the bullet entered the left side of Mrs. Middleton's head. If Mrs. Middleton did cause the gun to fire, as alleged by Movant, the fact that no gunshot residue test was performed on Mrs. Middleton's left hand, or that a test was performed but the results were withheld, may have been of particular relevance to Movant's theory of defense.

Records indicate that both of Mrs. Middleton's hands were preserved for evidence. An investigation report filed by Detective Dave Link states that he removed the paper sacks from both of her hands and scraped the underside of each fingernail with separate instruments. The scrapings, instruments, and the paper sacks were marked and packaged. (Ex. 17 – Inventory Report.) However, the inventory report filed on February 13, 1990, which directed the crime lab to perform gunpowder residue tests, and which appears to have been altered, makes no mention of any test on Mrs. Middleton's left hand.

Mr. Duncan did request the results of any gunshot residue tests performed on Mrs. Middleton's left hand; however, he failed to take any further action when his request went unanswered. Furthermore, he failed to elicit these facts from any witness, or introduce the altered document during

trial. (Ex. 11 – Discovery Request; Ex. 18 – Inventory Report for Katherine Middleton.) A reasonably competent attorney, in representing Mr. Middleton, would have recognized the evidentiary value of the altered report and the absence of test results for Mrs. Middleton's left hand. He or she, in all likelihood, would have called these facts to the attention of the jury in an effort to create reasonable doubt. As such, the Court finds that the first prong of the *Strickland* test, as to this point, has been met in that Mr. Duncan's performance did not conform to the degree of skill, care and diligence of a reasonably competent attorney.

The Court does not find, however, that Mr. Duncan's omission, as to this point alone, is sufficient to rise to the level of prejudice sufficient to meet the second prong of the *Strickland* test. Had Mr. Duncan been more diligent at the time of trial, he arguably may have been able to obtain the results of any tests performed on Mrs. Middleton's left hand, or he may have been able to cause a new test to be performed if results of prior tests remained unavailable. No matter what the results of the tests, however, Movant has failed to show that the outcome of the trial would have been different. If the test results had been negative for the presence of gunshot residue on Mrs. Middleton's left hand, Movant's theory of defense would be neither more nor less credible than before. If the test results had been positive for the presence of gunshot residue, Movant's defense still would have been challenged by the State because such results would have been consistent with the State's theory that Mr. Middleton shot his wife at arms length while she was in the process of raising either one or both of her hands to protect herself. Finally, Mr. Duncan's failure to introduce into evidence the altered inventory report, likewise, does not rise to the level of prejudice sufficient to satisfy *Strickland*. While the Court is satisfied that a reasonably competent attorney would have called this document to the attention of the

jury, prejudice is not presumed even upon a showing of deficient performance, but rather must be affirmatively proven. Movant has not met that burden here.

3) Mr. Duncan failed to challenge the competence of the Blue Springs police department investigation.

As to this point, Movant alleges that police made three key mistakes during their investigation into Mrs. Middleton's death, and that Mr. Duncan failed to bring these mistakes to the attention of the jury, so as to question the integrity of the investigation and create reasonable doubt.

Specifically, Movant takes issue with Mr. Duncan's failure to object to the introduction of photographs taken after the scene was reconstructed and his failure to question any witness about how the photographs failed to accurately depict the scene as it existed at the time of the shooting. The State's case relied heavily on the use of circumstantial evidence to show that Mrs. Middleton's death was preceded by a struggle. Most notably, the State argued that there was no phone in the dining room for Mrs. Middleton to use as Mr. Middleton contended, and that Mr. Middleton left a boot print on the wall when he braced himself to shoot Mrs. Middleton. The photographs introduced at trial did not show the telephone in the dining room, nor did they show the planter and statue that had been in front of the boot print, even though the latter two items were identified on a diagram of the scene made by police.

With respect to this issue, the Court first notes that Movant has failed to make any showing that the photographs would have been excluded had Mr. Duncan objected at trial. Further, a review of the trial transcript reveals that Mr. Duncan did question a number of witnesses as to the placement of furniture and other items, including the planter and statue in front of the boot print. While it is true that Mr. Duncan did not confront each officer with the diagram made by Detective Link, he did make an

effort to point out inconsistencies between how the scene appeared in the photographs and how it actually existed on the day of Mrs. Middleton's death. The Court finds no reason to believe that the outcome of the trial would have been different had Mr. Duncan approached this issue alone in the manner suggested by Movant.

Mr. Middleton next points to trial counsel's failure to question police at any length about why they removed his wife's clothes at the scene. Officer Gale briefly testified that a button was found on the floor in close proximity to Mrs. Middleton's body and that the blouse she was wearing at the time of her death was missing a button. Ralph Baney, a firearm and toolmark examiner subsequently testified that, in his opinion, the button missing from Mrs. Middleton's blouse had been torn off rather than just having come unraveled. This testimony was offered by the State to support its assertion that a struggle occurred between Mr. and Mrs. Middleton prior to her death. Mr. Duncan, while cross-examining Mr. Baney about the button, failed to ask whether Mrs. Middleton's clothes had been removed and then replaced by officers at the scene, although he did elicit such testimony from Officer Gale. (Tr. 134.) Movant contends that it was "bizarre" for officers to have removed Mrs. Middleton's clothes at the scene, implying that Mr. Duncan should have done more with this information in an effort to convince the jury that proper procedures were not followed and that perhaps one of the officers caused the button to be removed from Mrs. Middleton's blouse. Movant offers no evidence, however, to prove his contention that it is unusual for officers responding to a shooting to remove clothing from the victim. Furthermore, Mr. Duncan elicited testimony from Officer Gale that Mrs. Middleton's clothes had, in fact, been removed by officers. The jury, given this information, would have been able to make the inference that officers, rather than Mr. Middleton, may have caused the button to be removed.

Finally, Movant notes that police made no attempt to obtain a warrant prior to seizing items from the Middleton home and from the hospital, and that Mr. Duncan made no effort to bring this to the attention of the jury. Movant appears to be of the mind that items were seized by officers unlawfully, but offers nothing to support this bare assertion. In his motion, he states only that "[d]espite the lack of exigent circumstances, no attempt was made to obtain a warrant before searching the Middleton home from top to bottom, and seizing several items later used as evidence." The Court, absent further evidence, is unable to find that the outcome of the trial would have been different if the legality of the seizures had been challenged by Mr. Duncan.

4) Mr. Duncan failed to elicit testimony from police witnesses to corroborate Movant's alleged statements to police.

Movant next complains that Mr. Duncan failed to confront witnesses with facts memorialized in the police reports that were provided to him during discovery and which corroborated exculpatory statements Mr. Middleton made to police on the day of his wife's death. Although Mr. Middleton's motion alleges that Mr. Duncan "neglected to elicit...facts", in the plural, he discusses the omission of only one fact with any specificity and so the Court will consider only that "fact". Movant alleges that Mr. Duncan failed to confront any police witness with a report that was written on February 12, 1990, which contains the statement, "he (Mr. Middleton) had cleaned the gun and the victim had picked it up and was preparing to use the phone in the dining room, which was on a wall between the dining room and kitchen...". (Ex. 14 – Investigation Report.) Movant contends that this report independently proves the existence of the phone and should have been used on cross-examination when police witnesses claimed they could not remember whether a phone was located in the dining room. However, Movant fails to cite the relevant statement in its entirety, which reads as follows: "I overheard Mr. Middleton saying he had

cleaned the gun and the victim had picked it up and was preparing to use the phone in the dining room, which was on a wall between the dining room and kitchen." (Ex. 14 – Investigation Report.) When read as a whole, this report does not firmly establish the presence of the phone as Movant contends. It is unclear whether the officer independently noted the location of the phone, or if he was merely reporting that Mr. Middleton said the phone was located on the wall between the dining room and kitchen. In light of this, it cannot be said that Mr. Duncan's failure to confront police witnesses with this report, standing alone, amounted to ineffective assistance of counsel, as it did not necessarily result in any prejudice to Movant.

5) Mr. Duncan failed to object to the State's introduction of crime scene photographs.

The issue of the introduction of the crime scene photos has already been discussed at length. However, Mr. Middleton again complains about Mr. Duncan's failure to object to the introduction of photographs taken after the scene was reconstructed. He contends that, because they were not fair and accurate representations of the scene as it appeared at the time of Mrs. Middleton's death, they were "vulnerable to a foundation objection which this Court would have been required to sustain, unless the State could prove the photos depicted the crime scene as it was back on February 12, 1990." Movant points to the importance of this issue by again reiterating that the State's case relied heavily on the use of circumstantial evidence to show that Mrs. Middleton's death was preceded by a struggle. Such circumstantial evidence included the boot print found on the wall in close proximity to Mrs. Middleton's body. The photographs introduced at trial failed to include a planter and statue that had been in front of the boot print on the day of the shooting, even though these items were identified on a diagram of the scene made by Detective Link.

The Court declines to address Movant's statement that it would have been required to sustain a foundational objection had one been made, since a review of the trial transcript reveals that Mr. Duncan made a strategic decision not to object to the photographs. Prior to the State's introduction of the photographs, Prosecutor Peters noted on the record that, "[b]y agreement of the parties" the State would introduce the photographs through Officer Gale, although Officer Gale was not even present at the scene when they were taken. (Tr. 138-139). Mr. Duncan did not correct Mr. Peters' recitation of this agreement. Further, Mr. Duncan questioned a number of witnesses, including Officer Gale, as to the placement of furniture and other items, including the planter and statue in front of the boot print. He made an effort to point out inconsistencies between how the scene appeared in the photographs and how it actually existed on the day of Mrs. Middleton's death, even if he did not always refer to the diagram made by Detective Link. Again, under these circumstances, it is clear that Mr. Duncan made a strategic decision regarding the use of the photographs. The Court finds no reason to believe that the outcome of the trial would have been different had Mr. Duncan approached this particular issue in the manner suggested by Movant.

6) **Mr. Duncan failed to object to the State's opening argument when the Prosecutor made reference to a statement attributed to Mr. Middleton which the Court had just agreed at the pre-trial conference should be suppressed.**

Prior to trial, Mr. Duncan filed a motion to suppress all statements the police claimed were made by Movant at the time of Mrs. Middleton's death and in the days following, including two statements Mr. Middleton gave to Officer Gale just prior to leaving the house to go to the hospital, and the statement made to Detective Curby the next day at the police station. In the statements made by Movant at his house, he indicated that Mrs. Middleton had picked the gun up and dropped it,

causing it to discharge. When questioned at the police station by Detective Curby, however, Movant stated that he was carrying the gun into the kitchen when he began to feel particularly ill. He reached to hand the gun to his wife, blacked out, and when he awoke, found himself lying next to his dead wife. In ruling on the motion, the Court deemed the statements made at Mr. Middleton's home to be admissible, as Movant was not in custody at the time they were made. The Court ruled the statement made to Detective Curby at the police station, however, to be inadmissible as Movant had been mirandized and had requested to speak with his attorney.

During the State's opening argument, Prosecutor Patrick Peters told the jury that Officer Spartz would be called to testify and he would tell them that, while in the hospital, Mr. Middleton said he got up from the chair and fell unconscious while passing the gun to his wife. Mr. Duncan failed to object to this statement. He further failed to object when Officer Spartz was called in and testified just as Mr. Peters said he would.

Movant contends that the questioning conducted at the hospital was in the nature of a custodial interrogation, and should have been argued during the suppression hearing. There is no mention of this particular statement in the Motion to Suppress filed by Mr. Duncan, nor was it ever referred to by either side during the February 15, 1991, suppression hearing. Officer Spartz never testified about it during that hearing, and Mr. Peters never said anything about it in his remarks to the Court. (Tr. 9-10, 39-97) It is Movant's position that if Mr. Duncan was unaware of the statement made at the hospital at the time the Motion to Suppress was argued, then he should have objected when he learned of it for the first time at trial. If, on the other hand, he was aware of the statement and made a conscious decision not to seek suppression of it, then seeking suppression of the statement made to Detective Curby was pointless, as the same information would be passed to the jury through Officer Spartz.

The Court declines to consider whether Mr. Duncan's failure to object satisfies the performance prong of the *Strickland* test and takes up instead the issue of prejudice. As to this point alone, the Court is not satisfied that, had Mr. Duncan objected, the result of the trial would have been different. Movant fails to show that the objection would have been sustained, or that a motion to suppress the statement would have been granted. This is particularly true in light of the fact that the Court had already denied the request to suppress statements made by Mr. Middleton earlier in the day, where there is no evidence that he was, in fact, in custody or being questioned as a suspect rather than as a witness.

