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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUFFOLK SUPERIOR COURT
DOCKET NO.: 2012-11181

_____)
COMMONWEALTH)
)
v.)
)
DAVID YARDE)
_____)

DEFENDANT'S SECOND MOTION FOR NEW TRIAL

INTRODUCTION

"Sometimes the only way to fix a mistake- is to make it twice."

A quote from "Girl Talk", a novel by Julianna Baggott.¹

This quote from this contemporary novelist, essayist, and poet, lends relevant
 profoundness to a very tortured set of circumstances. Mr. David Yarde is an INNOCENT man
 convicted of second degree murder where he is presently serving 15 to life. The reason why he
 claims he is innocent is because, and since his conviction, he has provided not only the
 Commonwealth but the Trial Court proof of this innocence, which has yet to be formally
 addressed due to previous "mistakes".² As such:

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NOW COMES the Defendant, David Yarde, by and through his Counsel, and
 respectfully moves this Honorable Court, pursuant to Mass. R. Crim. P. 30 (b), Mass. Const. Pt.

¹ Julianna Baggott (born 30 September 1969) is a novelist, essayist and poet who also writes under the pen names **Bridget Asher** and **N.E. Bode**. She is an associate professor at Florida State University's College of Motion Picture Arts. Baggott has published over twenty books and where she published her first novel, "Girl Talk", while she was still in her twenties. "Girl Talk" was a national bestseller.

² The evidence of Mr. Yarde's innocence can be seen via the report of Crime Scene Reconstructionist, Mr. Lewis Gordon, attached hereto as exhibit A, which includes his "CV". To date, the Commonwealth has not rebutted the analysis given by Mr. Gordon via any sort of pleading filed on the docket. Furthermore neither has this Court officially handed down any ruling, giving its' own perspective on the exhibit.

1, Art. 12, and U.S. Const. Amend. V and XIV, to vacate his conviction and sentence for second degree murder and unlawful possession of a firearm, and grant him a new trial. As grounds therefore the Defendant submits that his innocence, which is now patently evident as seen in *exhibit A*, was NOT presented to the jury in the “first” instance, which necessarily was the “first” mistake made, resulting in a jury not having the tools they needed to acquit Mr. Yarde. Then, this innocence was not presented to the Trial Court in the “second” instance, resulting in it not having the tools which it needed to reverse the jury’s conviction – we can call this the “second” mistake. The result of both of these mistakes has ultimately caused a man to be experiencing (and as of present) an active injustice – where each day he loses a day of his life of constitutionally guaranteed freedom – a certain constitutional federal violation. *See Kenniston v. Department of Youth Services*, 453 Mass. 179, 183 (2009) (“[f]reedom from bodily restraint is a fundamental liberty interest at the core of the protections provided under the due process clause of the Fourteenth Amendment to the Federal Constitution”). *See also Commonwealth v. Holmes*, 83 Mass. App. Ct. 737, 741 (“an entire sentence served for an erroneous conviction”, is where “the improper deprivation of liberty was [at its’] greatest”). Mr. Yarde now presently intends to highlight these 2 mistakes, seeking a “fix” as outlined in this instant “Second Motion for a New Trial” – which to be sure, alleges new grounds not previously alleged before. See the following:

SUMMARY OF THE CLAIMS

- 1) Mr. Yarde submitted a “first” Motion for New Trial, filed on February 1, 2019, and DENIED on January 8, 2020. This pleading lacked the report of a crime scene reconstructionist which opined in no uncertain terms, that it was *impossible* for Mr. Yarde to have committed this crime from his last known position, or from any other, within the temporal limits that are dictated by the case. Although the opinions generated in this report were absent in Mr. Yarde’s “first” Motion for New Trial, it was readily present and available to Yarde’s post-conviction counsel, but came up missing at the time it was needed to seek relief on the motion. As such post-conviction counsel was *ineffective* when filing Yarde’s “first” Motion for New Trial as, and if they had provided the report to Judge Kaplan, he would have ruled in

Mr. Yarde's favor.³

- 2) Also, and upon review of Judge Kaplan's decision on Mr. Yarde's Motion for New Trial, which did not have the benefit of considering the opinions of the crime scene reconstructionist, we see that the decision could have used it, as it would appear that the Court committed error in its' analysis when deciding the Motion. We see this error when the Trial Court generated its own reconstruction of the crime scene, and which conclusions it drew being factually impossible. Once Judge Kaplan denied the motion based the aforementioned error, post-conviction counsel had one more opportunity to cure the active injustice being suffered by Mr. Yarde, but did not. A Motion for Reconsideration should have been filed within 30 days of Judge Kaplan's denial, again bringing the evidence of the crime scene reconstructionist to light, and which would have also enlightened the trial court of its' error. No such Motion was filed by post-conviction counsel who was still counsel of record. Mr. Yarde contends that had the Motion for Reconsideration been filed timely before Judge Kaplan, and upon the Court's review of the same, it would have been compelled to see what was evident – that at the very least, a jury should have had this evidence before deciding the guilt or innocence of the accused, as it would most have certainly affected the outcome of their decision. Furthermore, and consequently upon that same review, Judge Kaplan would have been compelled to grant Mr. Yarde's Motion for a New Trial instead of DENYING it. As such, post-conviction counsel was "*ineffective*" once again when it did nothing in response to Judge Kaplan's decision.

Hence, one could really argue that Mr. Yarde's case has suffered from more than the "two" above mistakes made by post-conviction counsel – with the "third" one generated at the inception of Mr. Yarde's misfortune, where trial counsel **also** failed to present this evidence of innocence before the jury. Post-conviction counsel to their credit did attempt to preserve trial counsel's error, although they used the wrong source of authority to advance the claim. As a result, it would appear that Mr. Yarde's claim of ineffective assistance of his "trial-counsel" has

³ Mr. Yarde has submitted an affidavit from post-conviction counsel (Mr. Jarrett Adams, Esq.), which conveys that he DID NOT consider using a crime scene reconstructionist in advancing Mr. Yarde's first "Motion for a New Trial". He further contends that this was not a strategic decision to do so, but rather, he felt that he had "sufficient" information with the experts he hired to advance the motion, which necessarily relied upon the opinions from a forensic pathologist, and a media expert – both of which this instant pleading will show was NOT "sufficient". The Commonwealth and this Court can find and read this affidavit, as it is enclosed as *exhibit B*. Taking *exhibit B*, and placing it side by side with *exhibit A*, the ineffectiveness of post-conviction counsel becomes evident. What we see thereafter is not only how post-conviction counsel misperceived on what he needed to advance Mr. Yarde's Motion for New Trial, but also *exhibit A* puts an exclamation point on what should have been given to Judge Kaplan on a Motion for Reconsideration. In sum, Mr. Yarde cannot envision any strategic reason for keeping this gem of information from the Trial Judge at ANY point.

not yet been adequately perfected. As a result, and to be perfectly clear about it, Yarde **also** raises that claim here – that trial counsel was also *ineffective* in not advocating for his innocence before the jury, via the utilization of forensic science.⁴

⁴ Now, and that said, and since the Commonwealth (up to the present moment) appears to more about procedure over substance (see their pleading numbered 168), Yarde can surely anticipate an argument from them that where post-conviction counsel had the right expert readily available to them (a crime scene reconstructionist), but mistakenly used the wrong one(s) (a forensic pathologist and a video expert) to prove the two aforementioned factual impossibilities, as a result Mr. Yarde has therefore “waived” his right to bring up this “improved” evidence now. *See e.g., Rodwell v. Commonwealth*, 432 Mass. 1016, 1018 (2000) (“If a defendant fails to raise a claim that is generally known and available at the time of trial or direct appeal or in the first motion for post-conviction relief, the claim is waived”); Mass. R. Crim. P. 30 (c) (2), 378 Mass. 900 (1979). Rule 30 (c) (2) states: “All grounds for relief claimed by the defendant... shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge *in the exercise of discretion* permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.”

However, Yarde would fire back that he is not saying anything new in substance, as the same “claim” of his innocence has not changed, nor the grounds for that innocence (forensic science) – as you can see both claims and grounds on display in Mr. Yarde’s original Motion for a New Trial. In short, nothing has changed with respect to the “substance” of his claims – merely the author. Furthermore, Yarde contends that as it relates to his claim of ineffective assistance by post-conviction counsel, there has been no previous filing which has been made which should have included that allegation – thus rendering that claim far from waived. Mr. Yarde’s retort would therefore volley the issue of waiver back into the lap of the Commonwealth, where they must tango with the allegation which Mr. Yarde makes in the first instance, that post-conviction counsel behaved ineffectively, and which ultimately led this Court to DENY Mr. Yarde’s “first” Motion for a New Trial, due to this Court being asked to rule on an issue without the benefit of Mr. Lewis Gordon’s report (“The Gordon Report”).

Furthermore and in any event, so long as Mr. Yarde argues that the failure to raise and/or advance ANY claim (which could have been raised in any earlier pleading but was not done so due to ineffectiveness of counsel and) where that claim would amount to a “substantial miscarriage of justice” if the claim was advanced timely, and considered for its’ merit, such a scenario escapes the gauntlet of waiver. Mr. Yarde contends that failing to present scientific evidence of one’s innocence before any jury “pre-conviction”, or before this Court “post-conviction”, would amount to such a miscarriage of justice.

Furthermore, there is also nothing to stop this Court from resurrecting the claim, and on its own volition, the claim being that trial counsel should have presented the Gordon Report to the trial jury. Therefore, Mr. Yarde also seeks this Court to “resurrect” that specific claim, as failure to do so would also amount to a substantial miscarriage of justice. *See Commonwealth v. Hallet*, 427 Mass. 522, 554-555 (1998) (The “resurrection” exception to the waiver doctrine arises when the trial judge, on a motion for new trial filed and considered before direct appeal, decides to consider an issue on the merits, despite the defendant’s failure to raise it at a proper time. In those circumstances, the issue is considered as if it had been properly preserved.). As such, Mr. Yarde submits that when there is an active substantial miscarriage of justice taking place, the Commonwealth should know that no issue is ever waived, and again if the Commonwealth believes no substantial miscarriage of justice exists after reviewing *exhibit A*, the time to say so would be in their responsive pleading to this instant motion.

Oh, and as an aside, so long as the Court believes that failure to present the “Gordon Report” to the trial jury resulted in a miscarriage of justice – **“ineffectiveness is presumed”** – thus obviating the need from any affidavit from trial counsel. *See Commonwealth v. Randolph*, 438 Mass. 290, 294 (2002) (“If we determine that an error has been committed, we ask whether it gives rise to a substantial risk of a miscarriage of justice – *ineffectiveness is presumed* if the attorney’s omission created a substantial risk, and disregarded if it did not”) (emphasis added). As a result, and if this Court believes upon its’ review of *exhibit A*, that no strategic reason can be conceived of why any lawyer should deprive the jury the benefit of a reconstructed crime scene which contains the missing pieces (via gaps in video footage) to tell the whole story, then it would matter not the excuse which any lawyer could give to support that denial.

ANOTHER COMPONENT TO THE LAW OF INEFFECTIVE ASSISTANCE – NOT ONLY MUST POST-CONVICITON COUNSEL BE INEFFECTIVE, BUT IT MUST ALSO BE PREJUDICIAL TO THE DEFENDANT’S PLIGHT

To succeed on an ineffective assistance of counsel claim, the consequence of counsel’s serious incompetency must ALSO be prejudicial. The Supreme Judicial Court has defined such claims as “a reasonable probability” that “but for counsel’s unprofessional errors, the result of the proceeding would have been different”. *Commonwealth v. Mahar*, 442 Mass. 11, 15 (2004) quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984). As stated above using quite extensive language, Mr. Yarde has alleged two “errors” committed by post-conviction counsel, and that but-for the same, Mr. Yarde’s “First Motion for a New Trial”, would have been allowed by Judge Kaplan, and that he would no longer stand convicted of second-degree murder, thereby enjoying again his presumption of innocence, and forcing the Commonwealth to either try him again, or come to terms with his innocence and set him free. *See “Summary of the Claims” referenced supra*. However, and if this Court seeks for Mr. Yarde to state the serious

incompetency in more succinct terms, we have: 1) the failure of post-conviction counsel to allege in its' Motion for New Trial that trial counsel was ineffective for not calling a "crime scene reconstructionist" at trial to demonstrate that it was scientifically "impossible" for Mr. Yarde to have committed this crime; and 2) the failure of post-conviction counsel to file a Motion for Reconsideration of that DENIAL of Mr. Yarde's Motion for New Trial, to demonstrate how a crime scene reconstructionist would impeach the factual and/or legal rationale of Judge Kaplan's DENIAL. If either one of the two errors were not committed, the outcome of Mr. Yarde's "first" Motion for a New Trial would have been different.