7) Mr. Duncan made no opening statement.

Movant alleges that defense counsel's failure to make an opening statement left the jury to wonder if Movant had any defense to the charges leveled against him by the State, and that this problem was compounded by counsel's failure to call any witnesses to testify on Mr. Middleton's behalf and the failure to have Mr. Middleton testify in his own defense. The Court finds, however, that it is entirely possible under the facts of this case that Mr. Duncan made a strategic decision to reserve his opening argument given the nature of the evidence, then decided not to put on any evidence following the close of the State's evidence, in which instance an opening by Mr. Duncan would have been precluded. Indeed, Movant testified that his decision not to testify was made only after the State closed its case. Pursuant to the holding in *Vogel v. State*, 31 S.W.3d 130 (Mo.App. W.D. 2000), the Court must presume that Mr. Duncan chose not to make an opening statement as part of a sound trial strategy, and Movant has failed to present any persuasive evidence sufficient to overcome the presumption. Because Movant has failed to satisfy the performance prong of the Strickland test, the

Court need not consider whether Movant suffered any prejudice as a result of trial counsel's decision not to present an opening argument to the jury.

8) Mr. Duncan failed to interview Cliff Middleton and present his testimony that the indentation in the wall occurred weeks before Mrs. Middleton's death.

Movant next complains that Mr. Duncan failed to interview and present the testimony of his son, Cliff Middleton, who could have confirmed that the boot print found on the wall near Mrs. Middleton's body had actually been there for several weeks prior to the shooting and that there was a phone on the wall in the dining room just as Movant said there was. It is Movant's contention that this testimony, combined with the lab report confirming the absence of gypsum on Movant's boots, and the diagram showing the placement of the planter and statue, would have significantly undermined the state's theory that a struggle took place prior to Mrs. Middleton's death. The Court finds, however, that Mr. Duncan's failure to interview and call Cliff Middleton as a witness does not, standing alone, constitute ineffectiveness sufficient to warrant the grant of a new trial because the jury could have found Cliff Middleton, Kenneth Middleton's son, not to be a credible witness. Movant has failed to show a reasonable probability that the presentation of Cliff Middleton's testimony would have changed the outcome of the trial.

9) Mr. Duncan failed to call Michelle Brockman, Mrs. Middleton's niece.

Movant's eight-year-old niece, who was living with the Middletons at the time of the shooting, was interviewed by police on February 15, 1991. During that interview, as evidenced by an Investigation Report made available to Mr. Duncan during discovery, the child indicated that Movant and Mrs. Middleton had not been fighting in her presence before the shooting and that Movant had mentioned the day before that he was not feeling well. Movant contends that this

testimony, if offered at trial, would have refuted the State's contentions that he and his wife had been fighting and that there was nothing wrong with Mr. Middleton's health, and would have supported Movant's statement that he had indeed been feeling ill and had blacked out. Again, the Court does not believe that Mr. Duncan's failure to interview or call Mrs. Middleton's niece as a witness, considered alone, is sufficient to rise to the level of ineffective assistance of counsel. Further, Movant fails to make an affirmative showing of prejudice on this point.

10) Mr. Duncan failed to call any witnesses to testify on Mr. Middleton's behalf, although there were many with exculpatory testimony willing to do so.

Movant next complains that trial counsel neglected to interview potential witnesses for Mr. Middleton who would have testified about his good character and reputation for non-violence. These witnesses also could have testified that they were familiar with both Mr. Middleton and his wife, and that they had a good marriage, in an effort to show that Mr. Middleton had no motive to kill his wife. (Ex. 28 – Letters addressed to Mr. Duncan in support of Mr. Middleton's character.)

Beyond these bare assertions, however, Movant fails to make an affirmative showing that the outcome of the trial would have been different had Mr. Duncan interviewed these potential witnesses. The Court must presume that Mr. Duncan, a seasoned trial attorney, made the strategic decision to not put on character evidence, as doing so would have allowed the State to rebut such testimony with evidence of Movant's bad character. Having made the decision not to present such evidence, Mr. Duncan may have determined that it was not necessary to interview these potential witnesses.

As such, the Court finds that Mr. Duncan's failure to interview potential character witnesses prior to trial, standing alone, does not amount to ineffective assistance of counsel. Rather, it is but one more factor to be weighed by the Court in considering the cumulative effect of Mr. Duncan's errors.

11) Mr. Duncan failed to object to Prosecutor McInerny's misleading and prejudicial argument that Mr. Middleton "confessed" to killing his wife.

During his closing argument, the prosecuting attorney implied that Mr. Middleton "confessed" to killing his wife. It was specifically argued that, "[a]fter he washed his hands, and after he wiped them off with a towel, and after he dug them in the dirt, he did change his story. And what's his second story? That he did cause the death of Katherine Middleton by shooting her. That's his second story." (Tr. 502.) Clearly, the prosecutor was referring to the statement made by Mr. Middleton at the hospital that was admitted during trial as part of the State's evidence. The prosecutor's remark was nothing more than a characterization of Mr. Middleton's statement and there is no showing that the remark was improper. Further, Movant has failed to show that the characterization of Mr. Middleton's statement as a confession so misled the jury that its omission would have produced a different result. As such, the Court finds Movant was not denied effective assistance of counsel based on Mr. Duncan's failure to object during the State's closing argument.

12) The cumulative effect of Mr. Duncan's errors and omissions should be weighed by the Court.

The Court, having now considered eleven separate allegations of Mr. Duncan's ineffectiveness, and having found that no one alleged failure, standing alone, is sufficient to warrant the grant of a new trial to Movant, now considers the prejudicial impact of trial counsel's performance as a whole. Such an analysis of *Strickland* prejudice by considering the defense given Mr. Middleton as a whole, rather than piece-meal, is mandated by *Kyles v. Whitley*, 115 S.Ct. 1555, 514 U.S. 419, 131 L.Ed.2d 490 (1995).

An attorney's "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Although courts generally afford great deference to an attorney's informed strategic choices, close scrutiny is nonetheless to be applied when examining an attorney's preparatory activities. *Foster v. Lockhart*, 9 F.3d 722, 725-26 (8th Cir. 1993). Failing to interview witnesses or discover exculpatory evidence relates to trial preparation, not trial strategy. *Chambers v. Armontrout*, 907 F.2d 825, 828-29 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 369 (1990); *Schlup v. Bowersox*, 1996 WL 1570463 (E.D. Mo.). A defense counsel's practice of not interviewing witnesses contravenes the attorney's essential duty to make an adequate factual investigation and is an "absurd and dangerous policy which can only be viewed as an abdication - not an exercise - of his professional judgment." *McQueen v. Swenson*, 498 F.2d 207, 216 (8th Cir. 1974).

In the case at bar, Mr. Middleton's trial counsel, Robert G. Duncan, took no depositions, nor did he seek independent testing of the handgun or any other piece of evidence revealed by the State in discovery. He failed to follow up on his request for the results of gunshot residue tests on Mrs. Middleton's left hand. Mr. Duncan further failed to interview a single witness about whom he learned from Mr. Middleton, including Cliff Middleton, Michelle Brockman, and various character witnesses. (Ex. 9 – Affidavit of Kenneth Middleton; Ex. 10 – Affidavit of Kenneth Middleton.) Finally, Mr. Duncan failed to obtain any medical records relating to Mr. Middleton's history of epilepsy and seizures, as will be discussed further below. When considering these failures together, it cannot be said that Mr. Duncan's performance conformed to the degree of skill, care and diligence of a reasonably competent attorney under similar circumstances. Had Mr. Duncan not been ineffective with respect to his handling of the pre-trial

investigation of this case, there is a reasonable probability that the outcome of the trial would have been different. Therefore, the Court sets aside Mr. Middleton's convictions and sentences, and grants him a new trial.

Ground No. 2: Mr. Middleton's trial attorney performed ineffectively, in violation of the Fourth, Sixth and Fourteenth Amendments, when he failed to challenge the admissibility of evidence recovered during the warrantless search of Mr. Middleton's home, as well as the warrantless seizure of his clothing and boots at St. Mary's hospital. Mr. Middleton was prejudiced by counsel's neglect because misleading physical evidence, including photographs of the "reconstructed" crime scene, a total of three pairs of boots, a gun cleaning kit, a door frame, pieces of sheetrock and other evidence taken from Mr. Middleton's home were used to construct a misleading theory of guilt which, properly suppressed, could not have been used as evidence against him.

In this point, Movant argues that Mr. Duncan was constitutionally ineffective by failing to file motions to suppress evidence illegally seized by officers following the warrantless search of his home, and the warrantless taking of his boots and clothes at the hospital. Specific items seized from Mr. Middleton's home include the gun believed to have caused Mrs. Middleton's death, a bullet that was found inside a wadded-up towel, a gun cleaning kit found in the basement, boots found in Mr. Middleton's bedroom closet, sections of sheetrock and door facings that were removed from the wall, photographs that were taken of the dining room, and other observations and measurements made during the day of the shooting. All of these items from the home and the hospital were introduced into evidence at trial, and each was used to support some aspect of the State's theory of the case.

A warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Terry v. Ohio*, 88 S.Ct. 1868, 392 U.S. 1, 26, 20 L.Ed.2d 889 (1968). Movant contends that the exigent circumstances which justified the officers' initial entrance into Mr. Middleton's home no longer existed by the time officers secured the scene and began searching the home room by room, finding the bullet, the gun kit, and boots. Further, more than four hours after the officers' arrival at Mr.

Middleton's home, police made arrangements with the fire department to have personnel respond with tools to remove two sections of sheetrock wall and door facings which were considered to be of evidentiary value. (Tr. 150, 310, 352.)

The Court recognizes that there is no "murder scene exception" to the warrant requirement. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Thompson v. Louisiana*, 469 U.S. 17, 21, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984); *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999). That being established, the vast majority of items seized at the crime scene were in plain view and were relevant to the shooting or were within the proper scope of a "sweep" by law enforcement officers. *Washington v. Chrisman*, 455 U.S. 1 (1982). Officers had the consent of Mr. Middleton to enter the house and to search therein, as he summoned emergency services and did not object when police entered the house to search for and tend to his wife. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (consent to be determined by "totality of all surrounding circumstances"); See also *State v. Melville*, 864 S.W.25 452, 456 (police need not ask permission to extend search once new containers or objects of interest are discovered). Even assuming such consent was not established, all of the items seized from Movant's home likely would have been seized at a later time and thus are not excludable under the inevitable discovery doctrine. See *State v. Hicks*, 722 S.W.2d 650 (Mo.App. S.D. 1987). Likewise, Mr. Middleton's clothing would have been seized at a later time as well.

Aside from the fact that a motion to suppress would have been unlikely to succeed, there are other good reasons to conclude that Mr. Duncan made the strategic decision not to ask for suppression. First, a number of the items seized were relevant to Mr. Middleton's defense. For instance, the towel found in the dining room supported Movant's contention that he was wiping down the gun. The boots

taken at the hospital tested negative for the presence of gypsum, indicating that Movant had not kicked the wall prior to the shooting, and Movant's long-sleeved shirt did not reveal the presence of any gunshot powder residue as it might if he had fired the gun. Secondly, there is no reason to believe that the State could not have made its case against Mr. Middleton without admitting the seized items into evidence. Finally, Movant contends that he asked Mr. Duncan about the seizure of items and asked that a suppression motion be filed. If that is so, trial counsel was clearly cognizant of the issue, and chose not to pursue it. The Court must assume that this decision was made by Mr. Duncan in the sound discretion of trial strategy. As such, Movant was not denied effective assistance of counsel as to this particular claim.

Ground No. 3: Mr. Middleton's trial attorney was constitutionally ineffective in failing to conduct a reasonable investigation and present available evidence of Mr. Middleton' s medical history of epileptic grand mal seizures, as well as evidence of his physical and psychological condition on the day of his wife's death. Mr. Middleton was prejudiced because such evidence would have established that he was being truthful when he told police that he was ill, and that he blacked out before his wife was shot. Moreover, this medical evidence would have rebutted the state's claim that Mr. Middleton exhibited no grief over his wife's death.

In granting Movant's Motion to reopen the Rule 29.15 proceeding on the basis of abandonment by post-conviction counsel, the Court indicated that it would consider only those issues that had not previously been litigated. Both this Court and the Missouri Court of Appeals have had occasion to consider and deny whether trial counsel was ineffective in failing to obtain medical records for treatment provided to Movant on the day of the shooting. As such, this particular claim for relief is denied as having been previously litigated. The Court does note however, that Mr. Duncan's failure to obtain and review records of treatment provided to Mr. Middleton on the day of the shooting are just one more indication of his failure to properly investigate and prepare for the defense of Mr. Middleton.

Movant also contends as part of Ground No. 3 that Mr. Duncan was ineffective in failing to conduct an investigation into his pre-shooting medical history. Had he done so, Movant claims, he would have learned that Movant suffers from epileptic grand mal seizures, which may be precipitated by hyperventilation; trauma, and emotional stress, and which may result in an altered state of consciousness. Mr. Middleton believes that evidence of this medical condition, if presented at trial, would have refuted the State's position that he was feigning illness and was pretending to be unconscious to avoid questioning from police. The Court is not convinced that Mr. Duncan's failure to delve into Mr. Middleton's history of epileptic seizures, by itself, is sufficient to warrant the grant of a new trial. However, it is further illustrative of his failure to properly prepare for Mr. Middleton's trial and the Court includes this complaint as a factor in the cumulative effect of Mr. Duncan's deficient performance.

Ground No. 4: Mr. Middleton's right to due process of law was violated because of three commissions of gross prosecutorial misconduct:

a. The prosecutor had an improper, undisclosed financial interest in the outcome of the case arising from his referral of Katherine Middleton's family to the prosecutor's father's law firm for representation in wrongful death/probate actions brought against Mr. Middleton.

As to Ground No. 4, Movant first complains that Mr. Peters, while preparing for the criminal trial, directed Detective Ray Vasquez to investigate the financial condition of the Middletons, which investigation revealed that Mr. Middleton was financially well off. Movant contends that, prior to the criminal trial, Mr. Peters referred Mrs. Middleton's family to the law firm where Mr. Peters' father practiced, for the purpose of pursuing a wrongful death action against Mr. Middleton. Movant further complains that the fact that Mr. Peters gave such a referral to Mrs. Middleton's family was not revealed to the defense prior to the criminal trial.

To strengthen his position that Mr. Peters was aware of the financial benefit that would inure to his father's firm, Movant points to two specific incidents. First, Movant points to the unusual bond condition requested by Mr. Peters which restrained Mr. Middleton from disposing of any assets without Mr. Peters' approval. Movant believes that this is fairly interpreted as an effort to benefit Mr. Peters' father's law firm since it prevented Movant from reducing the total value of assets available in the event the wrongful death action was successful. Secondly, Movant points to Mr. Peters' failure to respond to Mr. Duncan's December 20, 1990 letter seeking the gunshot residue test results for Katherine Middleton's left hand. Movant seems to believe that Mr. Peters' failure to respond was a conscious decision to hide evidence, as positive test results would have "all but end[ed] not only the criminal prosecution, but also the wrongful death case." The Court finds Movant's position to be unconvincing.

At the most recent hearing, the lead prosecuting attorney, Patrick Peters, testified that he did not have a financial interest in the outcome of the wrongful death case brought by Mrs. Middleton's family. In fact, he stated that he had no recollection of giving such a referral, either in this case or in any other case over the course of his career as a prosecuting attorney. He could only surmise that the family contacted the firm in question based on its status as the largest law firm in Blue Springs. More importantly, Mr. Peters clarified that his father simply shared office space with the firm. He was not a partner, nor did he have a fee sharing agreement with any member of the firm. To Mr. Peters' knowledge, his father had no involvement in the civil litigation and received no financial benefit from the firm's representation of Katherine Middleton's family.

Mr. Peters also testified that his request for the bond condition restricting Mr. Middleton's ability to dispose of assets was in no way motivated by a desire to benefit the firm where his father

officed. Rather, Mr. Peters was aware that Mrs. Middleton had threatened to contact the IRS concerning Mr. Middleton's financial dealings. It was his belief that Mr. Middleton murdered his wife to prevent her from carrying through with this threat. Mr. Peters testified that he asked for the bond condition in an effort to preserve the assets, as well as to prevent Mr. Middleton, if convicted of murder, from keeping them. As to the issue of Mr. Duncan's request for the gunshot residue tests, Mr. Peters was unable to recall whether he had seen the December 20, 1990, letter. However, the Court notes that the letter requests eight separate items of evidence, including "[t]he lab report of the gun shot residue test performed on the right hand of the victim" and "[i]f there was a similar test of her left hand, I would also like to have it." (Ex. 11 – Discovery Request.) As noted above, the requisition form does appear to have been altered, but there is no clear indication whether a test was actually conducted on Mrs. Middleton's left hand. As such, the Court cannot find that such a test was conducted, that Mr. Peters was aware of it, and that Mr. Peters failed to turn it over because his father's law firm stood to make money in the wrongful death action. The Court finds Mr. Peters' testimony to be credible. Movant has failed to establish that the prosecutor had an improper financial stake in the related civil litigation.

b. The prosecutor ordered the release of jewelry worth over $18,000 to witness Mildred Anderson three days after the jury's verdict, thereby circumventing known pending probate proceedings, and creating, at best, the *appearance* of impropriety with a trial witness.

Movant next contends that he was denied his right to due process of law under the Fourteenth Amendment when Mr. Peters failed to disclose that he directed Detective Ray Vazquez to give State's witness and Katherine Middleton's sister, Mildred Anderson, approximately $18,700 worth of Mrs. Middleton's jewelry within days of the verdict, thereby allowing her to circumvent pending probate proceedings. Movant complains that Mr. Peters' decision to release

the jewelry to Ms. Anderson and the failure to reveal this decision to Mr. Middleton created an appearance of impropriety.

Again, the Court finds no support for Movant's allegation. Mr. Peters testified at the most recent 29.15 hearing that it would have been a matter of routine to give permission to detectives to release personal items to a family member of the victim once the trial concluded. Mr. Peters also stated that he had no improper motive in approving the release of the jewelry, such as influencing witness testimony or circumventing probate proceedings. Rather, he wanted only to ensure the items were returned to the family. The Court again finds Mr. Peters' testimony to be credible and holds that Movant has failed to establish prosecutorial misconduct.

c. The State made an improper closing argument which misstated the evidence and improperly imputed to Mr. Middleton a confession which never occurred.

Movant lastly complains about certain remarks made by prosecuting attorney Pat McInerney during his closing argument. According to Movant, Mr. McInerney's closing argument mischaracterized certain of Mr. Middleton's statements to police as a confession. The Court, having already addressed this issue in Section A., Ground No. 1, point no. 7, above, will not consider the issue further, other than to recite it's finding that Mr. McInerney's statements were not improper and do not support a finding of prosecutorial misconduct.

Ground No. 5: Mr. Middleton was denied his Fourteenth Amendment right to effective counsel on appeal because trial counsel Duncan remained in the case after sentencing as Mr. Middleton's appellate attorney, despite the inherent conflict of interest which arose when Mr. Middleton indicated that he wanted to assert allegations of ineffective representation, and Duncan thereafter stayed in the case nonetheless. As a result, Mr. Middleton's appeals of his conviction and the denial of his initial Rule 29.15 motion were consolidated, thus causing issues to be abandoned. Mr. Duncan, in working closely with "29.15" appellate counsel, urged that many issues from the "29.15" proceeding be abandoned in the interests of the combined brief. As such, many meritorious claims of error were waived.

As set forth above in the Court's holdings with respect to re-opening the Rule 29.15 proceeding, the claims abandoned by Mr. Middleton's trial and post-conviction counsel, Robert G. Duncan, have now been stated by Mr. Middleton's current counsel and considered by the Court. This point is denied as moot.

CONCLUSION

WHEREFORE, in light of the above and foregoing, this Court finds Mr. Middleton was abandoned by post-conviction counsel, thus providing just cause to re-open his Rule 29.15 proceeding. Further, in light of the evidence and law presented at hearing and in the briefs submitted by counsel, the Court finds that Movant was denied effective assistance of counsel and orders Mr. Middleton's convictions and sentences vacated and set aside, and grants Mr. Middleton a new trial.

IT IS SO ORDERED.

5/26/05
Date

Edith L. Messina
Honorable Edith L. Messina
Division 12

INVESTIGATION REPORT
BLUE SPRINGS POLICE DEPARTMENT
BLUE SPRINGS, MISSOURI

COMPLAINT: 90-01111/S
DATE: 02-23-90

TYPE	LAST NAME	FIRST NAME	MID NAME	DOB
V	Middleton	Katherine	B	03-18-44

DATE RCVD	DSPH (TIME)	HOW	UNIT	PSN	AREA/DIST	DISP	LOC
02-13-90	0900		420	334	1	7	56

CHARACTER OF CASE: Homicide
Autopsy witness

At or about 0900 hrs. on 02-13-90, Reporting Officer accompanied Det. R. Vasquez to the office of the Jackson County Medical Examiner, 2301 Holmes, Kansas City, Mo. for the purpose of witnessing the autopsy of Middleton, Katherine B., the victim of homicide, and for the purpose of receiving property of evidentiary value.

The body was identified and presented by John Overman, M.D. I was afforded ample time to photograph the body initially.

I then removed the paper sacks from the hands of the body and scraped the underside of each fingernail by using a fresh instrument. The scrapings and scraping instrument were packaged and marked. The paper sacks which were removed were also marked and packaged.

Two complete sets of fingerprints and palmprints were made , marked, and packaged.

Hair standards were retrieved by use of a fresh comb. The standards and comb were packaged and marked.

I was permitted to take several photographs during the different stages of the autopsy resulting in the exposure of a complete roll of film which was marked and packaged.

I received a vial of blood drawn by Dr. Overman from the body. It was properly marked and packaged.

I received 2 small metal fragments, believed to be part of a bullet, which were retrieved from the brain as the result of examination by Dr. Overman. They were properly marked and packaged.

For details of the autopsy, see Dr. Overman's report.

All evidence was returned to B.S.P.D. and placed in the secured Property Room.

E.O.R.

Reporting Officer Dave Lusk (334)
Evidence Technician

Exhibit 5
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Blue Springs P.D.
Submitting Agency

REGIONAL CRIMINALISTICS LABORATORY

PHYSICAL EVIDENCE INVENTORY REPORT

LABORATORY USE ONLY

Lab. Case # 90-022532

Lab. Page # 5

Exam JMW

and Date 23Aug90

Approved by [illegible] Case Report No. 90-0111

Type of Offense Homicide Date 02/13/90

Recovered From Middleton, Katherine B

(Victim ☒ Suspect ☐ Indicate Other ____) Race W Sex F D.O.B. 03/18/49

Address 1409 N 48th Blue Springs Phone 228-4708

Suspect (1) Middleton, Kenneth G. (2) ____

(3) ____ (4) ____

PROPERTY ROOM USE ONLY

Control ____

Location ____

Rec'd. by ____

Date Rec'd. ____

Disposition ____

Victim's Name Middleton, Katherine B.

☐ Firearms and Toolmark ☐ Chemistry ☒ Trace Evidence ☐ Fingerprints ☐ Documents ☐ Indicate other ____

Item No.	No. of Articles	Description	Serial Number	Estimated Value
1	1	BX. Gunshot Residue Tests for Right [illegible] Hand		
		Victim		
		Please Test for GSR		
		Stub # 100		

PETITIONER'S EXHIBIT 4

TOTAL

Reporting Officer Sgt [illegible] Rogers Serial No. 211 Unit or Station Detective Unit

Form 422-C P. D. (Rev. 1-76)

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Laboratory Case # ______

EVIDENCE CHAIN OF CUSTODY Agency Case # 90-01111

ecelved From Dave Link (334) Agency/Unit B.S.P.D.
eleased To M. CATION, RCL FEB 2 1 1990 Agency/Unit
em Nos. Date Time 1510 Hrs
elease Authority

eceived From M. CATION, RCL SEP 0 4 1990 Agency/Unit
eleased To Dave Link (334) Agency/Unit B.S.P.D.
em Nos. Date Time 1450
elease Authority

eceived From Agency/Unit
eleased To Agency/Unit
em Nos. Date Time
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em Nos. Date Time

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COMPLAINT # 90-01111 | GO/SUTT #

BLUE SPRINGS, MO POLICE DEPT.

D = VEHICLES | E = OFFICE EQUIPMENT | J = LIVESTOCK | K = MISC/ALL OTHER

DATE 02/12/90 | TIME 1545

ADDRESS/LOCATION 1409 N 48TH

☐ RECOVERED ☐ SAFEKEEPING ☒ EVIDENCE ☐ FOUND

DISPOSE OF ☐ YES ☒ NO

(V) O 1 NAME MIDDLETON, KATHERINE E. | RACE W | SEX F | DOB 03/18/44

RES ADDRESS 1409 N 48TH ST. | CITY BLUE SPRINGS | STATE MO | ZIP 64015 | PHONE 228-4708

(S) RP 2 NAME MIDDLETON, KENNETH G. | RACE W | SEX M | DOB 08/11/44

RES ADDRESS 1409 N 48TH ST | CITY BLUE SPRINGS | STATE MO | ZIP 64015 | PHONE 228-4708

Eric Page

REMARKS

This is the Gunshot Residue Test Performed on Katherine Middleton During Crime Scene Processing.