A historical account of the factual and procedural rulings in this case are in order, but a review of the docket in this case would actually suffice, and Mr. Yarde hereby incorporates by reference the same, including all of the relevant pleadings which shall include:

- a) **Pleading #133** – *Pro-se* Defendant's Motion for post-conviction relief
- b) **Pleading #134** - *Pro-Se* Defendant's supplement to attachment to post-conviction relief motion;
- c) **Pleading #137** - *Pro-se* Defendant's Motion for Post-Conviction Relief "Sua Ponte"
- d) **Pleading #138** – *Pro-se* Memorandum of law in support of law in support of Defendant's Motion for Post-Conviction Relief
- e) **Pleading #139** – *Pro se* Defendant's Motion requesting that Judge Kaplan accept report of consultation without filing with the Clerk
- f) **Pleading # 153** – Defendant's Motion for a New Trial
- g) **Pleading #154** – Commonwealth Opposition to the Defendant's Motion for a New Trial;
- h) **Pleading #158** - Defendant's Motion Unopposed Motion for Leave to File a Supplemental Memorandum to his Motion for a New Trial
- i) **Pleading #160** - Affidavit filed in support of Pleading #158

- j) **Pleading #164** - Memorandum and Order of Decision of Defendant's Motion for New Trial
- k) **Pleading #167** - Defendant's Motion to Stay Sentence Pending Motion for New Trial
- l) **Pleading #168** Commonwealth's Opposition to pleading #167
- m) **Pleading #170** Notice of Appeal of Court's DENIAL to Pleading number 167
- n) **Pleading #172** Defendant's Motion to Reconsider his Release Pending Appeal of the Defendant's Motion to Reconsider Granting a New Trial

In his attempt to give the "readers' digest" version of approximately 14 docket entries,

Mr. Yarde states the following:⁵

- 1) This is a case which turns largely upon video evidence collected from security cameras installed in the lobby, elevator, and exterior of 1050 Tremont Street in Boston (1050 Tremont), where there were six cameras which monitored the outdoor area where the shooting occurred, and which are the essential pieces of evidence used at trial.
- 2) On the night of October 27-28, 2012, the victim, Deandre Russ and four men were in this outdoor area: a) the defendant Mr. Yarde; b) John Collins ("Collins"); c) Calvin Miranda ("Miranda"), and d) Victor Lewis ("Lewis")
- 3) Video footage captures the five individuals walking along a sidewalk in proximity to one another. The individuals eventually come to a white pillar/column⁶, and at 3:17:58, Mr. Yarde, Collins, and Lewis can be seen on one end (building side which is south and just due east of the column), all facing the victim who is separated by the column, who can be seen facing them at the other end (street side which is north and) just due "east" of the column.⁷
- 4) The last footage depicting the locations of the four men prior to the shooting occurs at 3:18:02. At that time, Mr. Yarde can be seen on the southwest side of the column facing the victim who is on the northwest side of the column. The

⁵ Mr. Yarde relies upon, and hereby incorporates by reference (unless stated otherwise) the facts as laid out in pleading # 153 – Defendant's First Motion for New Trial, along with various exhibits including the video footage introduced at trial.

⁶ The dimensions of the column are five feet in length and 9 inches wide/thick – and are not in dispute.

⁷ It is a reasonable inference that Miranda is behind the column at this point.

entire width of the column separates them almost exactly. Mr. Victor Lewis can be seen adjacent to Mr. Yarde, but on the east side of the column closer to the building. Collins' foot and shadow can be seen just poking out on the northeast side of the column with the majority of his body positioned behind the column, and Miranda can be seen northeast of the column angling toward the street.

- 5) At that moment the surveillance footage switches cameras to a different angle and the men and column can no longer be seen. However, at 3:18:03 one second later, the victim can be seen entering the frame falling to the ground, coming to a complete resting place at 3:18:04.
- 6) A jury found Mr. Yarde guilty of shooting Mr. Russ, although there were four potential suspects, and no video footage demonstrating one over any other.
- 7) It would appear that the evidence relied upon by the Jury to convict Mr. Yarde was the following:
 - a. Yarde is the last person to run from the scene;
 - b. Testimony from a police officer who claims that he believes he can see a gun in the hand of Mr. Yarde as he is running away.⁸
- 8) To add further relevant evidence to the calculus, six shell casings were recovered at the scene, five from the sidewalk and one from a flowerbed/shrubbery area right next to the sidewalk.⁹
- 9) All of the casings were found both north and west of the column (or to its' left).¹⁰ All of the shell casings were found to be .9mm ammunition, and were manufactured by Winchester (1), Speer (1), American Ammunition (1), and

⁸ Mr. Yarde surmises the jury latched onto to these two areas of information, as it was the only pieces of information relied upon by the Commonwealth in closing to support Mr. Yarde's guilt. However, neither of these points say anything about what took place *before* Mr. Yarde runs from the scene. In other words, the Commonwealth offered NO evidence (let alone argument at closing) on the time when it mattered – because they couldn't because they had not reconstructed the scene. Rather, and in lieu of that, they chose to argue inferences which derive from a police officer's inadmissible opinion, and rank speculation from the prosecutor herself – that last to run means first to shoot.

⁹ This can be determined from the crime scene sketch drafted by a Boston Police Officer, but is also contained in the "Gordon Report" at *exhibit 4*. This sketch was not introduced at trial, but is provided here for demonstrative purposes, in order to appreciate the schematics of the crime scene.

¹⁰ See the Gordon Report, at *id.*, *exhibit 4*.

Master (3). All six casings were determined to be fired from the same weapon, which was never recovered.

- 10) Also at trial, the medical examiner Dr. Kimberly Springer testified. She testified that the victim was shot three times, all of which entered and exited the victim's body. The fatal wound entered just above the victim's left eyebrow and exited the back of his head with a left to right, front to back, and slightly upward trajectory. The victim was also shot in his left thigh and right calf. The trajectory of the shot to the thigh was also left to right. Dr. Springer was unable to determine the trajectory of the shot to the calf. Dr. Springer further concluded due to stippling on the defendant's face, the fatal bullet could not have been fired from more than 3.5 feet, and was most likely fired within 3 feet.
- 11) At trial, the defendant argued that Collins was the likely shooter, as he was closer in match to the description provided by Mr. Hawthorne.¹¹ Further, Mr. Collins initially lied to the police claiming that he was not at the party.¹² Moreover, the ammunition found in Collins bedroom was the same as the shell casings found at the scene.¹³ Lastly, the trajectory of the bullet (left to right) and location of shell casings suggested the shooter was more likely standing where Collins was purportedly last seen in the surveillance footage as compared to where the defendant was last seen.¹⁴ Trial counsel did not seek any expert review of the evidence, or present expert testimony on behalf of the defendant at trial to suggest that from a forensic perspective, the theories of his defense would have scientific confirmation.

**PROCEDURAL POSTURE OF THE CASE LEADING UP TO THE ALLEGED
INEFFETIVE ASSISTANCE COMMITTED BY POST-CONVICTION COUNSEL**

After a jury found Mr. Yarde guilty of second degree murder and unlawful possession of a firearm, on August 6, 2014, he was sentenced by the Honorable Judge Mitchell Kaplan to life with the possibility of parole after fifteen years on the second-degree murder charge, and not less than three years nor more than three years and one day on the firearm charge, to be served concurrently – all of which can be noted on the docket. On March 27, 2018, the defendant filed

¹¹ Tr. 9: 17-22

¹² Tr. 9: 32-33

¹³ Tr. 9: 31

¹⁴ Tr. 9: 23-25

various *pro-se* motions which included: 1) a Rule 30 motion for post-conviction relief; and 2) a supplement to his post-conviction relief motion. *Id. at entries # 133 and 134*. He thereafter further filed an additional *pro-se* motion for post-conviction relief and a memorandum of law in support. *Id. at #137 and 138*.¹⁵

Upon review of Mr. Yarde's *pro-se* pleadings, and in support thereof, Mr. Yarde presented an expert report authored by Dr. Jonathan Arden (a forensic pathologist) of Arden Forensics. After review of the same, and if Dr. Arden were to have been called upon to testify at trial, he would have opined that based upon the trajectory of the gunshot wounds, along with the location of the fired cartridge casings, the firing of the weapon would have been "**inconsistent**" with the defendant's last seen location on the video immediately before the shooting.¹⁶

- 1. After Mr. Yarde's *pro-se* filings, he hires new "post-conviction" counsel, who thereafter filed a supplement to Yarde's *pro-se* motions, which included another expert, Dr. Elizabeth Laposata.**

The Commonwealth was given until July 20th 2018 to file an opposition to Mr. Yarde's pleadings and did so on July 23rd 2018. *Id. at #144*. Prior to a ruling on the filings to date, Mr. Yarde secured the services of new "post-conviction" counsel (Mr. Jarret Adams and Mr. Carlton Williams), with their filing of appearances on September 11, 2018. A status hearing was held on October 18, 2018, at which time Judge Kaplan granted the defendant (via his new counsel) leave to make a supplemental filing, to buttress his already filed motions, and to do so by January 4, 2019. *Id.* On February 01, 2019, pleading #153 was filed – entitled "Motion for New Trial".

¹⁵ Pleadings 137 and 138 appear to supersede Mr. Yarde's previous pleadings (133 and 134) as Mr. Yarde contends they are a mere magnification of what was originally filed.

¹⁶ See page 4 of Dr. Arden's report which has already been filed with this Court – "On the contrary, all of the evidence from the gunshot wound and casings is consistent with the shooter having approached Mr. Russ from his left. . . and shooting from close range".

*Id.*¹⁷ In this final pleading, Yarde argued that trial counsel provided him with ineffective assistance for failing to call an expert pathologist, failing to cross-examine the medical examiner at all, and his failing to retain a video expert. On the issue of trial counsel’s failure to call a pathologist, post-conviction counsel found a pathologist of his own, Dr. Elizabeth Laposata who opined to a reasonable degree of medical certainty, that:

“[i]t is *impossible* for the shots to have originated from Mr. Yarde’s position [seen in the surveillance video]”.

See page 2 of Dr. Laposata’s report, in Dkt. 153.

Dr. Laposata reached this opinion based upon a trajectory analysis/argument – similar to Dr. Arden. In essence, she found that the shots which impacted the victim had to have come from his left side, extrapolating that location from: a) analysis of the location of the shell casings which had laid to rest; b) the bullets entering the left side of the victim’s body; and c) the testimony from witness/Hawthorne, stating that the shooter ejected his weapon from the east side of the pillar (or the left of Mr. Russ). Since Mr. Yarde from his last known position was not to the left of Mr. Russ, but actually to his right, she rendered it an “impossib[ility]” that he was the shooter.

2. Judge Mitchell Kaplan had oral argument on the pleadings filed to date, but focused exclusively upon Dr. Laposata’s report.

After the Commonwealth submitted an opposition on April 22, 2019 (*Dkt Entry # 154*), a hearing was held on October 17, 2019, to have oral arguments regarding Yarde’s request for relief. Upon review of the recorded hearings, Judge Kaplan only focused upon the report of Dr. Laposata, and was firm in his belief that it was inadequate to advance the merits of Mr. Yarde’s

¹⁷ Although the title of the pleading was named “First Motion for New Trial”, by all accounts it should have been perceived as a supplemental filing to Mr. Yarde’s original *pro-se* motions. Indeed, and on page 3 of this supplemental filing (#153) Yarde’s lawyers acknowledged that it was merely supplemental, thereby, and by inference, incorporating by reference Mr. Yarde’s original filings.

motion. The staunchness of his belief can be fleshed out, not only upon a review of his written findings (*Dkt entry no. 164*), but also from a review of the hearing minutes itself. What follows is what Mr. Yarde gathers from review of the aforementioned:

- 1) Judge Kaplan rejected Dr. Laposata's ultimate opinion rendering it an "impossibility" that Mr. Yarde was the shooter from his last known position, as the Court believed that it was not within her range of expertise to make such a finding. Judge Kaplan reasoned that although Mr. Yarde's last position can be seen on the camera, once the camera pans away, his exact positioning at the time of the shooting is "unknown". Once the camera panned away, Judge Kaplan believed it was "possible" that Mr. Russ could have positioned his body at an angle, all the while still facing Yarde head on, but with his body slightly turned and exposing his left side to Mr. Yarde;
- 2) Upon consideration of the aforementioned positioning, Judge Kaplan argued that Mr. Yarde could have shot a weapon which entered Mr. Russ' left side, but while Mr. Yarde's physical body was still standing to the right of him – calling the positioning of both parties an "obvious possibility".
- 3) To explain this even further, Judge Kaplan believed that so long as Mr. Yarde's arm was within 3 feet away from Mr. Russ, and from the aforementioned positioning, Mr. Yarde still would have been within the 3 feet required of the stippling, and therefore within the range of firing the fatal shot.¹⁸

After argument, Judge Kaplan issued a written opinion on January 8th 2020, and for the reasons stated above, DENIED the motion. In providing further findings, Judge Kaplan also