PROPERTY

ITEM NO.	PROP TYPE	NO. OF ITEMS	NAME OF ITEM	DOLLAR VALUE	MAKE	MODEL	SERIAL NUMBER	DESCRIPTION (COLOR, SIZE, ETC.)	BIN NUMBER
1	K	1	TEST KIT		REGIONAL LAB	GUNSHOT RESIDUE		WHITE BOX & CONTENTS	

PAGE 1 OF 1

REPORTING OFFICER [signature] | PSN 21

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questions.

THE COURT: Very well. Is there cross?

MR. KELLY: Nothing.

THE COURT: Can this witness be excused?

MR. KELLY: Yes, Your Honor.

MR. LAURANS: Yes, Your Honor.

THE COURT: Thank you very much. You may step down.

(Witness excused.)

MR. LAURANS: Judge, my next witness will be Charles Gay.

THE COURT: Yes, sir. Would you please step up and raise your right hand to be sworn.

CHARLES GAY, being sworn by the Court, testified:

DIRECT EXAMINATION by MR. LAURANS:

Q Could you please tell us where -- your name and where you're from?

A Charles Gay, born and raised in California.

Q And from where do you come today?

A North Winds Investigations.

Q And where is that?

A In Rogers, Arkansas.

Q Mr. Gay, can you give us a little bit of history of your educational background?

A I will. I was in the police academy in August of '66

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for the police department, 18 weeks of training for the Long Beach Police Department in Los Angeles, California. I attended several FBI schools for training for crime scene development, intelligence, counter intelligence courses. Attended several management -- police municipal management institutes.

I currently sit on the board of directors, certified financial investigator for the National Association of Certified Financial Investigators out of Colorado, Denver, Colorado. I have approximately 1,200 hours, I believe, when I retired from the police department in 1982, of additional training within the police department.

I have associate's degree in public administration out of Orange County, California. I obtained my teaching credentials for law enforcement in junior college for a junior college instruction. I believe that was in 1979. I attended an institute, FBI institute, out of Hawaii for counter intelligence programs. I think that was in 1985.

I was -- when I retired in 1982, I was in charge, for the past eight years, of major crimes detail in the Long Beach Police Department, in charge of criminal investigations. In 1982, upon my retirement, I went to work for the Department of

Defense. I was administrator of all the counter intelligence programs in communist countries. In 1986 I left the Department of Defense and moved to Arkansas, and shortly thereafter I started North Winds Investigation.

Q You've been qualified to teach law enforcement officers?

A Yes, I have.

Q And what subjects do you teach?

A Everything from crime scene investigations, patrol procedures, evidence collection, anything that has to do with -- in the law enforcement field.

Q And have you testified in court before?

A I have.

Q How many times?

A In Los Angeles County, both Superior Municipal Court I testified over 2,000 times as an expert in the field of narcotics. As far as in criminal cases, it just enormous amount. I'm sure a couple thousand times.

Q Have you ever testified as an expert with respect to evidence collection procedures and crime scene preservation procedures?

A Not as an expert, no, just part of my job.

Q And you've taught that subject as well, correct?

A I have.

MR. LAURANS: Judge, I'd ask that Mr. Gay be qualified as an expert on those topics.

MR. KELLY: I have no objection.

THE COURT: All right. As an expert in what area?

MR. LAURANS: Crime scene preservation and evidence collection.

THE COURT: All right. All right.

Q (By MR. LAURANS) Mr. Gay, can you tell us when you first became involved in this case, this postconviction proceeding?

A It was towards the end of 1993 when I received a call from Mr. Middleton.

Q Is it fair to say that sometime in -- between '93 and '95 Wilma Sallee was working for you?

A That's correct.

Q And did you send her down to the crime lab to look at some documents, gunshot residue documents?

A Yes, I did.

Q Did she notify you of anything about those gunshot residue documents?

A Yes, she did.

Q What did she notify you about?

A That the copies that she received at the police department appeared to be altered, and I had requested

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her to go to the crime lab to obtain the originals and to see if they matched the copies that the police department gave her.

Q And are we talking about Mr. Middleton's gunshot residue documents or Mrs. Middleton's?

A Mrs. Middleton's.

Q Did you actually go in and look at those documents yourself?

A I did at a later time.

Q After Ms. Sallee, correct?

A Yes.

Q Can you tell us what happened and what you observed?

A I compared her evidence sheet against the gunshot residue sheets -- reports against Mr. Middleton's, and noticed on the green evidence sheet that was used by -- at the medical examiner or at the crime lab, that it was a green paper but had White Out in areas where it showed the number of samples. And also on the line where it said left and right test kits, hers said "right." And there was a space where if you put the -- hers over the top of Mr. Middleton's, you could see this part scrolled of the writing still underneath the line that tied in exactly and had the word "left." You could see where the word "left" went in. Underneath the White Out you could also see the word "left," and

under the White Out where it said the number of test kits, you could see the number 2.

Q Did you hold that document, that green document, up to the light?

A Did.

Q You were not permitted to take that document out of that crime lab, though, correct?

A No, that's correct.

Q Can you tell me whether whiting out information on that kind of a document is a proper or improper procedure?

A It would be an improper procedure. The proper method of collecting evidence and doing the reports, it all has to be consistent. The integrity of the report, the reports have to be reliable, as far as no alterations on the reports. Merely the fact that at that point and many years down the road it's going to be in front for speculation or for people to examine evidence, such as the prosecutors, defense, the judge, the jury, medical examiner, coroners and other police investigators, so it would be imperative that there's no alterations on the particular forms.

Q Would it be fair to say if there's an altered document, that procedure is to follow up with another report?

A It would be, yes.

Q Did you see another report in this case?

A There was not one.
Q I'd like to turn your attention to the gun in this case. As part of your investigation, did you evaluate the trial transcript?
A I did.
Q In reading the trial transcript, did you take note of how this gun was tested?
A I did.
Q Was this gun tested properly or improperly?
A I thought it was tested improperly.
Q In what fashion?
A It had been taken apart and examined and replaced back together. In doing that, you could alter the condition of the gun, the actual condition the gun was in at the time it was fired.
Q What is the proper procedure for testing a gun?
A Prior to taking the gun apart, you would conduct your tests with the gun in its original state, the way it was found.
Q And why is that manner preferred to the manner of reassembling it and then testing it?
A Well, my experiences with guns, especially out at the police range where we'd normally take our guns apart as a normal routine, clean them, take them apart, inspect the mechanisms and oiling them, many times you can put

the gun back improperly, which would give you an improper misfire out in the field or it's not going to function the same. There's been a lot of accidents that I've seen in the field.

Q Conversely, if a gun is malfunctioning prior to reassembly, is it possible to put it back in a way that it doesn't malfunction?

A You could, yes.

MR. KELLY: And if I might, I'm sorry, sort of an objection, but more of a -- I just want to make sure we get this done right. I'm not sure that we laid the foundation for his being an expert in ballistics.

THE COURT: I believe that's correct. The objection's sustained.

MR. KELLY: And I know that it's there, but I think we need to get it done.

THE COURT: I agree. The objection is sustained, but you can lay further foundation.

Q (By MR. LAURANS) Do you have experience and training in firearms?

A I do.

Q Can you inform the Court what that experience and training consists of?

A Eighteen years of working around the police department prior to my retirement, qualified as an expert in -- as

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far as shooting at the target range at the police academy, disassembling, putting together several different firearms that we had, as far as we're able to use at the police department, we carry it in police cars, and pretty much everyday use of firearms, taking them apart and keeping them in proper condition.

Q Have you been trained on how to assemble and disassemble a weapon?

A I have.

Q Have you been trained on how to assemble and disassemble the type of weapon at issue in this case?

A I have.

Q Have you been trained in how to assemble and disassemble a weapon and test a weapon in relation to evidence collection and crime scene preservation?

A No, that wasn't my duty as far as testing them.

Q But have you ever become familiar with the procedures?

A Well, sure, I've watched them.

Q Have you had any further training or experience in that regard?

A All my experience is based on 18 years at the police department, which we maintain our own guns and other guns that part of the department used for our task force.

MR. LAURANS: Judge, with that foundation,

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I'd offer this man as qualified to speak on that topic of ballistics.

MR. KELLY: If I might voir dire the witness, Judge.

THE COURT: Uh-huh.

VOIR DIRE EXAMINATION by MR. KELLY:

Q Mr. Gay, I'm not trying to be difficult, I just wanted to -- again, we're trying to get the record accurate.

A Sure.

Q Have you -- you testified that you have never been trained vis-a-vis ballistics and its import to evidence; is that correct?

A That's correct.

Q But you've certainly had training about firearms?

A That's correct.

Q You are familiar with ballistics training as far as the procedures that are used to identify where -- where and how a bullet comes from a weapon; is that correct?

A That's correct.

Q And you are certainly familiar then with how you can identify whether a particular firearm has fired a certain projectile; is that correct?

A That's correct.

Q And you're familiar with, you know, lands and grooves, things like that?

A Yes.
Q Okay. And so when you give your opinion as to whether or not breaking down a gun and then putting it back together might affect that, is that based upon your knowledge of the techniques they use to establish ballistics evidence?
A That's based on my own experience as far as handling guns for that many years.
Q Trying to help you here.
A Okay, go ahead.
Q You have been exposed, though, to how ballistics testing and collection of evidence is done, correct?
A Yes, I have.
Q And so when you've offered your opinions, it's based upon not only your personal experience but also your background and understanding of how that is performed?
A That's correct.

MR. KELLY: That's all I have, Judge. We have no objection.

THE COURT: Okay. Very well. You may proceed.

DIRECT EXAMINATION (resumed) by MR. LAURANS:
Q Have you -- have you -- you didn't have an opportunity to test the gun at issue in this case, correct?
A No, I did not.

Q But have you tested other guns of the same make and model?
A I had a similar model first -- I had a similar model gun that was my duty weapon. It was a Smith and Wesson six-inch model. I think it was a model K. It was a .38 or was it .357? Pretty much the same gun, shooting different ammunition.
Q Is it possible to have a hair trigger on that model of a gun?
A Most definitely. Mine had one.
Q Directing your attention back to the gunshot residue test reports, you evaluated Exhibits 17, 18, 20, and 21, correct?
A I have.
Q What findings did you derive from your evaluation?
A I saw several reports indicating that both of her hands were bagged for future tests for paraffin and for stippling from the -- a gunshot, if she would have used it. I saw the reports indicating that Ken Middleton, both of his hands were tested with negative results. I recall several reports showing that his clothing was tested with negative results. I showed that her clothes was not tested, and that in the final report, as far as the test at the crime lab that appeared to be altered, I saw reports indicating, or test -- that only

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her right hand had been bagged and tested, which was inconsistent with the other reports indicating both hands were bagged at the time of the -- while she was at the crime scene.

Q Have you drawn any conclusions from your findings?

A I formed some conclusions, yes.

Q What are the conclusions you formed?

A My conclusions was she was shot on the left side of the head, which means -- which would tell me that she -- if she had shot herself, she would have had to have a gun in her left hand.

But the fact that the -- that hand wasn't tested. If any hand would have been tested, if they had a choice, for some reason they're only going to bag one hand, it should have been the left hand.

My conclusion was that both hands were bagged. And if I could talk about belief, I believe that the tests were probably made, and that means there's no other evidence of Ken Middleton firing a weapon, even on his clothes or his hands. I believe that the evidence was altered.

Q You've read the trial transcript in this case?

A I have.

Q Do you have an opinion as to whether the gunshot residue test and its altered fashion would have been

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significant to this trial?
A Oh, I definitely think it would have been.
Q Significant as to guilt or innocence?
A Both. I mean if we could show that -- if the evidence would have been tested, if there was the evidence shown they tested the left hand, means there's no evidence that Mr. Middleton fired a weapon or no evidence on even his clothing that there was any indication he had fired a weapon, or blood spattering, I think it would have been significant evidence to show either she was handling the gun at the time that the gun went off, or it possibly could have accidentally gone off, it could have been dropped.
Q And in your investigation, did you also have opportunity to evaluate the Blue Springs Police Department investigation?
A I have.
Q Can you tell me what your findings were?
A I felt that the entire investigation, from the time the first patrolman arrived on the scene, was entirely improper as far as crime scene preservation. One of the things I did note, the patrolman -- that one of the first patrolmen that were there at the scene, he kept Mr. Middleton at the house. And proper procedure, I think with any police department, at least of the

numerous cases I have been involved in, you remove the people from the crime scene and try to preserve it.

And in his report, he picked up the gun, examined it, opened up the cylinder, meaning he wasn't holding the gun for any kind of fingerprints or evidence. He at a later time picked up the gun and had hid it behind the television, which again would have destroyed any evidence of her hands being -- or fingerprints being on the gun or even Mr. Middleton's fingerprints being on the gun.

And then at some later point, I think it was Detective Link asked him to replace the gun where he thought it was when he found it. And he replaced it, which is total altering the evidence, which should never have been done. If anything, the photographs should have been taken where the gun was behind the TV, explaining why it got there and how it got there.

Q Did you have opportunity to examine the crime scene or the photos of the reconstructed crime scene by Detective Link?

A I have.

Q Were you able to compare those photos to the crime scene diagram done on the day of the -- of the death of Katherine Middleton?

A I have.

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Q Were they consistent or inconsistent?

A Well, the original crime scene photograph showed -- depicted where the body was and depicted a plant and a brass -- I believe it was a giraffe, just to one side of where the boot print was apparently embedded into the wall. Photographs, however, later on, were taken and it was no evidence of either of those items being placed on the carpet or being positioned against that wall.

There was additional reports in the evidence about issuance about a phone being on the wall, that she possibly was going to use the phone. And there was numerous parts of the testimonies, I think from Detective Link, that there was no phone on that wall.

However, the -- when the photographs were retaken at a later date, all the pictures taken of the crime scene appeared to deliberately omit the phone on the wall. In one picture, if I recall, that I saw, there was a partial cord. It was like the camera was taken just to the side of the phone so it wouldn't show. And that means that was a -- I believe a crucial part of the case. The phone should have been taken as far as part of the evidence.

Q Why was it a crucial part of the case?

A There's some speculation that she was running for the

phone and picked up the gun. And I think Mr. Middleton had in -- some part in that. In the case I had read it indicated that he thought she was running for the phone or going for the phone.

Also an indication he picked up the phone to call 911. And it was a result of the testimony to Detective Link and other information that was in evidence. There was all -- they were all stating that there was no phone on that wall, even though there was an affidavit placed into evidence from the original builder that he had installed a wall on that phone.

Q So bottom line is, without the phone it casts Mr. Middleton in what light?

A That his story was untruthful.

Q With respect to those reconstructed crime scene photos, were procedures followed proper or improper?

A Definitely improper.

Q With the omission of the telephone from the photographs, is that proper or improper?

A Improper.

Q Let's talk about the collection of evidence and preservation of Katherine Middleton's body, the crime scene. Can you speak to your findings in that regard?

A In the reports it indicated that they unclothed the body to preserve the clothing and then wrapped the body

in a sheet to be taken to the medical examiner. In all my years as a police investigator and conducting crime scene searches, you would never disrobe the body. You'd leave the body in its same condition that you found it, have the medical examiner do all their tests. And at some point, when the medical examiner's done with their findings or reports, then we were allowed to do whatever tests we wanted to do.

But we never tampered with the body or positioned the clothing or how the clothing was on. And taking the clothing off a deceased person in the field, actually at the crime scene is -- is totally improper. I don't know of any police department that would have that in their procedure manual for crime scene investigation.

Q In fact, in the trial transcript was there not a mention of a button torn off the blouse?

A There was.

Q And to whom did the prosecutor ascribe the fault for that button coming off the blouse?

A I believe the grabbing, of Mr. Middleton grabbing her when he was pushing her up against the wall, I think -- I believe that's when he indicated that's probably when the button came off.

Q Is it possible the button could have come off during

the disrobing of the victim at the crime scene?
A Oh, definitely.
Q Is that one of the reasons why the procedure would call for you not disrobing?
A That's correct.
Q Having reviewed the reports, police reports and other materials in this case, and employing your experience -- well, let me stop there. In reviewing the case, can you tell us what the State's theory was concerning the distance between the gun and Ms. Middleton's head?
A I believe it was anywhere from four to eight inches from her head, different various testimonies.
Q In your experience as a law enforcement officer and handling weapons and as an investigator, is it possible to shoot someone in the head four and a half to eight inches away and not get blood or gunshot residue on your clothing, skin, or hands?
A In my years of investigation, I have never found someone without any type of residue on their clothes or hands, blood or residue from the gun.
Q Did the Blue Springs police end up putting Katherine's clothes in evidence?
A I believe they did, yes.
Q But taken from the house, correct?

A That's correct.
Q And is that a proper or improper procedure?
A That would -- in my opinion that's improper. With the police departments that I have worked with or conducted investigations with, it would have been very improper to do anything with the clothing as far as disrobing at that time. The medical examiner's the only place that we would take custody of the clothes, after they've taken -- done their medical examination.
Q Are you aware that this trial started on February 15, 1991?
A I am.
Q Were you available to testify at that time?
A I was.
Q Have you acquired any experience in the intervening 13 years that would have resulted in these opinions today or could they have been formed prior to, say, February 20, 1991?
A They would have been prior to 1991, my prior police experience.
Q So nothing that's happened to you since February of 1991 could have bolstered these opinions today?
A No.
Q And so what I'm driving at is your opinions today would have been the same as they would have been in 1991?

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A That's correct.
Q You were armed with the same amount of education and experience to draw these conclusions back in 1991?
A That's correct.
Q And available to testify?
A Yes, sir.

MR. LAURANS: No further questions.

CROSS-EXAMINATION by MR. KELLY:

Q Mr. Gay, you've previously testified that -- and I want to make just clarification here -- that you had a similar model to the firearm at issue in this case?
A That is correct.
Q And when you say similar, can you bring it down a little bit more for me?
A Well, mine was a .28, Mr. Middleton's was a -- mine was a six-inch Smith and Wesson model K38 revolver. His was a six-inch Smith and Wesson .357 Magnum.
Q Are their mechanical actions the same?
A Yes.
Q You've read the trial transcript in this case?
A Yes, I have.
Q And you've gone over what I'll just term as the ballistics evidence in the case?
A I have.
Q Okay. Are you familiar with the testimony in the

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underlying case that suggested that this weapon, Mr. Middleton's weapon, could not have misfired but for a purposeful action on the trigger?

A I read that, yes.

Q Okay. Do you agree or disagree?

A I disagree.

Q Okay. And why is that?

A Incident that happened to me when I was on the police department with my weapon, which has the same safety feature his has. In my police training I was told that my weapon would not fire accidentally when dropped. And not being a ballistics expert or gunsmith, I've always believed that.

One day down in the locker room -- I'd been on the police department about eight, nine years -- I was at the gym. And I kept my gun on top of the shelf in my locker. And I had gone back to my locker to get something, and the gun started to slide off the shelf. I had no fear or even thought of going after the gun. I was basically trying to keep from hitting the ground because it was engraved, it was a nice-looking gun.

And when it hit the ground, barrel was pointing at me. And I still had no fear of it, and the thing went off. And it took me a few minutes, that I really thought at that point I had been shot, because I

was so close to the barrel. And actually, it fired right past my head up into the air conditioning duct, which it's probably still there today.

But at that point I decided to get rid of the .38 and went to an automatic. I had no confidence in the gun at that point.

Q And what is it about both firearms, if you will, that is purported to be fail-safe but for the trigger?

A Well, where the firing pin is, there's -- there is a shield or piece of metal between the firing pin and the primer. And when you cock the gun back, it drops down, allowing the firing pin to be able to strike the primer on the bullet. But when the gun is not cocked, there's a safety between that to where if -- technically, it was supposed to -- you can slam it. If it hits hard, it's not going to get to the firing pin, it has no way of firing.

I took my gun to the gunsmith and had them look at my gun after the incident, because it had had me pretty well upset and nervous about using the gun after that. And he couldn't find anything. He did some tests on my gun and I watched him. He dropped my gun. And because at that point I told him I wasn't going to use the gun after that anyway. And he tried dropping it and doing several tests and never could get

it to go off. But the fact was, it did go off and I was no longer confident of that gun.

Q Is it possible -- and I'm talking about the realm of possibility -- that somehow that gun was cocked before it fell off the -- from the top of the wherever it was?

A No.

Q Do you think it's possible that in dropping that distance that it somehow did cock the gun, if you will, or at least partially?

A I don't think -- because I didn't even get my hands on it. I was trying like in vain to get that gun before it hit the ground. I didn't even touch the gun. It -- there's no way it could have cocked as falling without handling it. And it was actually in the holster. I have a side holster and it was snapped when it was up in the top shelf. And that snap wouldn't allow the gun to be cocked. And it was still -- it was still snapped shut when I retrieved the gun.

Q It was in the holster?

A It was in the holster. But it's got a holster where the barrel still sticks out about that far beyond it, so I'm still looking at the barrel when it hit the ground. And there's no way it could have been cocked. I had no explanation why it went off. The gunsmith wasn't able to tell me why it went off, but at that

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point after eight years being told I had a safe gun, I realized that time that it was something different.

Q Can a load or ball, whatever the vernacular is, can it be constructed in such a way that it is in itself sort of a volatile load and any blunt force trauma could cause it to discharge?

A If you just ask my opinion, because I'm not an expert on ballistics, I'd have to say no. You have to be able to center fire that firing pin, I mean the firing cap on the bullet and -- in order to get it to explode, in my opinion.

The gunsmith didn't come up with that theory. I mean I would have gone for any kind of theory to tell me why my gun wasn't safe or why it wouldn't be safe after that or if there's something wrong. He took the gun apart afterwards. He did test it before he took it apart. And made all his tests, couldn't make it go off. Then he did take it apart to see if there's anything wrong with the way the gun had been put back together one time when I was cleaning it and couldn't find anything wrong. I still have that gun, but it's not been fired since.

Q Okay. With respect to your testimony that it was a, quote unquote, hair trigger --

A Yes.

Q -- I know that typically there are tests as to how much pound feed of torque needs to be applied to a trigger and there's a continuum. Can you ballpark or is that just your own sense of whether it was a light trigger or a heavy trigger?

A Well, on my gun, manufacturer stated, I believe, anywhere from three and a half to five-pound trigger pull. I had mine worked on down to a half-pound trigger pull because I was also shooting competition with my gun and I was a sharp shooter or expert.

Q So that was very, very light?

A It was very light.

Q Do you know, in fact, whether Mr. Middleton's gun had been altered in that way?

A I have no idea.

Q And so you would expect then that it would come with the normal trigger load, wouldn't you?

A It would normally come -- you can order them as a target pistol and it will come with what I call a hair trigger. And you can -- you can actually order them with whatever pull you want --

Q Okay.

A -- if you're into competition. I wasn't in that serious competition. I was just basically just the competition of the police department. But you can

order them as a target pistol. And with that they come with different sights. They come with the bigger shoe and a bigger trigger, a fatter trigger.

Q And with respect to -- and I know yours was obviously very hair trigger. Would you consider the normal manufactured spec at three to five pounds, would you consider that to be a hair trigger?

A I don't -- if it's three and a half to five pound, I wouldn't -- I would not consider that a hair trigger, in my opinion.

Q Okay.

A I think mine came that way, three and a half to five; it wasn't light enough for me.

Q Okay. And just one other issue going on. With respect to the gunshot residue on the left hand --

A Uh-huh.

Q -- in all of everything you've looked at, you have no evidence nor reason to believe that in fact she had gunshot residue on her left hand, do you?

A I do not.

Q Okay.

MR. KELLY: That's all I have, Judge.

THE COURT: Do you have redirect?

MR. LAURANS: No, I do not, Your Honor.

THE COURT: Can this witness be excused?

MR. KELLY: Yes, Your Honor.

MR. LAURANS: Yes, Judge.

THE COURT: Thank you, sir. You may step down. You are excused.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

MR. LAURANS: Can we approach for a second? Judge, I think it's appropriate for me to withdraw 13. I want to make sure the list is complete so that you don't wonder if I just forgot some of these.

THE COURT: You're withdrawing 13?

MR. LAURANS: Because Cliff testified, I don't think it would be appropriate for me to try to enter his affidavit.

THE COURT: Okay.

MR. LAURANS: I think the same holds true for 15 and 16.

THE COURT: Also withdrawn?

MR. LAURANS: Yes.

That was my next one, 35.