¹⁸ As can be seen *supra*, (from *the Gordon Report*) Judge Kaplan's theoretical "obvious possibility", with regards to the respective positioning of Yarde and the victim at the time of the shooting would **still** be an "obvious impossibility" for Mr. Yarde to have been the shooter, as the barrier in this case would not make it possible for Yarde to have been facing the victim (from any hypothetical positioning as contemplated by Judge Kaplan) and shoot Mr. Russ while his arm and weapon is on one side of the barrier, with the shell casings ending up on the other side. In any event, and for the record, and with the utmost deference to Judge Kaplan, but any theoretical "take" he may have regarding this case after his consideration of the proffered expert testimony would have been rejected by the jury once they heard from an expert better suited to give theoretical "takes" – for example, a crime scene reconstructionist such as Mr. Lewis Gordon. Judge Kaplan took it upon himself to reject opinions given by a forensic pathologist (Laposata) holding that what is possible and impossible was not within her range of expertise. However and again, with the utmost respect to Judge Kaplan, who is a seasoned jurist, his opinions about what is possible and impossible is not within his range of expertise either – and as the facts would have it, Dr. Laposata was actually correct – it was "impossible" for Mr. David Yarde to have shot the victim from his last known position. *See exhibit A* the "Gordon Report" (which explains actually why – albeit on different grounds). Once we appreciate that the Gordon Report demonstrates the error in Judge Kaplan's thought process, we must also appreciate the apparent prejudice, that failure for post-conviction counsel to either: a) get Judge Kaplan on the right track to begin with; or b) demonstrate the error to him once he ends up on the wrong track, altered the outcome of this hearing.

found Dr. Laposata's testimony (in other respects) consistent with what the Commonwealth's expert, Dr. Springer, had already testified before the jury, and therefore her testimony would not have impeached Dr. Springer, who was not called in any event to evaluate areas of crime scene reconstruction, but rather cause of death and trajectory of the entry and exit wounds. As a result, Judge Kaplan found that trial counsel's failure to cross-examine Dr. Springer, did not demonstrate "what [if any] additional evidence of value could have been obtained by cross-examining Dr. Springer". Finally, regarding trial counsel's failure to retain a video expert, Judge Kaplan found that the expert's "affidavit and report does not provide any additional visual evidence beyond that presented at trial."

THE ERRORS OF POST-CONVICTION COUNSEL

This section does not need extensive factual development after one reads Judge Kaplan's decision, alongside the forensic report of the crime scene reconstructionist which came thereafter. As aforesaid in *exhibit A*, Mr. Gordon has opined that Mr. David Yarde could NOT have committed this shooting from his last known position, or any other. *Id.* A review of this document provides Mr. Gordon's review of the evidence presented at trial, which necessarily consists of the video-footage taken a moment before Mr. Russ was killed, and which would have necessarily outlined the positioning of the parties. After consideration and analysis of the same, and relying upon his expertise, not only did he opine that Mr. Yarde could NOT have committed this shooting from his last known position – which would have indisputably impeached Judge Kaplan's analysis on that point, but further opined that based upon the temporal limitations Mr. Yarde had to reach a position to be the shooter, he could NOT have been the shooter in any other instance – thus leaving the "well of theories" empty to support guilt, and thus denying Judge Kaplan any sound basis for him to have denied any Motion for a New Trial which came before

him.

Upon this realization stated above, the errors of post-conviction counsel appear plain. Post-conviction counsel merely asked Judge Kaplan to wrestle with the wrong expert. Judge Kaplan discredited the forensic pathologist provided by post-conviction counsel, concluding that she did not have the expertise to render the conclusion she did. Secondly, Judge Kaplan opined, that even if she did have the expertise, her conclusions would have been in error because he has his own conclusions based upon an “obvious possibility” – that Mr. Yarde still could have been the shooter in his last known position. Yarde responds that Judge Kaplan was actually right on the first point. The expert needed by post-conviction counsel was NOT a forensic pathologist – which to Mr. Yarde’s understanding is synonymous with a medical examiner – one who performs autopsies as a primary function.

Rather, and it appears evident that after Judge Kaplan made his own attempt at crime scene reconstruction, by theorizing how Mr. Yarde could have been the shooter, that a person actually trained in the art needed to weigh in on the analysis. To be sure, there was a critical piece of missing video-footage in this case, and there is only one person who could help us fill in that blank on that vital gap of information, and its’ not a forensic pathologist. The job of a forensic pathologist is not to tell us “who” could have, or “who” could have not done this shooting while the cameras at issue choose to change angles. The forensic pathologist can only provide any fact-finder (and in this case information regarding) the: a) stippling distance; b) exit and entry wounds; and c) cause of death. They make findings *after* the shooting, but they don’t recreate and make findings about what could not have happened with respect to potential suspects. This was just the wrong expert to use, and if post-conviction counsel couldn’t see this *before* the case was submitted to Judge Kaplan for review, they should have certainly seen it

after one has read Judge Kaplan's decision. The Court was all but telling post-conviction counsel that "you have given me the wrong person", and so "I must do the job myself". However, nothing was done to cure this less than cryptic message given to post-counsel by the trial court.

In sum, and if the report of the crime scene reconstructionist were submitted to Judge Kaplan, this Court would not have been able to challenge the competency of the report (or its' author) in DENYING Mr. Yarde's Motion for a New Trial, let alone challenge it in a way by substituting his own theory of the case. As a result, and Mr. Yarde's post-conviction counsel attests to this fact, and thereby sealing the issue, but by his admission that he never considered using a crime reconstructionist in the first instance, because he believed that he had a "sufficient presentation" with the forensic pathologist, he was wrong. Then, and when Judge Kaplan informed him (via his decision) that it was "insufficient", they should have took that cue and filed a Motion for Reconsideration thereafter. Post-conviction counsel never took the cue, never filed a Notice of Appeal, or some pleading to let Judge Kaplan know that Mr. Yarde understood the defects in the original Motion for New Trial. Post-conviction counsel was wrong again.

LEGAL ARGUMENT ON WHY MR. YARDE MUST BE GRANTED RELIEF ON THIS MOTION

A trial judge "may grant a motion for a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b). When a defendant has been convicted of second degree murder, and thereafter brings a motion for new trial based upon claims of ineffective assistance of counsel, the standard to be applied is set out in *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). In *Saferian*, the court described that in order to prevail on a claim of ineffective assistance of counsel, the defendant must show (as a first prong) that "there has been serious incompetency, inefficiency, or inattention of counsel...falling measurably below that

which might be expected from an ordinary fallible lawyer.” *Id.* This is prong 1. Mr. Yarde’s arguments on prong 1 are as stated:

Prong One argument a: Post-conviction counsel’s failure to consult with or hire a crime scene reconstructionist in lieu of a forensic pathologist to investigate and/or pursue a theory that it was not scientifically possible for Mr. Yarde to have shot the victim (either from his last known location, or from any new location to which he could move), amounted to serious incompetency, inattention, or inefficiency falling measurably below that which might be expected

Prong One argument b: Post-conviction counsel should have realized that they had the wrong expert, as Judge Kaplan in his decision intimated as much, and post-conviction counsel should have filed a Motion for Reconsideration, and this time asking the Court to reconsider its’ analysis, upon reflection after hearing evidence from the right expert.

For all the reasons stated above in the first 15 pages of this motion, Mr. Yarde stands upon the above stated in bold-face, in demonstrating to this Court the ineffective assistance by his post-conviction counsel. Yarde also further argues that Judge Kaplan’s decision was handed down on January 8, 2020. Post-conviction counsel thereafter had 30 days from the decision to file a Motion for Reconsideration. *See e.g., Commonwealth v. Montanez*, 410 Mass. 290, 294 n. 4 (1991) (Motion for Reconsideration should be filed within 30 days of adverse decision. Post-conviction was counsel was still counsel of record for Mr. Yarde between January 8, 2020 and February 7, 2020. *See docket entries generally.* Post-conviction counsel did not file any Motion for Reconsideration, nor take any proactive measure towards preserving any of the Defendant’s rights before the undersigned filed his notice of appearance (on February 12, 2020). The undersigned had since filed a Motion for Reconsideration which was subsequently denied as “Time Barred”. *See docket entry of April 2, 2021.*

Prong Two: Had an expert in the field of crime scene reconstruction been presented to Judge Kaplan, (either in Mr. Yarde’s Motion for New Trial, or a timely filed Motion for Reconsideration) there is a serious doubt that his decision would have been the same.

If the first prong of *Saferian* has been met, the standard for the second prong of the *Saferian* test is outlined in more detail in *Commonwealth v. Millien*, 474 Mass. 417, 432-433

(2016). The *Millien* court equated the second prong *Saferian* standard as the same as the prejudice standard where there is a claimed error that “defense counsel failed adequately to challenge at trial is raised for the first time on appeal or in a post appeal motion for a new trial.” *Id.* citing *Commonwealth v. Azar*, 435 Mass. 675, 685 (2002). Under that standard, a defendant is entitled to a new trial “if we have a serious doubt whether the result might have been different had the error not been made.” *Millien, supra* at 432 quoting *Azar, supra*. In 1984, the Supreme Court of the United States established its own ineffective assistance of counsel test and their bar to prove prejudice in *Strickland v. Washington*, 466 U.S. 668, 693-694 (1984):

“[t]he defendant 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.”

Although Massachusetts has not adopted the specific formula outlined above, it has “recognized that the prejudice standard under the Massachusetts Constitution is at least as favorable to a defendant as is the Federal standard.” *Commonwealth v. Millien*, 474 Mass. 417 (2016) (internal quotations and citations omitted).

As such, it is likely that the opinion testimony of such a defense expert would have influenced Judge Kaplan's evaluation as to whether this should have been presented to the jury, and where it wasn't, the lack of its' presentation was sufficient to undermine confidence in the outcome. See *Commonwealth v. LaBrie*, 473 Mass. 754, 772-774 (2016) (counsel's failure to consult with independent oncologist likely deprived defendant of substantial ground of defense on key issue in case). Judge Kaplan's conclusion on Mr. Yarde's Motion for New Trial would therefore have to be a different one – if it believed that the “Gordon Report” denied Mr. Yarde on a substantial ground of defense.

CONCLUSION

This Court is very well-aware of Mr. Yarde's plight, after many years of litigation to date. Mr. Yarde admits himself that in this pleading he has really come close to "beating the dead horse" – probably breaching that threshold already with the redundancy in this presentation. But all of this trumpeting is not being made in vain. There is an innocent man in jail, convicted only because a jury made quantum leaps from poorly-presented evidence. Mr. Yarde is limited to the amount of pleadings he can file, so he tries his best to make them count when he is given a platform.

After this exhaustive journey, there is really only one of two conclusions to make: 1) A man adjudicated guilty, and even though he has presented compelling evidence of his innocence, along with compelling evidence that his previous lawyers were ineffective for not presenting this innocence sooner, he should still be DENIED relief from that conviction, and instructing him to seek appellate review of that DENIAL (and without explanation on why he can't receive relief in the present moment); or 2) A man adjudicated guilty, but who has presented compelling evidence of his innocence, along with his previous lawyers for being ineffective for not presenting this innocence sooner, deserves as of right to have this pleading considered and ruled upon under the legal framework which outlines the law of ineffective assistance of counsel. All Mr. Yarde asks is that a conclusion is made NOW, with findings explaining one over the other.

Mr. Yarde prays the Court's judgment.

DAVID YARDE

By his attorney,

Gordon W. Spencer, Esq.

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Framingham, MA 01701

BBO# 630488

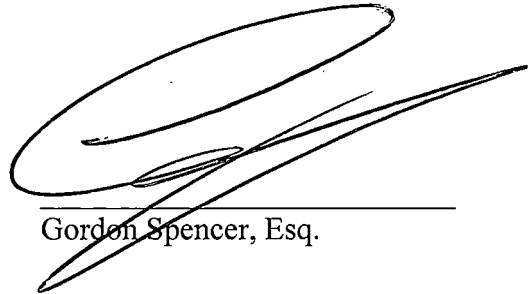
(508) 231-4822

July 2, 2021

CERTIFICATE OF SERVICE

I, GORDON W. SPENCER, attorney for the defendant, David Yarde, hereby certify and swear under the pains and penalties of perjury that on this 2nd day of July, 2021, I have served the aforementioned pleading on the Commonwealth *by* serving it in-hand delivery to:

Dara Kesselheim, Esq.
Assistant District Attorney
Suffolk County District Attorney's Office
One Bulfinch Place
Boston, MA 02114
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Gordon Spencer, Esq.

Forensic Evidence & Investigations
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My name is Lewis H. Gordon, of Forensic Evidence & Investigations, where I provide consultant forensic science services throughout the United States in case analysis, trial preparation, and post-trial strategy, in the area including, but not limited to; ballistics/firearms' examination and crime scene reconstruction, including shooting incident reconstruction. My curriculum vitae is being submitted, which outlines my credentials including a Masters of Science in Forensic Science from the University of New Haven, as well a Juris Doctorate from Western New England School of Law.