THE COURT: 35 is considered withdrawn.

MR. LAURANS: Judge, on 37, I have a few documents in there. I don't think it's appropriate for me to -- I mean I could offer Dixie Busby's affidavit. We couldn't find her. Obviously, I would expect an

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objection be sustained. But the reason I'm not withdrawing the whole thing is, the rest of the affidavit is actually Mr. Peters' father's obituary. And in that obituary it references his position at Blue Springs law firm. So I'd like to enter that part of 37 while withdrawing Ms. Busby's affidavit.

MR. KELLY: And I have no objection to that, Judge.

THE COURT: All right. To the extent that 37 --

MR. LAURANS: Has Busby.

THE COURT: -- is the obituary of Mr. Peters' father, it's admitted, over no objection. The affidavit is withdrawn.

MR. LAURANS: Okay. At this time I'll call Bob Tressel.

THE COURT: Well, let me -- we've been in session now for about an hour and 45 minutes, so we're going to take 15 minutes recess.

We'll begin again about 25 after three.

(Counsel approached the bench and the following proceedings were had:)

MR. LAURANS: Judge, I think we'll be able to get in my last two witnesses today, and then I didn't know what your preference would be, whether you wish us

to argue any points or summarize.

THE COURT: Let's see what time it is.

MR. LAURANS: Yeah.

(The proceedings returned to open court.)

THE COURT: Okay. We'll resume at 25 after.

(A recess was taken.)

THE COURT: Okay. I'm sorry. All right.

THE WITNESS: I'm waiting on you.

THE COURT: That's right.

RALPH ROBERT TRESSEL, being sworn by the Court, testified:

THE COURT: I'm sorry, I didn't think I'd been gone so long that I'd forgotten what had happened, but --

DIRECT EXAMINATION by MR. LAURANS:

Q Can you please state your name for the record?

A My name is Ralph Robert Tressel. I go by the name of Bob.

Q And Mr. Tressel, where are you from?

A I'm from a little town called Hiram, Georgia. It's about 25 miles west of the city of Atlanta, Georgia.

Q And could you tell us your education and qualifications?

A Yes, sir. I'm currently self-employed as a forensic investigator. I was a Cobb County police officer, Cobb County being the third largest county in the state of

Georgia, just north of the city of Atlanta, from 1973 until 1985. While I was with the Cobb County Police Department, I was promoted from a patrolman to the rank of detective after 18 months of being employed there.

After being in the detective bureau for about two, two and a half years, I was promoted to the rank of sergeant and placed in charge of evening watch of the crimes against persons unit, which is commonly referred as the robbery-homicide division.

I remained in the Cobb County Police Department until January of 1986, at which time I resigned my position and took the position with the Cobb County medical examiner's office as a forensic investigator. I was with the medical examiner's office for about two and a half to three years when I was made operations manager. Operations manager oversees the daily operation of the medical examiner's office, which included handling -- primarily, being the chief investigator for that facility.

I'm a high school graduate. I have not completed college. I've had almost two years of college. While with the police department and while with the medical examiner's office, I received training in death investigations and crime scene investigations at various universities and schools throughout the

United States. I've been trained at the University of Miami School of Medicine, University of St. Louis -- excuse me, University of St. Louis School of Medicine, the National Law Enforcement Institute in Santa Rosa, California, the FBI Academy in Quantico, Virginia, and various other courses throughout the United States.

I've attended three blood spatter interpretation courses. I've also attended ATF ballistics and firearms courses during the course of my training.

In all, I have in excess of 700 hours of events training and death investigation training and crime scene investigation.

Q Have you taught?

A I was a certified instructor while with Cobb County Police Department and with the Cobb County medical examiner's office. I was certified through the Georgia police offer's safety and training council as an instructor in death investigation and in crime scene analysis.

Q Okay. On what topics have you testified as an expert?

A I've testified as an expert in areas of blood spatter interpretation, crime scene analysis, which is the gathering of forensic evidence at crime scenes, evaluating that and determining positioning of bodies

at crime scenes. I've been qualified as an expert in the interpretation of crime laboratory reports pertaining to the forensic evidence that's obtained at the crime scenes.

Q Do you have any expertise in the area of ballistics and interpreting reports pertaining to ballistics and bullet paths?

A That's one of the things that I was trying to explain is it's not in ballistics per se as identifying this weapon fired this bullet, but in determining the trajectory of the bullets at crime scenes and knowledge of what different weapons do in their structure, yes, I have been qualified.

Q Can you give us a sampling of the courts around the United States where you've been qualified as an expert and testified?

A Yes. I've been qualified in various superior courts in the state of Georgia, the state of Florida, state of Alabama, state of North Carolina, and in the federal courts of the northern district of Georgia.

MR. LAURANS: Judge, at this time I'd offer Mr. Tressel as an expert on those topics.

MR. KELLY: No objection.

THE COURT: Very well.

MR. LAURANS: Judge, also, just if it might

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help later, at this time I'd offer Exhibit 52, which is not on my list, but it's a summary of Mr. Tressel's resume and background.

THE COURT: His CV? Okay. Is there any objection to the CV?

MR. KELLY: No objection.

THE COURT: Very well. The exhibit is received.

Q (By MR. LAURANS) Mr. Tressel, can you tell us how it is that you came to be involved in this postconviction proceeding?

A Yes. I was contacted or I should say the office that I work for at Burdon (ph) and Associates was contacted by North Wind Investigations out of Arkansas, by Mr. Charles Gay, pertaining to our involvement in looking at the crime scene of this case and providing some insight and some analysis of what the crime scene actually depicts. That was in January of this year, I'm sorry.

Q Can you tell me what materials that you've evaluated?

A There's certainly a litany of materials that I have, but primarily I have various affidavits; I have crime scene diagrams from the Blue Springs Police Department; I have some of their investigative reports from the crime scene from the Blue Springs Police Department. I

have the autopsy report on Mrs. Middleton and I have the crime laboratory reports pertaining to the gunshot residue and the testing of the shoes that were seized.

Q Did you evaluate the trial transcripts?

A I did read the trial transcripts of what was provided to me, primarily dealing with the investigators and the medical examiner.

Q Were you provided a book of some 46 or 48 exhibits?

A Yes, I was.

Q Okay. Did you evaluate those exhibits?

A I did look at those, yes, sir. Not all of them in depth, but the majority of them, yes.

Q And did you evaluate a book of transcripts, deposition testimonies, and pleadings related to this case?

A Yes, sir, I did.

Q And let me just hand these to you and ask you if these look like the books that you evaluated.

A Yes, sir. These are identical to what I've seen.

MR. LAURANS: Judge, I'll just represent for the record what he's looked at, we sent him an identical copy of the two volumes that accompanied the motion.

THE COURT: And I think you should identify them by the way they're styled.

MR. LAURANS: I think this -- the one of

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transcripts was Exhibit 55.

THE COURT: Okay.

MR. LAURANS: That was admitted earlier this morning. And then the other book is the book of 48 exhibits that is Court's Exhibit A. No, Court's A is actually the exhibit list.

THE COURT: Right.

MR. LAURANS: How did we -- I don't know if we denominated this.

THE COURT: It hasn't been yet. And I think it should be so that if somebody has to look at this at some point they'll know exactly what you're referring to.

MR. LAURANS: Could we call the Court's Exhibit AA?

THE COURT: Well, it's really your exhibit that's been presented to him for purposes of his evaluation. If you want to mark it 56, that's another -- that's the next available exhibit number and that would be perfectly fine if -- does the State have any objection to that?

MR. KELLY: Judge, our only objection would be there are a number of exhibits that are contained in that exhibit book that haven't been admitted. We don't object to its admission into evidence as a book of

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evidence that contains everything that we've been dealing with here today, but we object to that we would wholesale the exhibits that are contained therein that haven't otherwise been admitted.

THE COURT: And that's fair enough. Let me do this. Why don't you go ahead and mark that as 56. It's the -- I'm sorry, it's the exhibit that the witness has just testified about. And you might have him again identify 56 specifically as what he looked at. And then the record's clear as to what he looked at. And pursuant to the State's objection, the exhibit is not admitted as such, but there is a specific reference so that if you have to present it or if the State has to present it for purposes of an appeal, they'll know what you're talking about.

MR. LAURANS: Is there a way that we can also say then that 56 would be admitted subject to the record made on Exhibit A? Isn't that --

MR. KELLY: However --

MR. LAURANS: Isn't that what we've done?

THE COURT: I -- it's not admitted because there is an objection to some of the exhibits.

MR. LAURANS: Okay.

THE COURT: So I -- I don't want the record to appear as if the exhibit as a whole for some reason

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other than identifying the document as something that this witness had for purposes of reaching his conclusion.

MR. LAURANS: Okay.

THE COURT: I don't want this to appear that the Court has received it --

MR. LAURANS: Sure.

THE COURT: -- in some fashion that I don't mean to be receiving it at this point because the objection's been sustained.

MR. LAURANS: And I'm not trying to be difficult. I'm just trying to, for procedure purposes, the book that you have is the same as this one, but that one we've been admitting under Exhibit A.

THE COURT: No, no, no. Well, I believe you are correct about that.

MR. LAURANS: So, but here -- I think I have a solution, Judge. I'm going to withdraw 56, which is this copy of the book.

THE COURT: Okay.

MR. LAURANS: And your copy of the book goes under Exhibit A.

THE COURT: Let me -- no.

MR. LAURANS: No.

THE COURT: That's still not right. I'm

sorry, my mistake. What has been marked as Exhibit A is -- Court's Exhibit A is the list itself, just so the Court of -- if the Court of Appeals has to look at it, they will know what's been admitted and what's been excluded and what's been withdrawn. That's all this is. There's nothing about this, Court's Exhibit A, that automatically admits other exhibits. This is just the list. This is nothing else.

MR. LAURANS: I guess I'm confused. I thought that except for the withdrawn exhibits, I've been offering those exhibits in that book that have been admitted by stipulation.

THE COURT: And those have been received.

MR. LAURANS: Right.

THE COURT: But that doesn't mean the book wholesale.

MR. LAURANS: No, I know the book as a wholesale doesn't gain admission, but --

THE COURT: Okay.

MR. KELLY: So we don't have a problem.

THE COURT: We just --

MR. LAURANS: What can we call that book that you have corresponding to that list?

THE COURT: My book. Okay.

MR. LAURANS: Exhibit my book. Because I can

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withdraw this one that he's looked at, because I don't really need this in.

MR. KELLY: I would like for it to be called Exhibit 56. It's just easier to handle it that way and that it's never been offered except to the extent that the --

MR. LAURANS: The individual exhibits have been offered and received out of it.

THE COURT: Exactly.

MR. LAURANS: Okay.

THE COURT: All right.

Q (By MR. LAURANS) Mr. Tressel?

THE COURT: Only lawyers would get in that discussion. I don't think anybody else would. Okay.

Q (By MR. LAURANS) Can you identify the book I've just handed to you?

A Yes. This is a book contains the exhibits that were attached for the motion to reopen 29.15 hearing.

Q And what exhibit is that?

A It's marked as Exhibit 56.

Q And did you review a book -- a copy of this book?

A Yes, I have.

Q Okay. And this other book, I'll represent to you, is Exhibit 55. Did you review a copy of that?

A Yes, sir, I have.

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Q Do you need these up here right now?
A No, I don't think I do.
Q Anything else that you've evaluated in any treatises or books or documents?
A I've referred to some books, primarily a book on gunshot wounds by Vince Dimaio, just to review some literature in that.
Q Is Mr. Dimaio?
A Dimaio.
Q Dimaio. Do you happen --
A He's a forensic pathologist who is currently chief medical examiner in San Antonio, Texas. He's written several books on gunshot wounds and pertaining to death investigations.
Q In the community of those people who study that science, is he widely accepted -- is that book widely accepted?
A Yes. It's highly accepted in the forensic community as being accurate, yes.
Q Relied upon?
A Yes.
Q With respect to Mrs. Middleton, can you tell the Court your specific factual findings?
A Well, Mrs. Middleton received a close-range gunshot wound to the left side of her face, just to the left of

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the midline at about the left eye. It's described as being approximately one to one and a half inches, if I can remember correctly from the autopsy report, to the left of the midline and approximately three and a half inches down below the top of the head. So that's somewhere in this general vicinity right here (indicated).

The bullet penetrated through and pitted the right side of the head approximately two and a half inches below the top of the head. And if I remember correctly, the measurement's about three and a half inches from the midline back to it.

The entry wound displayed a four by four and a half inch area of powder stippling, gunpowder stippling, which the laboratory determined that they got a five by five inch stippling pattern at 12 inches in test firing.

That the bullet, once it exited Ms. Middleton, it struck the door framing of the door in the dining room in which the incident took place, ricocheted off the door framing and struck the ceiling approximately four feet out from the door framing, and then was found across the room on a towel.

Q With those measurements, were you able to conduct any calculations or perform any calculations?

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A Well, yes. One of the things that I was interested in is, can we determine approximately what the angle was of departure? By departure, I mean once this bullet had penetrated through and struck the wall, what angle did it ricochet off of the door framing and strike the ceiling? Well, we knew the distance was measured at four feet out from the wall and we knew the distance up. So I did a graph to portray the measurements. And using the graph, I came up with a departure angle or ricochet angle of 59 degrees from the door frame.

Q Okay. Now let's kind of put this in English. Once you've got those angles established, how are you able to use those angles?

A Well, the angles establish that we know that the bullet, because of the ricochet, is upward. In other words, the bullet didn't hit and bounce downward, that the bullet was traveling in an upward trajectory when it came through Mrs. Middleton.

We also know, based on the measurements from the autopsy report, that the bullet was traveling from what we determined in forensics is traveling from her left to her right, from the front to the back, and traveling upward at a slight angle. The bullet, in an upward trajectory, then struck the door framing, bounced off, traveled and struck the ceiling. So we

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know it's going upward.

One of the reasons I looked at Dimaio's book was it talks about ricochet angles. One of the problems with that is, is the ricochet angles that it talked about in all the forensic books and including he -- Dimaio references a book that was written in the early 80's by Haag, H-A-A-G, all deal with ricochet bullets before striking the human body. They're all different surfaces strikes. What does the impact happen? And in almost all the testing in the initial ricochet sequence, bullets that struck at angles, the departure angle was less than or equal to the impact angle. In other words, bullet comes in at 30 degrees, it's going to ricochet off at less than 30 degrees. Well, that's with a bullet that is undeformed and travel at normal speed into different surfaces.

Also in the textbooks we learn that a .38 caliber and certain caliber pistols, beginning at about 45 degrees, when striking sand, begin to embed and don't ricochet. They've reached an angle where ricochet does not occur.

So what I wanted to do was try and determine, what was the angle the bullet traveled from the wall to the ceiling, and then knowing that it either struck at an angle less than or equal to that, to try to

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determine where Mrs. Middleton would have been standing at the time she received the fatal gunshot wound.

Q Okay. So now you're getting on exactly where I'm getting. Once you draw that line from the ceiling back down to the door back into Ms. Middleton's head, correct?

A That's correct.

Q You're also able to draw a line through her head, correct?

A (The witness nodded.)

Q Ultimately, through those mathematical calculations of those angles, what -- where is that going to take you?

A Well, that's the thing we want to know, where does the weapon have to be in order to form these angles?

Q Okay. So would it be fair to say what your task was in this case was to reconstruct where, if Mr. Middleton was the shooter, where he would have been?

A In my sense of feeling, where the weapon had to be when it was fired to cause the bullet wound that she received and to also cause the strike on the wall and then the bounce off, whether he was the --

Q And you didn't take any of these measurements yourself, correct?

A These were all from the Blue Springs Police Department crime scene diagrams.

Q They didn't follow through with these calculations, correct?
A I saw nothing in the material that I received that they ever did a calculation as to where she had to have been.
Q So they did measurements, correct?
A They did.
Q But they didn't follow it with calculations to kind of back-calculate where the gun would have been when it went off?
A Well, I saw nothing to indicate that they took the measurements from the autopsy and the information they finally got from the laboratory about muzzle-to-target distance to go back and try to determine where she had to be.
Q But you've done that?
A I have done that, yes.
Q Now when you're talking about ricochet angles and you talk about there's an angle of the bullet going up from her head to the door frame, correct?
A That is correct.
Q And then when it hits the door and bounces off, that's the ricochet angle?
A That's the ricochet angle.
Q And the ricochet angle is going to be less than the

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angle of the bullet going up, correct?

A That's in a pristine condition without going through a human body. We have a bullet that once it penetrates through the body has lost a lot of velocity. It's also been deformed, and we don't know whether it's truly flying perfectly straight or beginning to tumble.

Q Let's take the body out of it for a second.

A Uh-huh.

Q A bullet goes up at 30-degree angle and it bounces off something. That angle, the ricochet is going to be less, correct?

A Less than 30 degrees.

Q And what physics factor makes it go less?

A Because when it impacts a surface, it is absorbing energy.

Q It loses energy to the surface of the door frame?

A That's correct. It loses its energy. Once it loses its energy, it doesn't deflect as much.

Q So it only makes sense that when a bullet goes through a human skull before hitting the door frame, it's not only going to lose that energy that you'd ordinarily see in a testing, it's going to probably lose even more because it went through more material?

A Well, it's going to lose about probably close to 50 percent of its energy going through the body.

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Q And are these things that you were able to factor in, given the measurements from the Blue Springs police?
A Yes.
Q Any other findings with respect to this aspect?
A Well, findings indicate that if we use the 59-degree angle and we bring it down to the -- create that to make the impact angle where it's coming through, taking the measurements that were provided, the barrel of the weapon, using the 12-inch muzzle-to-target that the crime lab gave us on a five by five pattern, the barrel of the weapon has to be at a 59-degree angle pointed upward towards that door frame from a height of four feet one inch off the floor.
Q How do we know that? What -- first of all, let's start with this. How high off the ground was the bullet when it hit the door frame?
A Five feet six inches.
Q And it was going up at the time it hit the door frame, correct?
A That's correct.
Q So that -- how tall was Katherine Middleton?
A Five feet six inches.
Q But the bullet was going up, right?
A That's correct.
Q So she would have had to be below five feet six?

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A She's got to be below that in order for the bullet to strike that high.

Q And then when you traced the bullet --

A When you follow the trajectory line back to -- you carry the trajectory line --

Q -- back to the gun?

A -- back to the floor. And then you go back and you try to determine, What are our distances? Well, we know from the crime scene that her head was approximately two inches from the door when -- at the exit point. The head's about a foot wide, so we add a foot there. And then we add the 12 inches that the crime lab says it had to be fired from, the muzzle to target. We then plot that on this graph, and that comes to four feet one inch off of the floor the weapon had to be fired from.

Q Now is that the highest the weapon could have been or lowest?

A That's the highest it could have been. It could have been much lower than that, because if you bring the angle down and shallow out the angle, then it takes the weapon closer to the floor.

Q So it's possible the weapon couldn't have been higher than four foot one inch?

A Could not have been any higher than that, no, sir.

Q But could have been lower?
A Could have been much lower.
Q Did you bring any exhibits or any things that would help you demonstrate and explain?
A Yes, I did.
Q Can you show us what you brought?
A Sure. What I did was I took a --
Q Hold on a second. Tell me what you brought.
A I brought a Styrofoam head.
Q Yeah.
A It's a wig head. And a dowel rod.
Q And this head isn't necessarily perfectly similar in any fashion to Katherine Middleton's head, it's just a Styrofoam head from a beauty salon?
A That's correct. Styrofoam head from the beauty salon. I don't have any measurements of Mrs. Middleton's head, so I can't correlate this being accurate to her head at all. It's just an idea to give us some idea of what the trajectory was of this bullet.
Q So would that aid you in your explanation of these angles?
A Yes, definitely.
Q And what else did you bring?
A I brought a dowel rod.
Q And what purpose does that serve?

A Well, this serves to -- this would be the bullet path.
Q And would that aid you in explaining to us what transpired?
A Most definitely.
Q Through a demonstration?
A Demonstration. That's what this is for.

MR. LAURANS: I'd move at this time that he be allowed to demonstrate with these two props, knowing that they're not precise.

THE COURT: Just for the purpose of showing the trajectory that the witness has talked about, you may proceed.

A Okay. Well, with the entry wound as described in the autopsy report is about to the left side of the eye right in here. And then the exit wound was on the right side of the head. And these are fairly close in measurement. But what I did was stick the dowel rod through to show the angle of this -- that this is going.

Now the thing that I did to try to understand this is this tip on the dowel rod indicates the two inches from the head to the wall where the head strike was, based on the blood spatter. You pull that back to the edge of the head. And on this end we have -- this is a 12-inch mark, which is where the crime lab got the

five by five. And then there's some testimony it could have been as close as eight inches, which is the beginning of the red mark. So the barrel is somewhere in this general area where the shot is fired.

Now the thing that we have to remember is that if she's standing erect, she's five foot six and the entry point to the wall is five foot six. So she has to be bent over. So we have to give it an angle of about 59 degrees.

And then we begin to see this is about the same angle. But the head can be anywhere on this plane. So if she's standing almost erect and slightly bent over, we get almost the same indication.

So we just have to remember that her head has to be on the plane of the dowel rod or the trajectory of the bullet in order to receive the gunshot wound.

Then I took this to try to determine what forensic evidence should we expect to see depending on how the weapon is fired? The weapon is a .357 Magnum, a six-shot revolver, and has a cylinder gap and has, I believe, a four-inch barrel, if my memory serves me correctly.

Well, we know that the stippling gunpowder comes out the end of the barrel and essentially tattoos the left side of the face of Ms. Middleton. And there

was some contention that Mr. Middleton, when he fired the weapon, had a hold of her or had his arm up against her when he fired the weapon. Well, that presented a little bit of a concern in looking at what forensic evidence did we have in this case.

If he has his hand around her throat or if he has his arm around her throat, he's got his arm directly in line with what we call the cylinder gap of the weapon, the cylinder gap being where you close the cylinder and the barrel is right here, goes out, and the weapon's fired.

Particles of unburnt gunpowder, just like we see stippling the face of Ms. Middleton, blow out the sides. He was wearing a white dress shirt, yet his shirt had no burn marks on it whatsoever and there was no gunshot residue found on his shirt. That was the first thing that was of concern.

The second thing is that once this bullet penetrates through her head, she's immediately going to want to drop, in less than a tenth of a millisecond, to the floor. As she begins to fall, she falls to her left -- left side and that's how she's found by law enforcement when they get there.

The perpetrator is off to her left side. Has her against the wall, because we know this is

two inches from the wall. So she begins to fall this direction. Yet the perpetrator, or in Mr. Middleton's case his white shirt, received no gun spatter -- excuse me, no blood spatter from the rebound off the wall, no blood spatter from the entry wound, and he had no blood on his clothing whatsoever.

Q In your opinion is that reconcilable? Is it possible he still could have fired that gun and not had any of that on him, that close range?

A Not with the scenario that was presented by the State at trial.

Q There's one other measurement I want you to talk about then, all right? How much room was there for all this to take place in?

A There was less than four feet.

Q From what to what?

A Well, the crime scene drawing shows that Ms. Middleton was -- body who -- is her head was four feet from the wall where the door was. And the drawing shows her as being slightly up under the edge of the dining room table. So that means there's less than four feet distance between the dining room table and the wall where these two people had to be standing for this shooting to take place, if the State's theory was correct.

A-222

Q Based on the calculations that you've explained and given that four-foot window, have you reached a mathematically or an empirically verifiable conclusion as to where a human being would have had to have been if a second human being, otherwise the alleged perpetrator, Mr. Middleton, would have had to have been to fire that gun?

A He'd had to have been within a -- less than a two feet area of the victim at the time the gun was fired. Or because of the angle of 59 degrees and dropping it down, he'd have had to be up under the edge of the table.

Q So given -- that's what I'm asking. Given the crime scene diagram, where would he have had to have been positioned?

A Up under the edge of the table.

Q How high was that table?

A I don't have a measurement on the table. I can only assume, based on the standard dining room table.

Q Have you seen a picture of that table in the exhibits?

A I have seen a picture of it.

Q It wasn't a bar stool table?

A It's not a bar. It looks like it's about 39 inches off the ground, give or take.

Q Was it much higher or about the same as this table

A-223

right here in this courtroom?

A It's probably about the same height as that table.

Q So he'd have to be crouched under that table to fire that gun?

A He'd have to be somehow underneath the table to fire it and in the position that his body is not exposed to her falling onto him.

Q And to do that, he'd have to fire the gun and get out of there?

A He'd -- he's got less than a tenth of a millisecond to clear before she falls to the ground.

Q So he's got that time restriction and he's got that being crouched under the table?

A He's got a table there.

Q Okay. Have you formed an opinion as to whether there is a statistical likelihood that the State's scenario could have happened, given the math that you've carried out?

A With the evidence that I've got and the things that I've done on this case, I don't see any way that the State's theory of this case is validated by the forensic evidence that is present and also not present.