Objectives

I was contacted by Mr. Gordon Spencer, Esq., counsel for Mr. David Yarde, a Defendant who was convicted of second degree murder and unlawful possession of a firearm, in connection with the shooting death of a Mr. Deandre Russ ("Mr. Russ") – a person who was shot and killed outside an apartment building located at 1050 Tremont Street in Boston, MA on October 28, 2012. Attorney Spencer has requested I review and analyze materials from a shooting incident from: i) a perspective of reconstruction, as well as from: ii) a firearms examination perspective. These materials included pre-trial discovery, trial transcripts and subsequent reports from other experts.

With respect to an approach involving shooting incident reconstruction, I was asked to review the series of events leading up to this shooting, and attempt to determine whether Mr. Yarde could have been the shooter in his last known position, or in the alternative, determine whether Mr. Yarde could have moved to a location where he could have been the shooter, based

There are a number of video surveillance cameras located on the exterior of the building at 1050 Tremont Street. These cameras provide substantial evidence of the events leading up to and immediately following the moment when Mr. Russ was shot and killed. The cameras pan away from the shooting at the instant the shots are fired and therefore do not show the actual shooting. The cameras do however provide a very specific frame of reference, assisting in creating a foundation for determining how the shooting occurred. The January 28, 2019 report of Mr. Garneau of Rampion Visual Productions, details where the cameras are located, and how they work. I have adopted all of his report as the basis for finding the following facts:

- 1) Camera #14 is located on the column on the east side of the entrance way to 1050 Tremont. It pans a 180 degree area of view. Camera #14 shows the interaction of four individuals near the base of the column that separates the office at 1042 and 1044 Tremont from 2:17:55 to 2:18:03 AM. The time on the camera is one hour behind the actual time which is 3:18 AM. The video shows the victim Mr. Deandre Russ standing on the North (Tremont Street side) of the column. David Yarde and two other individuals are standing on the South side (building side) of the column. (*See exhibit 1 – Still photo and diagram with North, South, East, West directionals*);
- 2) Two seconds later, at 2:18:02 AM, Mr. Yarde can be seen to move to the west of the column as Mr. Russ also moves to the west of the column. This is the last time the interaction between Mr. Yarde and Mr. Russ can be seen in any video. (*See exhibit 2 – Still Photo*);
- 3) At 2:18:03 AM Camera #7 located on the west side of the column 1042/44 shows Mr. Russ falling to the ground approximately six feet to the west of the column 1042/44. (*See exhibit 3 – Still photos*);¹

b. Autopsy Evidence

Deandre Russ was transported from the scene to the hospital where he died of major brain injuries. The autopsy was conducted by Dr. Kimberly Springer of the Massachusetts Office of the Chief Medical Examiner. The autopsy revealed that the cause of death was a single

¹ It is obvious that based upon the footage, and opinion of Mr. Garneau, which I adopt, that Mr. Russ was shot in the one second between 2:18:02 and 2:18:03. Further, I obtained the distance of Mr. Russ falling to the ground approximately six feet to the West of the column 1042/44 from the sketch of Officer Stephen Moy – attached as *exhibit 4*.

gunshot wound to the left forehead which passed through the skull and exited through the right parietal area. Mr. Russ also suffered two perforating wounds to the left thigh and right calf. Dr. Springer also noted that she observed gun powder stippling on Mr. Russ's face. Dr. Laposata opined that the gunshot wound to the head would cause immediate unconsciousness and collapse.

Dr. Springer noted the distribution of the gun powder stippling had a dimension of "4.5 inches by 6.0", and determined that the range of fire was on the order of 36 inches. Dr. Springer's autopsy findings were confirmed by Dr. Johnathan Arden and Dr. Elizabeth LaPosata in separate reports dated January 21, 2018 and January 18, 2019, respectively. Both reports are in substantial concurrence. The opinions of the medical examiners are substantiated by research on muzzle to target distance determination. *See exhibit 5.*

Based upon the same testimony and reports regarding the stippling, relying upon my outlined training and experience to concur with the same, I opine to a reasonable degree of scientific certainty that **the distance from the muzzle of the firearm belonging to the shooter, to Mr. Russ's forehead was about 36 inches maximum.** I don't believe that this finding would be in dispute.

c. Trajectory Evidence

Of further note, after review of the autopsy and expert reports, is that the three projectiles which struck and penetrated Mr. Russ were not recovered in his body. The trajectory of the fatal shot to his head was from left to right, front to back, and very slightly upward. The trajectory of the shot to his left thigh was also left to right, back to front, and upward. This information alone has restricted value, as it has very limited application in determining the location of the shooter. This is due to the mobility of the human body and the numerous ways it can articulate and rotate.

This is compounded by the fact that the shooter can also vary their position. It is only when the body becomes stationary or when contrasting to very specific facts can valid conclusions as to the location of the shooter be made from the wound path within the body.

d. Documentation and collection of evidence by B.P.D.

The Boston Police Department responded to the scene almost immediately. They secured the scene and the Crime Scene Response Unit photographed, measured and collected evidence from the scene. The inventory of materials collected was comprehensive and leads me to believe that all possible evidence was collected.

The investigation revealed 6 fired cartridge casings located on and near the side walk to the east of the column at 1042/44. The six fired cartridge casings were all 9 mm in caliber and were fired from the same unknown weapon based upon the testimony of Detective Camper.

An analysis of the crime scene measurements and diagram of Officer Moy (*exhibit 4*), along with the photos of the shell casings at the crime scene (*attached as exhibit 6*), shows that the fired cartridge casings are all found to the east and north of the column. Measuring from the southeast point of the column, Officer Moy determined the shell casings ranged from 10 feet 1 inch to 22 feet 5 inches from the column. A review of the photographs in *exhibit 6* provides visual context of the location of the shell casings in comparison to the location of the column.

Review and Analysis of Evidence

Ejection Pattern

When a semi-automatic firearm is fired, the pressure of the recoil of the fired cartridge forces the slide of the gun to open and the fired cartridge case is extracted and ejected.

Ejection pattern analysis to determine the location of the firearm and shooter also has very limited application due to a number of factors which can effect the distribution of the expended

cartridge cases. These factors include: a) the specific make and model of firearm; b) the caliber; c) the surface deposited on; and d) the method of hand hold which yields the orientation of the ejection port. In this case the only information known is the caliber being a 9 mm. However, and in this specific factual instance, what assists in narrowing down the possible location of the firearm and the shooter, is the presence of a concrete barrier at the scene. This barrier which is full height and impenetrable by cartridge cases permits some interpretation as to the location of the shooter. Meaning, and where all the ejected cartridge casings were found "East" of the barrier, the location of the firearm and thus the shooter must also have been East, as placing the firearm/shooter "West" of the barrier would have necessarily effected cartridge case distribution to appear "West" of the barrier, as this same obstruction ("barrier") would have prevented ejected cartridge casings to permeate through it, causing the casings to bounce off the same, reversing direction from "East" to "West".

As such, and in terms of reconstruction analysis, what makes this case rather unique is the presence of a concrete barrier at the scene. When considering all of the possible permutations of the aforementioned factors, which effect cartridge case distribution, none of them would yield the location of the firearm and shooter on the West side of the concrete barrier where Mr. Russ was located before the fatal shot was fired. *I can state within a reasonable degree of scientific certainty that the firearm's ejection port was on the East side of the concrete barrier when the six shots were fired.*

Projectile Recovery and Impact Mark Documentation

Despite a thorough crime scene documentation by the Boston Police Department, no intact projectiles were recovered. Bullet fragments found in Mr. Russ' right calf were unsuitable for comparison purposes. The absence of projectiles or additional fragments combined with the

absence of bullet impact marks on the concrete sidewalk indicate Mr. Russ was not shot after falling to the ground. This is further supported by the combination of Dr. Springer's conclusion that the gun shot wound to Mr. Russ' left thigh is back to front, and the video evidence which does not show a shooter in the area behind Mr. Russ' body after he falls.

Timing of the Shots

The time required to fire six shots from a semi-automatic pistol varies with the caliber of the firearm, the type of ammunition, and the skill of the shooter. What is relevant to the analysis and reconstruction of this event is that we know that the fatal shot appears to be one of the first three shots fired, and that the fatal shot took place in under one second. This conclusion derives from the images obtained from the surveillance video, which depict Mr. Russ on the ground and bleeding from the wound to his head within the one second time frame.

Factual Evidence Summary

- The victim was shot and killed in the one second between 2:18:02 and 2:18:03;
- Three shots impacted the victim; One to the head, one to the left thigh, and one to the right calf;
- The victim was rendered incapacitated by the shot to his head which occurred within the one second time frame;
- For the fatal shot to the head, the muzzle of the gun was a maximum of 36 inches away from the victim;
- Mr. Yarde's location at 2:18:02 was at the Southwest (building) side of the column; *See exhibit 2.*
- The victim's location at 2:18:02 was at the Northwest (street) side of the column, and facing towards the building; *See exhibit 2.*
- At 2:18:03 the victim's body falls to the West side of the column, with his head resting 6 feet 7 inches from the column, and the victim is 5 feet 7 inches tall. *See exhibit 4 (Moy's sketch), exhibit 7 – crime scene photo, and exhibit 8 (excerpt from autopsy report detailing Mr. Russ' height).*

- The cartridge casings are all found East side of the column (also North of the column as well) indicating the firearm was discharged on this side of the column; *See exhibits 4, 6.*
- Bullet impact marks were not present at the scene.

Based upon these facts and observations, as indicated at the outset of this report, I have been requested to determine whether: 1) Mr. Yarde could have been the shooter in his last known position (west of the column, and closest to the column's most southern point (building side) – and if not possible, in the alternative; 2) determine whether Mr. Yarde could have moved to a different location, where he could have been the shooter based upon the evidentiary materials provided to me.

In order to answer the first question, I am only directed under the guise of the location of the respective parties (Yarde and Russ) at their last observed moment in time, prior to the camera angle panning away. If the last known location of both parties renders Mr. Yarde as not being the shooter, only then do I move onto the second part of the inquiry.

Shooting Mr. Russ from Mr. Yarde's last known position;

As already determined in the "Factual Evidence Summary", the victim was shot and killed in the one second between 2:18:02 and 2:18:03, and the last known location of the victim at the most North Western corner (street) side of the column with him facing towards the building, and David Yarde's last location, was at the most South Western corner (building) side of the column, facing the street (in the direction of the victim). Assuming that both parties did not move within the split second before shots rang out, Mr. Yarde had a visual of the alleged victim, and if he was holding a firearm, he could have raised his hand up with the muzzle of the weapon "plausibly" being 36 inches away from Mr. Russ' face, and began to fire. However, the ballistics' evidence in this case would immediately reject this hypothesis. In any of the various

possible directions that the cartridge cases could have been ejected being left, right, straight up, down, or any variation of this would have yielded the ejected cartridge casings on the West side of the column, and in positions inconsistent with the actual locations where they were found on Officer Moy's crime scene sketch. This finding alone renders this hypothesis "impossible", without even consideration of the trajectory of the entry and exit wounds into Mr. Russ.

Mr. Yarde moving from his last known position, and with a firearm 36 inches from Mr. Russ, being able to shoot Mr. Russ three times in under a second;

Introduction

Since my analysis has necessarily excluded Mr. Yarde from being the shooter from his last known position, it is necessary for me to move onto the second part of this analysis – determining whether he could move from his last known position, to some other, and inflict the fatal shot. When addressing the answer to this second question, while I am working with unknowns with respect to exact locations at the time of the fatal shot, I still have guidance with respect to the exclusion of certain locations and limitations with respect to time. For example, we know that the shooter had to have been East of the Column, and the muzzle of any weapon which he held to be within 36 inches of Mr. Russ. Furthermore, and as an additional control factor, the shooting of at least the first three shots had to have occurred in under one second. Thus, and in a more precise manner, the second question requires the analysis of whether (and in terms of time) Yarde could have moved to a location with his weapon at least 36 inches away from Mr. Russ, (and in under one second), where he could have been the shooter.

- a. At the time of the shooting, while the shooter would be "East" of the column, Mr. Russ' position would still be "West" of the column.**

As aforementioned, due to the mobility of the human body and the numerous ways it can articulate and rotate, the various positions that Mr. Russ could have been at the time the fatal shot

was inflicted would be approaching the infinite. Furthermore, entry and exit wounds only become helpful if the body becomes stationary or when contrasting to very specific facts can valid conclusions as to the location of the Mr. Russ' body. However, and while I am not able to state the exact positioning of Mr. Russ' body at the time he was shot, I can render an opinion regarding the general placement of his body in relationship to the column. The crime scene diagram indicates the victim's head was found approximately 6 feet 7 inches to the "West" of the column, and where he is approximately 5 foot 7 inches, and where his body was not fully extended. Further, Dr. Laposata rendered an opinion which indicates that when the fatal blow was administered, it would have caused Mr. Russ to be immediately incapacitated and fall. Based upon the location of Mr. Russ at rest, with his head approximately six feet seven inches to the "West" of the column. along with Dr. Laposata's opinion stating that he fell immediately upon being shot, renders me confident in my opinion that Mr. Russ was positioned to the West of the column when he was shot.

Further, not only would Mr. Russ be positioned West of the column, but, and as already explained, Mr. Russ' assailant would have necessarily been "East" of the column at the time the first three rounds were fired. Since Mr. Yarde was also "West" of the column at his last known position, for him to be the shooter, he would therefore be required to position himself: a) "East" of the column; and then b) move further in a northern and easternly direction, so as to have visual access to Mr. Russ and shoot him while Mr. Russ was positioned "West" of the column (See exhibit 9 - diagram depicting path of travel).²

² *Exhibit 9* is a sketch drawing for demonstrative purposes. It does not purport to isolate the exact location of the shooter. However, what exhibit 9 does is reveal the difficulty a person would have shooting Mr. Russ from Mr. Yarde's last known position on the "West" side of the column, having to therefore move to a position East and North from that last known position, and position oneself at an angle, where visual access is once again obtained of Mr. Russ.

- b. **Mr. Yarde must move to a position North and East of his last known position, with being within a 36 inch radius of Mr. Russ, as he is standing West of the Column, in order for him to be the shooter.**

As previously opined, Mr. Yarde could NOT have been the shooter of Mr. Russ from his last known position – which was West of the column. By way of deduction, if the shooter could not have been West of the column, I opine that the only potential location for the shooter would be to the East side of the column, and within a 36 inch radius of Mr. Russ as he is standing to the West side of the column. The only question to further answer is whether Mr. Yarde could have reached such a location, and fired the three shots in under one second.

(i) On Site Documentation

In order to answer this question, on November 16th, 2020 I visited the scene to view, measure, and photographically document the area. The column appeared unaltered and was measured to confirm its dimensions. In addition, I obtained measurements to determine the shortest distance the muzzle of the firearm would have to travel from the Southern end of the column to intersect a target which was one foot from the Northern end of the column. The one foot starting point from the Northern end of the column was conservatively designated since the precise location of Mr. Russ' head at the time it was impacted by the projectile is unknown. This measurement is conservative due to the fact that the video appears to illustrate a smaller space between the column and Mr. Russ. A one foot starting point exposes more of a target area which results in a reduction of both time and distance required. The closer Mr. Russ was to the column, the more obstructed he would become requiring an increase in distance and time to produce the shots.

(ii) Recreation from on-site documentation

In order to determine the feasibility of Mr. Yarde moving (north and east) to a location

within 36 inches of Mr. Russ and firing three shots within one second time frame, I conducted testing using the measurements obtained at the scene. A sixty-inch-long barrier eight inches thick was constructed and a target was positioned twelve inches from the end of the barrier to the closest edge of the head shape of the target. The image depicting Mr. Russ' last known position before the shooting shows the front of his left foot on the concrete expansion joint which runs perpendicular to the corner of the West side of the column. There is separation of between Mr. Russ' forehead and the North East side of the column consistent with width of his left foot or less.

The point of intersection of the location of the potential muzzle at 36 inches with the one-foot measurement yielded a distance of 40 inches to the Southern end of the column and 12 inches off of east side of the column in order to have the target exposed. The full width of the cardboard target (17.72") was exposed, this is wider than the thickness of a human torso. The additional width of target utilized during testing exposes more available target area reducing target acquisition time and reduces the total time of placing three shots on target. The total height of the target was five feet seven inches. A large stake was placed in the ground at 36" to ensure the muzzle to target distance was consistent with the stippling documented on Mr. Russ' body.

The testing was conducted with a shot timer that produces an audible tone to start and records the total time stopping at the last audible report of the firearm. The timer also records the time in between shots referred to as "split times". The documentation and video in this matter did not provide any information related to how Mr. Yarde is alleged to have been carrying a firearm. The video frame preceding the shooting shows Mr. Yarde's left hand exposed and does not depict his right hand. Since this information is unknown the testing was conducted with the firearm already in hand and fully exposed to reduce the total time required to produce three

shots. The act of pulling a firearm from a concealed location would be expected to require additional time in the order of a minimum of a half to a full second or more. The testing was conducted using both a two-hand and single handed hold on the firearm. The starting point was always a single handed hold on the firearm.

The firearm was pointed at the target "point shooting" during discharge, as opposed to using the sights of the firearm "sighted shooting". This approach was taken also to reduce the total time required to fire the three shots. The targets were addressed from the bottom to the top, consistent with the way a semi-automatic firearm recoils which also reduces time. All testing was conducted with a 9 mm caliber semi-automatic pistol.

(iii) Results

Considering Mr. Russ's position at the time before he was shot, Mr. Spencer has asked me to test the feasibility of the muzzle of a gun held by Mr. Yarde moving to a location on the East side of the column and within 36 inches of Mr. Russ, taking into account a one second differential from Mr. Yarde's last known location, which was five feet of the column's most Southwestern point, and where Mr. Russ was located on the North West side of the column. *See exhibit 2.*

A total of three attempts were made to produce three shots on target at the known dimensions from the crime scene. Two attempts were with two hands on the firearm while firing and one attempt firing one handed. The times for two handed grip on the firearm were 1.76 and 1.72 seconds. The time for single handed firing was 1.78 seconds. It is my opinion based upon these results that it would be virtually impossible for a person standing in Mr. Yarde's last known position could: a) travel to a location where Mr. Russ would be visible and within 36 inches; b)

raise a 9 mm caliber semi-automatic pistol; and c) fire three rounds in under one second – which is what would have been necessary as directed by the evidence I have been presented with.

(iv) The presence of persons, east of the barrier, but with unknown location and distance to Mr. Russ.

The one factor that could not be accounted for was the presence of a third individual in the area of the North East end of the column. I am aware that trial counsel for Mr. Yarde (Attorney Scully) alleged at trial that Mr. Collins was the shooter and the individual was at the North East end of the column. The identity of the person occupying this space has no relevance from a scientific stand point. All that is known is that in the image isolated by the video expert Mr. Garneau, a person's foot is identified. The person's specific location is unknown and therefore cannot be accounted for in this testing. All that can be stated is that the presence of the individual could have obscured, totally occluded Mr. Russ as a target or present no obstacle at all. If the individual was in a position to obscure Mr. Russ as a target, however, this would have added to the total time required to acquire Mr. Russ as a target by some other person moving from Mr. Yarde's last known position. Since the documentation and record lack specificity on this issue the testing could not address this factor.

All of that said, however, I would opine that if there was a person (Collins or otherwise) already stationed in a position North and East from Mr. Yarde's last known position, and particularly if this person had a gun, and was drawn at the time the camera panned away, it is a high probability (if not a certainty) that this person would have had enough time to fire three rounds into Mr. Russ, in under one second.

In order to reach this conclusion – the feasibility of firing three shots from a stationary position in a one second time frame from a position closer to the North and West end where Mr. Russ was last depicted in the video before the camera panned away was tested. The same barrier

dimensions were maintained as in the first test. The only change was the stake indicating the 36" muzzle to target distance was moved to in front of the target to maintain this distance consistent with the stippling found on Mr. Russ. The starting position of the firearm was exposed and pointed towards the ground and in a two hand hold for stability and reduced time.

The testing yielded times all under a second. My times were .82 and .93 of a second. My associate a Master level shooter in scenario based action shooting competitions and firearms instructor, achieved times of .85 and .88 of a second.

Conclusion 1

Relying upon the crime scene diagrams, photographic /video documentation and my own measurements obtained at the scene; Mr. Yarde could NOT have been the shooter from his last known position and Mr. Russ' last known position – West of the column, for the reasons stated.

Conclusion 2

Relying upon the crime scene diagrams, photographic documentation, video documentation and my own measurements obtained at the scene, Mr. Yarde (from his last known position) would have had to move in a diagonal direction (North and East) to a location where the muzzle of a firearm would be within 36 inches of Mr. Russ. Based upon the foregoing facts, information and testing, and my firearms and forensic training and experience; I opine to a reasonable degree of scientific certainty that in a one second time frame, Mr. Yarde could NOT have moved to where the muzzle was within 36 inches of Mr. Russ, and discharged a 9mm semi-automatic pistol three times impacting Mr. Russ.

Conclusion 3

A stationary shooter with a firearm exposed, standing in front of a target with 36 inches of

separation between the muzzle of the firearm and the target, CAN discharge three shots from a 9mm semi-automatic pistol in less than one second.

Review and Analysis of Firearms Examination Evidence

Cartridge Casings Recovered

Six cartridge cases were recovered at the scene. All of the cartridge cases were 9 mm in caliber but were from a variety of manufacturers. Detective Tyrone Camper testified that the cartridge cases were from 4 different manufacturers, Winchester, Speer, American, and Master. Detective Camper further testified that all six cartridge cases were fired from the same firearm.

Projectiles and Fragments Recovered

The discovery and trial testimony indicates that no intact or full projectiles were recovered only two fragments from Mr. Russ' right calf. Detective Camper testified that these fragments were not suitable for comparison purposes.

Further Testimony of Detective Tyrone Camper

Detective Camper, based upon my knowledge of his work, is a very knowledgeable and well respected firearms examiner. His testimony was rather forthright – which is illustrated by his response to the following question:

Q. “Now if you have a live round or piece of ammunition that has not been fired in a weapon, are you able to do much examination with that”

A. “It all depends on what the request is for the examination of that item. If the item is believed to have been cycled through a weapon I could examine the live cartridge to see if it had cycling marks from a particular weapon” .

See exhibit 10 - excerpt from Detective Tyrone Camper's trial testimony.

Detective Camper further testified that he did not conduct any comparison examinations of the live ammunition from Mr. Collins' home.

Potential Firearms Analysis Examinations

A. Cycling Mark Examination

The six recovered cartridge cases recovered at the scene should have been examined to reveal several types of potentially relevant information. The expended cartridge cases from the scene should have been examined and compared to the recovered unfired ammunition from Mr. Collins' home at 3 Oakhurst street. The type of comparative examination outlined in Detective Camper's testimony regarding "cycling marks", could have yielded evidence identifying this ammunition to the same firearm that produced the recovered cartridge cases from the scene.

There are several types of tool marks and individual characteristics potentially present on the live ammunition and the six recovered cartridge cases from 1050 Tremont street. The live ammunition and expended cartridge cases should have been examined for extractor marks, ejector marks, ejection port marks and magazine marks produced by cycling through the magazine.

Bunter Mark Examination

An additional type of examination to identifying the seized live ammunition from Mr. Collins' home and the recovered expended cartridge case from Tremont street as coming from a common source is a microscopic examination for "Bunter" marks. A bunter is a tool that impresses the information, caliber and manufacturer on the headstamp area of the cartridge case. Due to the wear created during the manufacturing and stamping of the cartridge case individual characteristics can be imparted to the cartridge case. Examination of expended cartridge cases and live ammunition is an accepted practice within the firearms examination field. It is usually

of limited relevance due to the large number of cartridge cases that can be produced by a single bunter. In this case it could have exponentially greater importance since there are four different manufacturers. If all four brands of ammunition exhibited individual characteristics from the Bunter marks in common between the expended cartridge cases recovered at Tremont street and the seized ammunition from Mr. Collins' home it would have substantial relevance to establishing a common source (*See Exhibit 10*).

N.I.B.I.N Examination

The documents and trial transcripts do not indicate if the cartridge cases recovered at Tremont street were entered into the National Integrated Ballistic Information Network, "N.I.B.I.N." Entry of the information from the microscopic examination of the six cartridge cases could have yielded connections to other incidents and individuals. Since I was not provided a copy of the Boston Police Firearms Analysis unit's file, I cannot confirm if this information was submitted to N.I.B.I.N., and if any evidence from any other incident was determined to be from the same firearm used in this case.

Conclusions Regarding Firearms Examinations

It is apparent from the trial transcripts and information provided by attorney Spencer that Mr. Yarde's trial counsel was alleging that Mr. Collins was the shooter in this case. Based upon my training and experience in the field of firearms examination I opine that examinations for cycling marks, bunter marks and submission of information to the N.I.B.I.N. system should have been conducted to corroborate defense counsel's assertion that the perpetrator was Mr. Collins.

Respectfully Submitted on December 3rd, 2020.