Q Now, in the police reports described, did you read police reports which ascribed to Mr. Middleton a statement about an accidental shooting?

A-224

A Yes. Mr. Middleton -- excuse me.
Q Go ahead.
A Mr. Middleton stated that the first officer on the scene, that she was walking around the end of the table, it appeared that she dropped the gun and reached for it and it went off. And he described her as being bent over. Well, that perfectly fits the scenario and the trajectory that she had to be bent over at the time she received the gunshot wound.
Q Have you also evaluated gunshot residue documents?
A Yes, I have.
Q Are they consistent with the State's theory that Mr. Middleton was the perpetrator?
A Well, his tests were negative.
Q Is that consistent with a finding of guilt?
A No, it's not.
Q What about her gunshot residue documents?
A Well, apparently we have some kind of conflict with the gunshot residue tests on Ms. Middleton. Only the right hand was submitted for testing. There was no left hand sample submitted.
Q Is it possible, given an ordinary build of a human being, that she could have, with those mathematical measurements, shot herself with her right hand?
A Highly unlikely. I mean you never want to say

A-225

anything's totally impossible, but if she had fired it -- if Mrs. Middleton had fired it with the right hand, she would have had to bring it across her body and expose her arm to the cylinder gap.

If she'd have fired it with her left hand, however, and pulled the weapon with the trigger with her thumb, the gap is out here, she's not going to get any burns to her arm or anything. She can fire it with her left hand using the thumb to pull the trigger.

Q And those gunshot residue documents do not rule out that possibility, do they?

A There's no test performed on the left hand, apparently.

Q So it's not excluded as a theory?

A Certainly not. If the test came back positive, then that would indicate that was the hand the weapon was held in.

Q In your law enforcement background, have you received training in the procedures for documenting such tests?

A Yes, I have.

Q Have you examined the copies of those gunshot residue documents?

A I have.

Q Are they procedurally written properly or improperly?

A Well, they appear to be -- the one pertaining to the sample that's on Mrs. Middleton appears to be altered,

A-226

with no indication as to why it was altered.

Q You didn't see a subsequent report explaining it?

A Didn't see a subsequent report or didn't see a comment on the face sheet of that paper documenting why the change was made.

Q Did you make any other findings in connection with this case?

A The only other finding that I had from a crime lab report was involving the shoe print on the wall, that one foot ten inches in from the door. The shoe print is described as being behind some decorative statue and a potted plant or a plant of some sort. And it's described as being a heel print of a shoe.

According to the reports that I have, the shoe was checked and matched, supposedly this shoe print, but yet there was nothing found on the shoe to match it up to the gypsum board that the wall was made of.

I did some measurements and some testing, it's only two feet ten inches off the floor, which is fairly low, and it's a heel print, it's not a toe print. And it's inboard by one feet ten inches from the door frame. It's virtually impossible for a person to get your heel on the wall at that height with enough force to make an indention of it and still maintain

A-227

your balance and still be in proximity to the victim and the shooting in this case.

Q And is it fair to say that it would be even more difficult to also have a hand or an arm up on their throat and holding a gun all at the same time?

A You'd have no balance. You could easily be pushed over. I don't see any way that could happen.

Q And still be under the table?

A And still be under the table and not get any blood or gunpowder residue on you.

Q In February of 1991, do you recall what line of work you were in?

A February of 1991, I was still working for Cobb County medical examiner's office and working for Dr. Joseph Burton.

Q Were you doing anything else?

A I was doing consulting on the side on homicide and death investigation cases that were not within the jurisdictional boundaries of Cobb County.

Q Were you testifying outside of Cobb County?

A I was testifying outside of Cobb County for defense attorneys and for district attorneys during that time frame.

Q Were you available to testify at that time?

A Yes, I was.

Q Are there others around the country who you know to be similarly qualified as you?
A Oh, yes.
Q Back in 1991?
A Yes.
Q You weren't the only guy in the country?
A Oh, no, definitely not.
Q You're not the needle in the haystack expert?
A No.
Q We could have found another expert in another region of the country who could have done the same math, correct?
A Oh, yes.
Q And these are mathematical, empirical, scientific calculations?
A These are the ways we are taught to try to determine trajectory angles and to help determine how an incident takes place.
Q Is there any subjectivity within what you've done here?
A The only subjectivity is from using the 59-degree angle of impact, because we have no way of calculating that at this time, and that's merely giving it an equal to the departure angle.
Q You mean you're giving the State the benefit or the defendant the benefit?
A I'm giving the State the benefit in using that.

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Q Did -- I'm going to hand you what's been marked as Movant's Exhibit 53. Did you compile this?
A Yes, I did.
Q And what is that?
A That's my report prepared on this case.
Q Your testimony today in any way inconsistent with this report?
A I don't believe so.

MR. LAURANS: Judge, just as an aid to the Court, I've provided this to Mr. Kelly well in advance, and I would just offer this.

THE COURT: Any objection?

MR. KELLY: No.

THE COURT: Very well. 53 is received.

MR. LAURANS: This is your copy, Judge.

THE COURT: Thank you very much.

MR. LAURANS: I don't have any further questions.

CROSS-EXAMINATION by MR. KELLY:

Q Mr. Tressel, your conclusion, given where the shooter had to be or how the weapon had to be placed, more accurate, is based on what I would gather from your testimony is sort of a trajectory-ricochet-science theory; is that correct?
A It's measuring of known trajectory in this case. We do

have a known trajectory.

Q And I understand that, but ricochet theory plays a big part in how you're figuring the path and likely placement; is that correct?

A Not the departure angle. The incident angle is the one that can be less than 59 degrees.

Q Okay. But that assumes certain variables, and one of those variables is, you have a pristine projectile?

A No, sir. It's not assuming there's a pristine projectile. There's why I'm saying is the angle of 59 degrees is the maximum angle it could have struck at.

Q And this is based upon simply the entrance and exit?

A Well, the combination of the entry and exit and knowing that a bullet that ricochets is either equal to or less than the impact angle, under pristine conditions.

Q Right. And things that might make it not pristine could be variables such as?

A Oh, striking an intermediate target, such as the body of Mrs. Middleton.

Q Okay. That adds a whole host of possible problems, does it not?

A There's no way of fully, 100 percent, determining exactly the impact angle of that bullet.

Q Okay.

A-231

A There is a way, but we don't have anything to measure it with in this case.

Q Okay. And certainly movement of the players would make a difference, correct? If the body was in motion at the time, if the firearm was in motion at the time, would that also not play into it as -- I mean you're talking about stationary objects when you're doing this.

A I'm talking about when the weapon was fired, this is where it had to be.

Q Okay.

A Whether it's in motion or not doesn't matter. When it fired, it had to be in these certain positions in order to cause this wound and to cause that ricochet angle.

Q Okay. And the ricochet angle being that that happened after it exited the body?

A After it exited the body, yes.

Q And certainly the body's effect upon that projectile is somewhat undetermined?

A Well, we know it continued on its path. It didn't lose all its energy, because it had enough energy to dig into the wall and then rebound off, made a mark in the ceiling. But it didn't have enough energy, excuse me, enough energy when it got to the ceiling to embed in the ceiling.

Q Right.
A So we know that it still had a significant amount of energy upon exit.
Q And we -- but we don't know whether a deformity that occasioned upon a projectile either occurred as it passed through the victim or whether it occurred upon the ricochet?
A Well, I can tell you I'm sure there is some deformation that occurred passing through the body, and then there's additional deformation once it impacts the wall.
Q And you've been in business a long time, from what it sounds like; is that correct?
A Seems like forever sometimes, yes.
Q You know, I'll submit to you that I had a conversation not long ago with a medical examiner who is always quite difficult. And his testimony was, Bullets do wild things when they're inside of a body. They sometimes go different directions and it's just hard to know all the time what happens.
A .22's and .280's are notorious for that, but when you get into a .357 Magnum, velocities are too great. It doesn't do wild things.
Q But it -- a body could have an impact upon a projectile, we can --

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A It's going to alter the projectile some, yes.
Q And when you talked about it, you said you based part of your conclusion upon, for lack of a better word, a learned treatise by a medical examiner; is that correct?
A That's correct.
Q And so you're basing your ultimate conclusions upon a theory of another person; is that correct?
A Well, it's not just of him, it's -- he cites other individuals in his work also that have all done the same type of testing with similar results.
Q Okay. But largely, that's where that comes from?
A That's their testing, yes.
Q Okay. Jumping over now to the gunshot residue issue, is it possible for -- would it have been possible for one to fire the weapon in this case and vigorously wash and scrub their hands and then be administered the gunshot test and come up negative?
A Yes.

MR. KELLY: Okay. That's all I have, Judge.

REDIRECT EXAMINATION by MR. LAURANS:

Q Mr. Tressel, is it -- is it possible for the bullet to enter the head and somehow pick up energy on the exit of the head to create a greater ricochet angle?
A No.

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Q The head's going to absorb some of the energy?
A It's going to absorb about 50 percent of a .357 Magnum.
Q So your calculations are maximum height?
A Maximum height, yes.
Q And absolutely best the State could ever hope for is four foot one inch?
A There's no way it could go any higher based on the angle that it goes through her body and where it strikes and where it goes afterwards.
Q Any unknowns are actually going to lower the four foot one?
A It's going to lower the height of the weapon.
Q So if a bullet did a crazy thing with respect to Katherine Middleton, we can be assured it's not going to give you a finding of greater than four foot one, but less than four foot one?
A No. In my opinion it could not be any greater than four foot one inch.
Q And that's pretty much simple physics, the absorption of energy, correct?
A That's correct.
Q Is there any way that --

MR. LAURANS: Could I approach, Judge?

Q (By MR. LAURANS) Is there any way that the perpetrator, if there was a perpetrator, could hold a

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gun at this angle downwards to the head, have the bullet go in the head, do something crazy and then shoot out, ricochet off the door, and still give the same measurements?

A Not with a .357 Magnum.

Q And not from that close of range?

A Not that close of range. Muzzle -- the velocity of the .357 Magnum is documented, depending on ammunition, to be anywhere from 1,100 to 1,400 feet per second.

Q As you're sitting here today, can you state that your opinions are within a reasonable degree of scientific and mathematical certainty?

A Yes, sir, I can.

Q And to what -- to what degree are you certain?

A In my position, I believe it's 100 percent certain.

MR. LAURANS: Thank you. I don't have any further questions, Judge.

MR. KELLY: Nothing from the State.

THE COURT: Can this witness be excused?

MR. LAURANS: Yes.

MR. KELLY: Yes, Your Honor.

THE COURT: Thank you, sir. You are excused. You may step down.

(Witness excused.)

MR. LAURANS: Judge, I'm down to my last

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

In re: STATE EX REL., KENNETH MIDDLETON,	)	
Petitioner,	)	**WD81068**
vs.	)	
RONDA PASH, Superintendent, Crossroads Correctional Center,	)	
Respondent.	)	

ORDER

Petitioner's Petition for Writ of Habeas Corpus with Suggestions in Support filed on September 12, 2017; Respondent's Suggestions in Opposition filed October 3, 2017; and Petitioner's Reply filed October 16, 2017, are taken up and considered, and the court being fully advised in the premises hereby denies the petition.

Dated at Kansas City, Missouri this 8th day of November 2017.

/s/ *Thomas H. Newton*
THOMAS H. NEWTON
Presiding Judge, Writ Division

Judge Edward R. Ardini, Jr., concurs

cc:

Mr. Kent Gipson, Esq., Counsel for Petitioner
Mr. Stephen Hawke, Esq., Attorney General Office

MISSOURI COURT OF APPEALS WESTERN DISTRICT

A-237

IN THE CIRCUIT COURT OF DEKALB COUNTY, MISSOURI

KENNETN MIDDLETON,

PLAINTIFF,

vs.

RONDA PASH,

DEFENDANT.

Case No.: 17DK-CC00106

ORDER

Now at this day, the court takes up the petition of Petitioner for a writ of habeas corpus. It appears from the petition that the Petitioner is not entitled to relief in habeas corpus.[1]

It is, therefore, ORDERED by the court that the petition of Petitioner for a writ of habeas corpus be, and the same is hereby denied.

Date: August 7, 2017

Bart Spear
Associate Circuit Judge

[1] The only real difference between this petition and the one previously denied by the court in 14DK-CC00141 is the claim Petitioner makes from Exhibits UU and VV. Assuming for the sake of argument the Petitioner is not procedurally defaulted from maintaining the claim, the court does not believe these two exhibits prove "the police suppressed and destroyed the gunshot residue test of Mrs. Middleton's left hand".