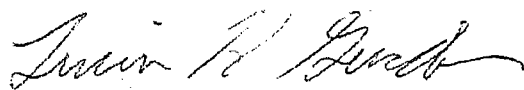
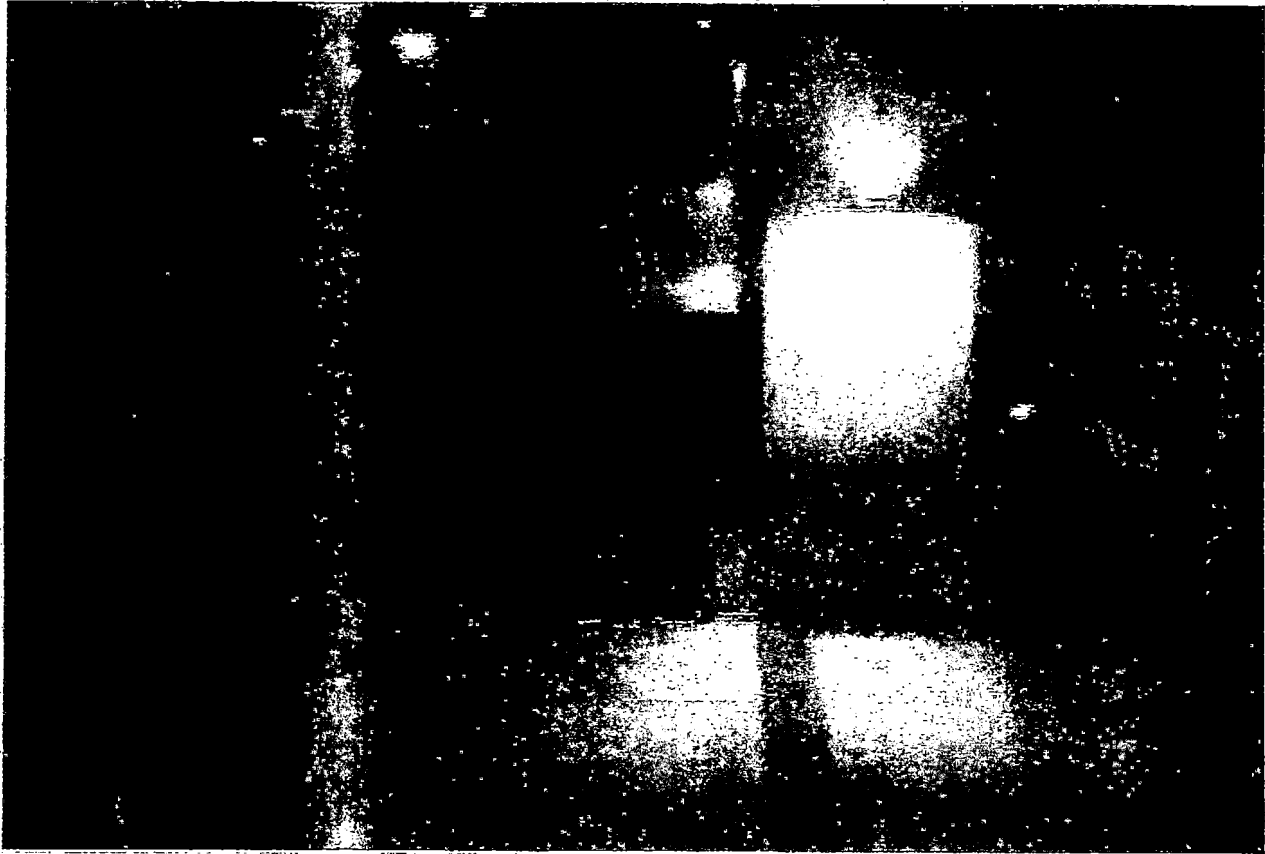


EXHIBIT 1



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Control



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Option

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TREMBANT ST
4

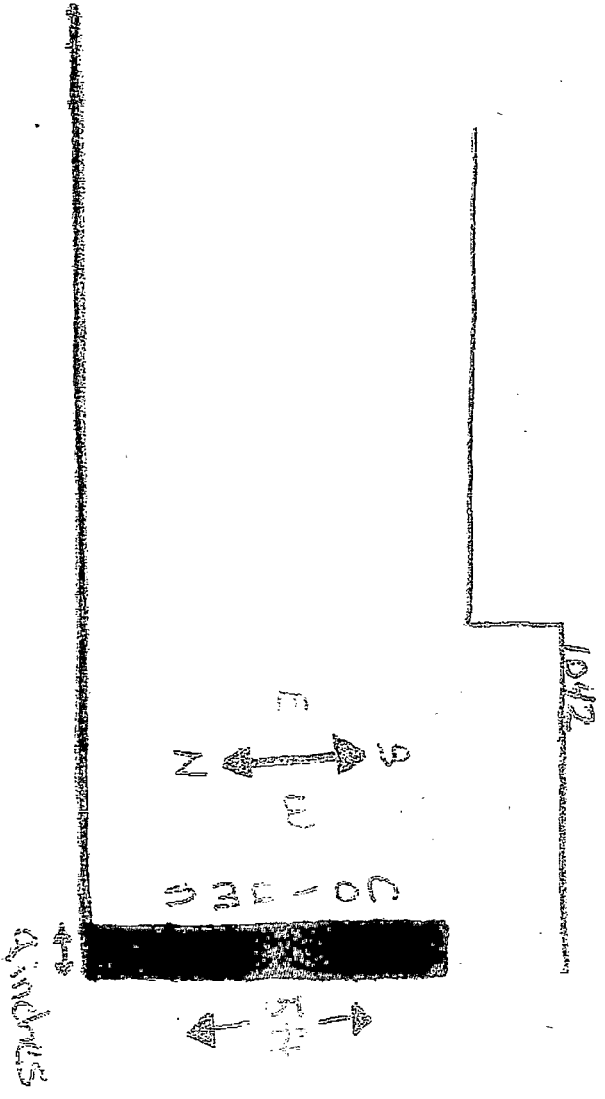
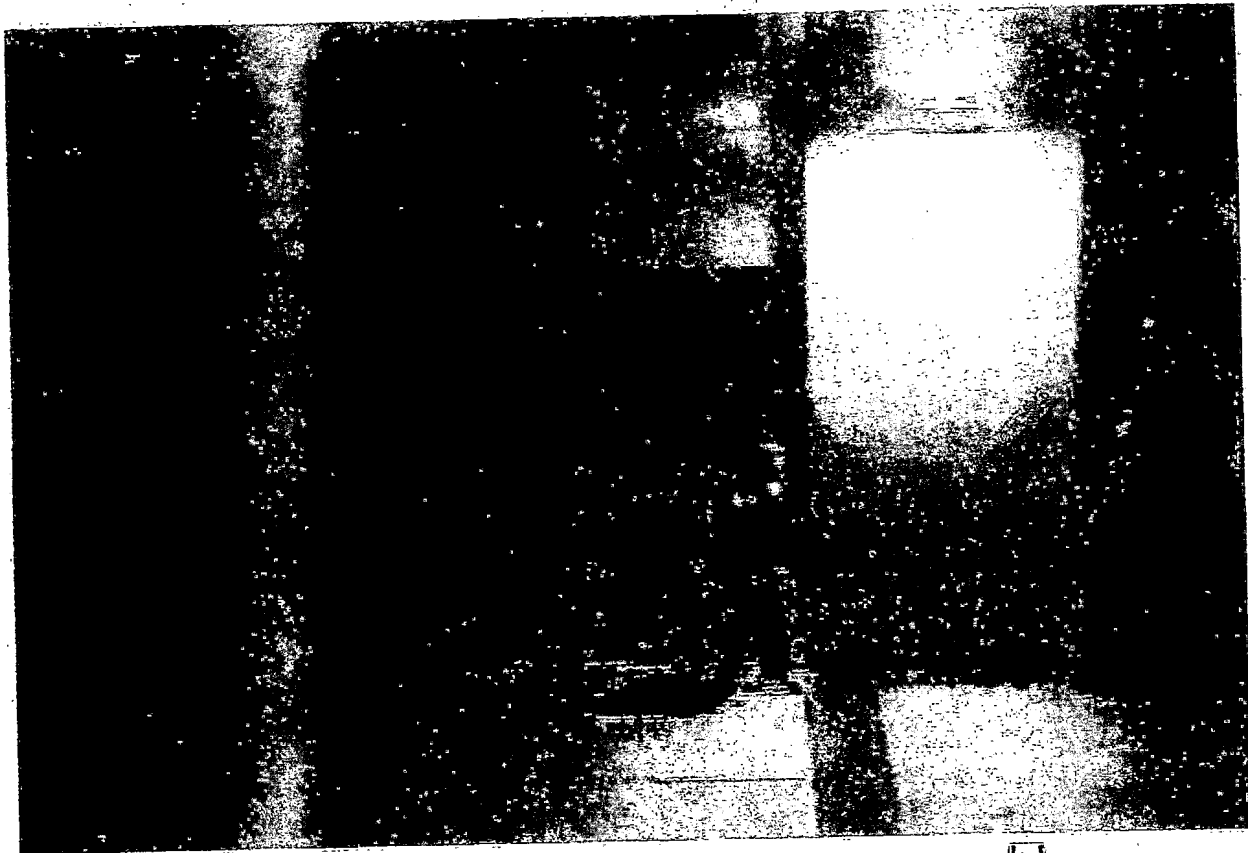


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EXHIBIT 3



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EXHIBIT 4

(12)

CC# 120 679 509

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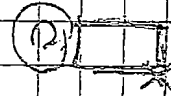
Location: 1050 TREMONT ST.

Event: PERSON SHOT

Page: 1 of 1

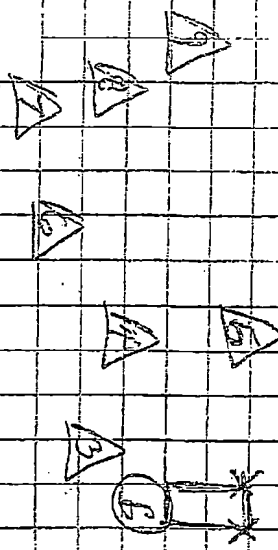
Prepared by: MOI

X = spot where measurements began



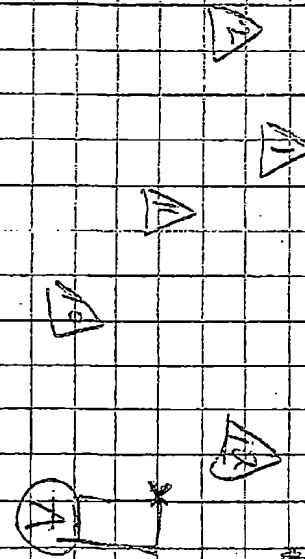
ROUGH SKETCH NOT TO SCALE

	CONES A	B
1	35'7"	6'7"
2	40'7"	4'3"
11	38'8"	10'4"
10	24'8"	19'5"
12	9'3"	40'4"



ROCKE TOWER SIGN

	CONES B	C
3	10'8"	45'9"
4	10'6"	42'7"
5	10'1"	36'11"
6	11'1"	40'5"
7	22'5"	33'3"
8	18'1"	30'11"
9	19'4"	28'1"



A to B = 41'9"
B to C = 44'0"

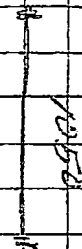


EXHIBIT 5

The Production and Persistence of Gunpowder Tattooing and Stippling of Living Human Skin

By: Lucien C. Haag Forensic Science Services, Inc. Carefree, AZ; Michael G. Haag Albuquerque Police Crime Laboratory Albuquerque, NM; Aaron Brudenell Arizona Department of Public Safety Laboratory Tucson, AZ

Keywords: distance determination, embedded powder, gunpowder, gunshot residue, persistence, powder particles, powder stippling, powder tattooing, propellants

ABSTRACT

Powder tattooing and stippling of living human skin was studied over periods of hours and days until the minute injuries were no longer obvious. The evidence of injury required as little as 4 days to as much as 3 weeks to no longer be noticeable in the studies presented here. Even after the healing process was complete, close inspection of the affected area revealed recognizable powder particles embedded in the skin. These particles ultimately disappeared over time intervals of 2 to 3 weeks to as much as 6 weeks.

These tests provide, for the first time, some reasonable expectations for the time available to recognize this type of physical evidence following a shooting incident in which a surviving subject sustains powder tattooing and/or stippling of the skin from a close proximity firearm discharge. Such evidence can have reconstructive value as well as associate the subject with a recent shooting incident.

Introduction

It is well known that unconsumed and partially consumed propellant particles emerge from the muzzles of many firearms with velocities comparable to the projectile itself. These particles spread out with distance in a conical distribution and lose velocity very rapidly. [See Figure 1] Gunshot victims within a few feet of such discharges typically sustain minute, punctate injuries to the skin when struck by these energetic particles. Depending on the physical properties (size, weight, density) and impact velocity, these particles may become embedded in the skin at maximum or produce small hemorrhages of the underlying capillaries at the impact sites at the minimum. These authors therefore make a distinction between these two types of injuries applying the term *tattooing* to the former and *stippling* to the latter.

While the mechanism of these firearm-related injuries is well understood and their reconstructive value routinely employed in distance determinations, there is *no* reliable, documented literature that provides information on the changes and persistence of powder stippling and tattooing with the passage of time in living individuals. How does one, anyone- detective, doctor, medical examiner, firearms examiner- assess the age of such injuries on a suspect or victim? How can the veracity of the subject's explanation for such injuries be tested? When can investigators stop looking for such evidence with the passage of time after a shooting incident in which an actor or possible surviving victim is likely to have received such injuries?

Procedure

There is no suitable simulant, including cadaver skin, that will faithfully mimic the vital response of living human skin to the minor injuries produced by powder particles expelled by a firearm during the discharge process. Yet the questions of persistence of powder tattooing and stippling and the changes in appearance of such injuries with the passage of time are important ones that deserve answers. The only way to derive answers to these questions is to use living human skin. Multiple obstacles stand in the way of government crime laboratories, medical examiners offices and universities hosting forensic or medical departments who contemplate carrying out such research. Sometimes the opportunity to address and answer the questions posed above arises out of some embarrassing misadventure during the test-firing of a gun such as having ones hand, arm, or fingers too close to the cylinder gap of a revolver at the moment of discharge. Figure 2 illustrates this alternate source of powder tattooing and stippling. This source is an important one to keep in mind in any shooting case where a revolver is known or believed to have been involved. For example, an improper hold by the shooter can result in the involvement of one or more fingers or even the wrist area at the moment of discharge. Likewise, the involvement of another individual trying to grab or deflect a revolver at the moment of discharge stands to receive tattooing or stippling injuries to that area of their hand or arm immediately adjacent to the cylinder gap of a revolver. Short of some misadventure during the otherwise normal test firing of a revolver and in view of these recurring and important questions, there are a few of us that simply subscribe to that statement probably taken from an old John Wayne western- A

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man's gotta do what a man's gotta do and use himself as a test subject. This, of course, will (and has) produce dismay and criticism from some, but the authors would venture to say that these same critics are secretly pleased to have, and quick to use the information derived from this drastic method. This method involved the secure mounting of a 9mm handgun in a Ransom Rest[®], discharging it multiple times into a witness panel located a few feet down range so as to verify that the flight path of the projectile was reproducible, constant and known for a particular sight picture and positioning of the Ransom Rest. The inside surface of the volunteer's bare forearm (co-author M. Haag) was positioned at a right angle to, and just below the future flight path of the bullet at three standoff distances (2-feet, 3-feet and 4-feet) previously demonstrated to produce powder patterns in a variety of non-living skin simulants used by firearms examiners. Figure 3a and 3b show the experimental design employed by Michael Haag and Gene Wolberg in 1999 to compare powder stippling by two forms of smokeless pistol propellants (disk-flake and flattened ball) in living skin vs. a variety of skin simulants employed by forensic firearms examiners. This work was ultimately presented at the 1999 Association of Firearm and Toolmark Examiner's (AFTE) Training Seminar as the *Scientific Examination and Comparison of Skin Simulants for Distance Determinations* and subsequently published in the AFTE Journal [Ref. 1]. It should be pointed out that the physical forms and combustion characteristics of modern propellants used in centerfire handgun ammunition vary considerably, and along with nature of the firearm (revolver vs. semi-auto pistol, long barrel vs. short barrel) will play a significant role in the distance at which propellant-induced injuries to the skin occur. Likewise, these same parameters can affect the density of any stippling tattooing pattern and how deeply any powder particles might embed themselves in human skin. As a general statement, the disk-flake forms of pistol powders tend to burn more efficiently and therefore produce fewer expelled particles than the same gun-cartridge ammunition combination firing a cartridge loaded with a ball powder. Additionally, the generally larger disk-flake powder particles, because of their increased surface area, are less able to penetrate skin, unless such particles strike the skin edgewise. Spherical ball and flattened ball particles tend to have better skin penetrating capabilities than disk-flake powders. These differences were the very reason for the Haag-Wolberg experimental design. The two propellants used in their experiment are shown in Figure 4. A comparable experimental design was subsequently used by co-author Lucien Haag for the dual purposes of evaluating a particular witness panel material (BenchKote[®]) for muzzle-to-victim distance determination as well as the persistence of powder stippling in living skin.

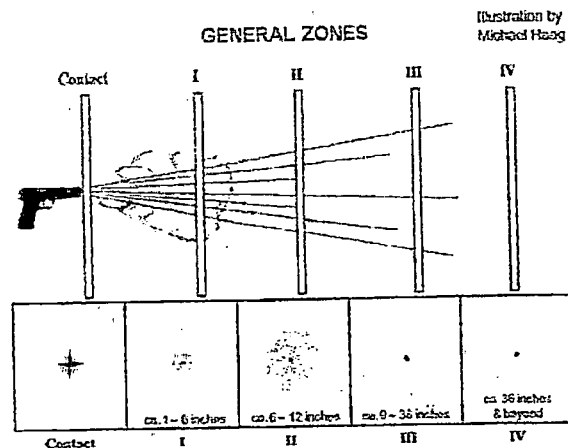


Figure 1: General zones of GSR deposition

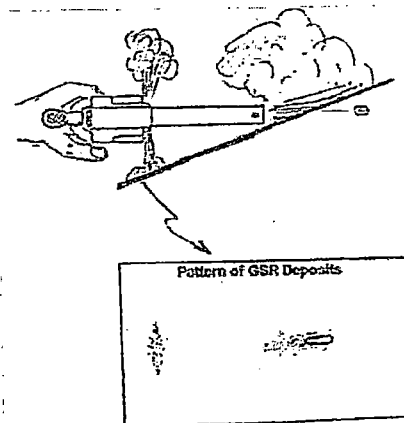


Figure 2: Common pattern of GSR from revolvers



Figure 3a: Haag-Wolberg experimental design

Results

Controlled Experiment: M. Haag-G. Wolberg Design

The purpose of the Haag-Wolberg study was not persistence of powder-induced injuries to the skin; rather it was to compare and evaluate the substantial variety of skin simulants used by forensic scientists to estimate range of fire from stippling patterns photographed and measured by medical examiners during the autopsy of gunshot victims. Nonetheless, it is the general recollection of co-author M. Haag that the visible evidence of the stippling of his 26 year old forearm disappeared after about 25 days. The patterns created at greater distance, naturally, contained fewer particles that were embedded in the skin as a consequence of their reduced velocities and wider pattern. These greater distance patterns were the first to disappear, followed by the nearer distance patterns.

Controlled Experiment: L. Haag

Co-author L. Haag carried out a similar experiment to the Haag-Wolberg design in a fatal shooting case where powder stippling and tattooing of a victim was of central importance. The responsible firearm was a 9mm Glock pistol and 124-gr. Speer *Gold Dot* ammunition loaded with a flattened ball powder. Although muzzle-to-victim distance was the critical issue in the case, the appearance and persistence of the unconsumed powder particle injuries in living skin were documented for three days. This experiment differed from the Haag-Wolberg in several respects:

The ammunition in the 1999 Haag-Wolberg experiment consisted of hand-loaded cartridges that were designed to produce considerable unburned powder [Sec Ref. 3], whereas the Speer *Gold Dot* cartridges in this experiment were much more efficient, producing much fewer partially burned and unburned powder particles. The standoff distance was also greatly reduced to 16-inches muzzle-to-bare, living skin of co-author Haag's wrist area. Figure 5 shows the 2 minute aftermath of a shot from a Model 17 Glock pistol secured in a Ransom Rest. Figure 6 provides a close up view of the affected area of the wrist after 5 minutes. Figure 7 is a concurrent view taken through a stereo-microscope revealing several embedded particles of unburned propellant. Figure 8 illustrates the importance of lighting in seeing the minute injuries and embedded powder particles 24 hours after the shot. Figure 9 reveals that after 3 days in this test it was difficult to see and recognize the stippling and tattooing consequences of this shot. Figure 10 is the final figure from this test and shows a view through the stereo-microscope of two embedded powder particles at the 3-day mark. All of the embedded powder particles in this test had worked their way

1999 Experimental Design

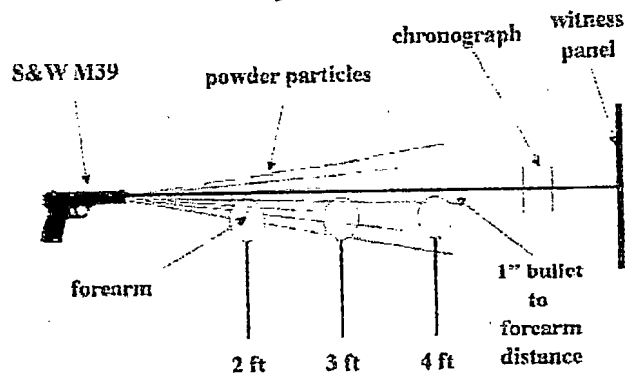


Figure 3b: Haag-Wolberg experimental design

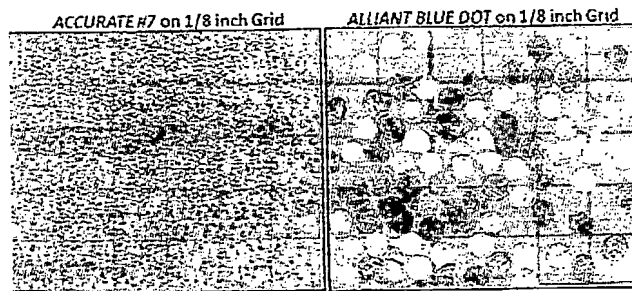


Figure 4: Propellants used in the Haag-Wolberg tests

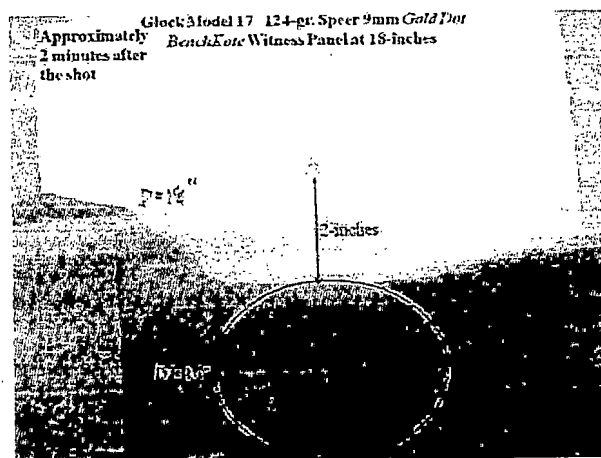


Figure 5: L. Haag experimental design

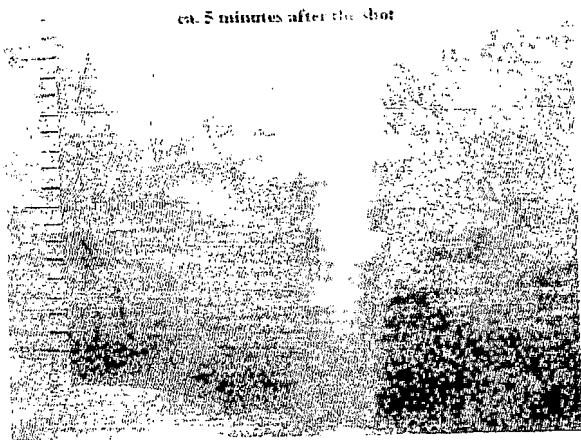


Figure 6: L. Haag stippling test

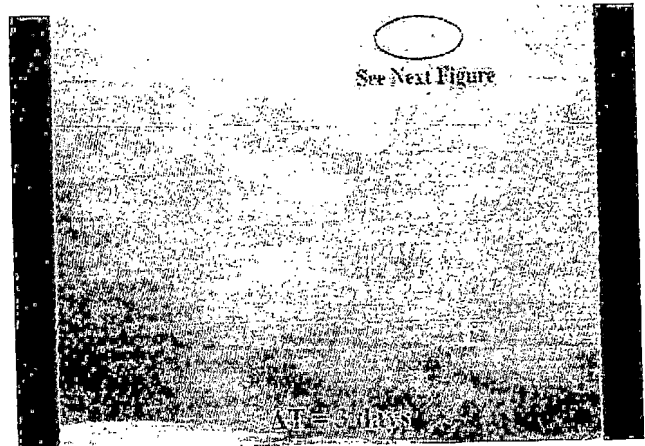


Figure 9: L. Haag stippling test

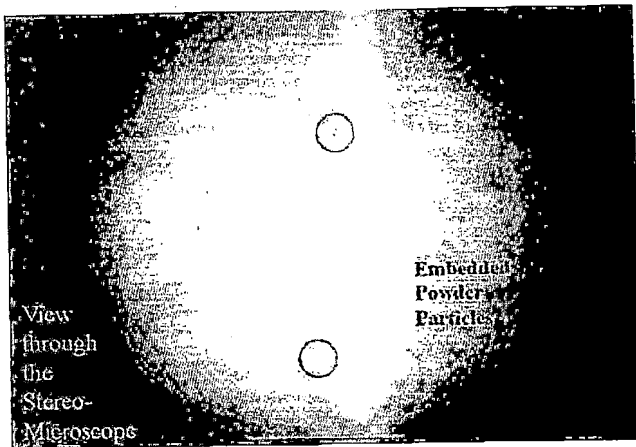


Figure 7: L. Haag stippling test

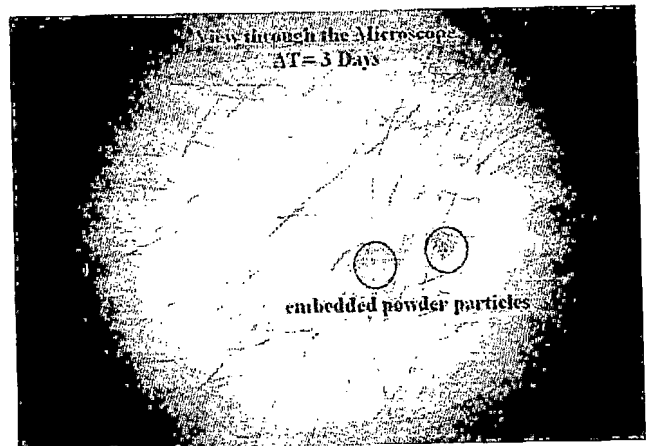


Figure 10: Embedded powder particles viewed through microscope after 3 days

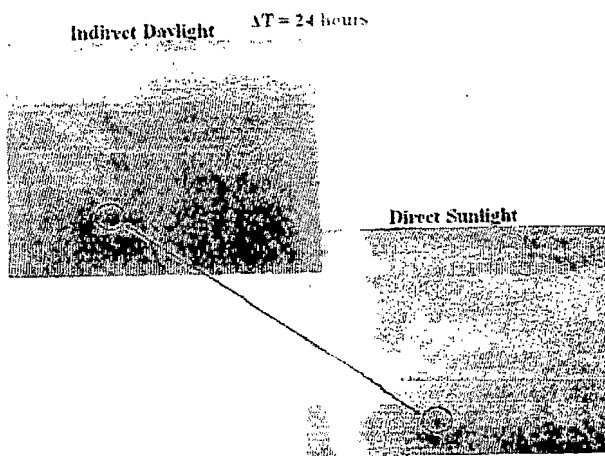


Figure 8: L. Haag stippling test - lighting effects

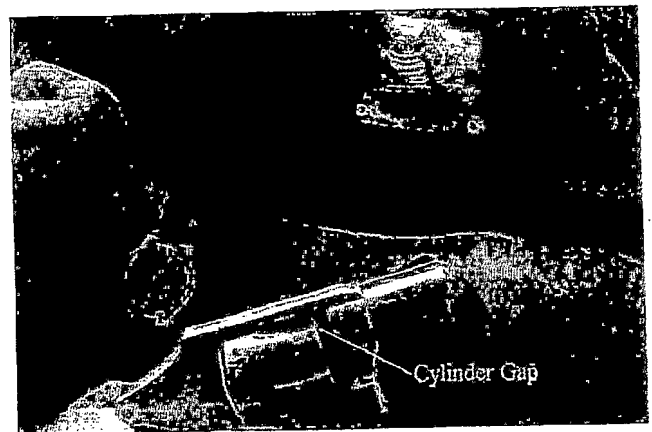


Figure 11: Reconstructed event

out of the skin within a week.

Unintentional Tattooing/Stippling of the Forearm

The powder injuries in this instance were the result of a training exercise in which a Smith & Wesson Model 632 revolver chambered for the .32 H&R Magnum cartridge was located too close to the shooter's unprotected forearm at the moment of discharge. The subject was a white male, age approximately 42 years. **Figure 11** provides an approximate reconstruction of the incident by co-author Aaron Brudeneil. **Figure 12** shows the obvious stippling injuries in the subject's left forearm taken 3 hours after the incident. Two of three minor moles in the injury area provided reference points in the subsequent photographs taken at 30 hours, 48 hours, 55 hours, 4 days, 7 days and 14 days after the injury incident. [See **Figure 13** through **Figure 18**] The amber, unconsumed powder particles could be easily dislodged with a scalpel after 7 days and subjected to chemical testing for confirmation as nitrocellulose propellant particles. Their original morphology also remained intact with the passage of time. The presence and identification of embedded powder particles was possible out to 6 weeks in this case if one knew where to look with the assistance of a stereo-microscope set at low power.

Unintentional Tattooing/Stippling of the Fingers

The powder injuries in this instance were the result of an incident similar to the previous example. Co-author L. Haag was carrying out some firing tests with a .454 Casull revolver mounted in a Ransom Rest[®]. [See **Figure 19**] During the discharge of one of the very energetic .454 Casull cartridges, the right index finger and the right middle finger were somehow adjacent to the cylinder gap of this very powerful revolver when this factory cartridge loaded with flattened ball powder was discharged. **Figure 20** shows the immediate effects of this very unpleasant event. The separation distance was estimated to be about 3 to 5-inches. **Figure 21** shows close up views of the injury area after 1, 12, 24 and 48 hours. **Figure 22** covers the period of 3, 4, 5 and 6 days post-injury incident. **Figure 23** compares the appearance of the tattooing/stippling effects at 1 hour, 24 hours, 1 week and 2 weeks. **Figure 24** covers the period of 1 week, 2 weeks, 3 weeks and 4 weeks at which time the injury sites had effectively healed and the embedded powder particles had worked themselves out of the skin. Close inspection of this final figure will reveal whitish impact sites in the fingernail that are still visible after 4 weeks.

Postscript

AFTE member and firearms examiner Richard Ernest provided co-author L. Haag with an image of the accidental stippling of his hand with fine spherical ball powder expelled from the cylinder gap of a 6-inch S&W .357 Magnum revolver and the discharge of a Federal .357 Magnum cartridge loaded with a 158-gr. JHP bullet. This misadventure produced stippling and tattooing that bled for about 30 minutes. According to Mr. Ernest, the injury sites were not well healed until several weeks later. He also reported that he could still see some of the ball powder particles embedded in the back of his hand, 9 years later, and that he removed a particle and had it analyzed with an infrared spectrophotometer producing a recognizable spectrum of nitrocellulose without nitroglycerin detectable. The responsible powder contained nitroglycerin (double based propellant) so it was believed that the nitroglycerin had leached out over the years this particle was in his skin.

Discussion and Summary

These limited results provide forensic pathologists and forensic firearms examiners with some reasonable expectations of the time necessary for the discernible effects of powder tattooing and/or powder stippling in a living individual to heal and become undetectable by normal observation, to include inspection of any suspected injury area with a low powered stereo-microscope. A time interval of approximately 2 weeks is not unreasonable for such injuries and/or embedded powder particles to be observed by a careful examiner familiar with the appearance of such injuries and the special and unique physical characteristics of partially consumed and unconsumed powder particles. Any embedded powder particles will typically have an amber appearance and can be easily removed with the tip of a scalpel and preserved for subsequent testing at the crime laboratory.

Photo-documentation of any suspected powder pattern in a living individual with and without a scale placed in the same plane as the injury area should be carried out. If embedded particles are present, the recovery and retention of a few representative particles is of critical importance not only for confirmation as nitrocellulose particles but also for possible comparison to the morphology and chemistry of the propellant in any ammunition suspected as being involved in the shooting incident.

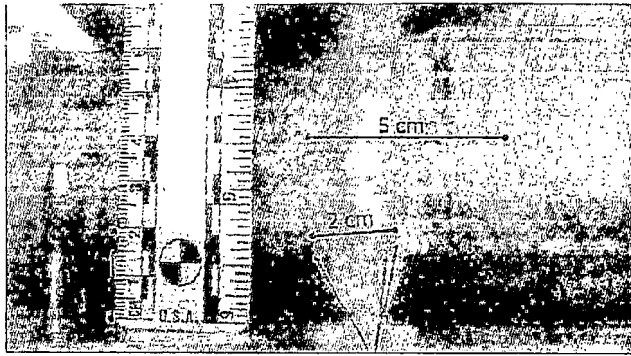
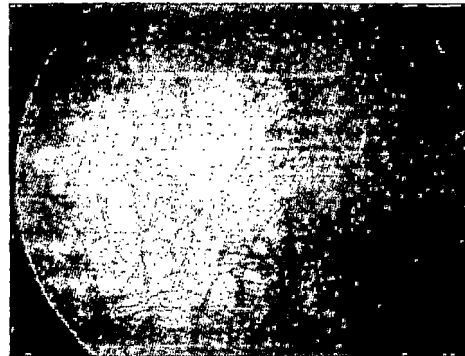


Figure 12: After three hours, post-event



- Particles visible on surface
- Pattern size and shape intact
- Visible redness at majority of impact sites

Figure 15: After 55 hours, post-event (under magnification)

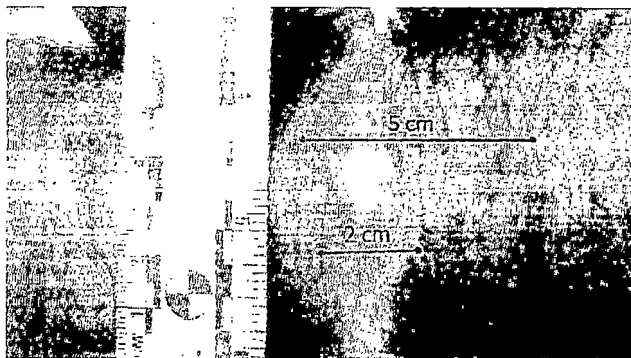


Figure 13: After 30 hours, post-event

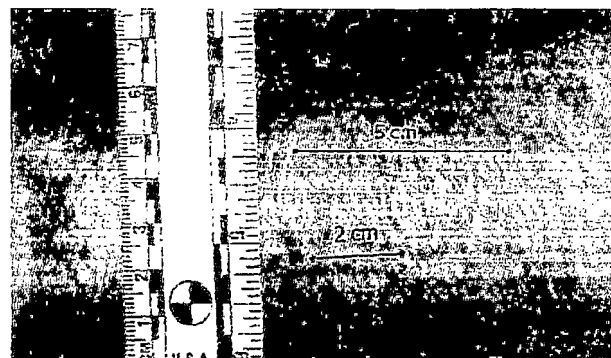


Figure 16: After four days, post-event

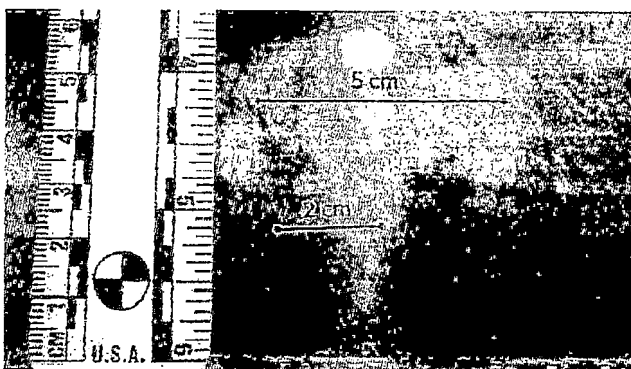
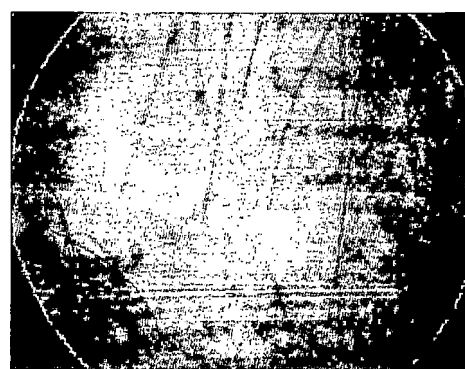


Figure 14: After 48 hours, post-event



- Particles remain visible on the surface
- Pattern size and shape still intact
- No visible redness or "wounding" appearance at impact sites

Figure 17: After four days, post-event (under magnification)

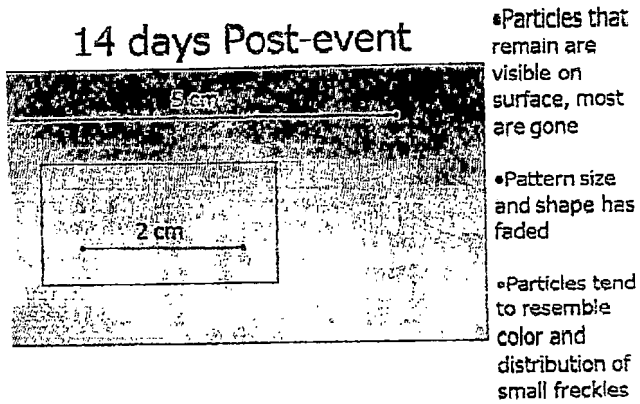


Figure 18: After Fourteen Days, Post-Event

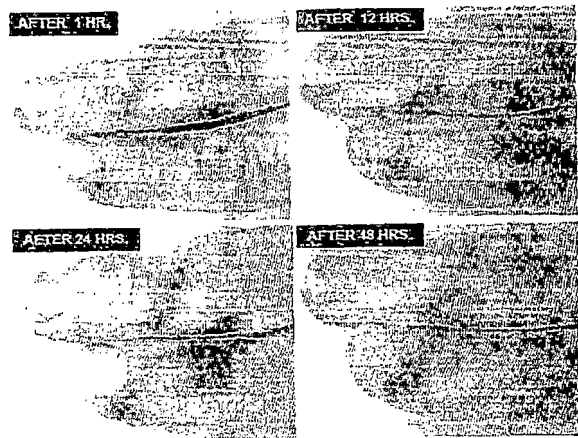


Figure 21: Stippling over time, 1-48 hours

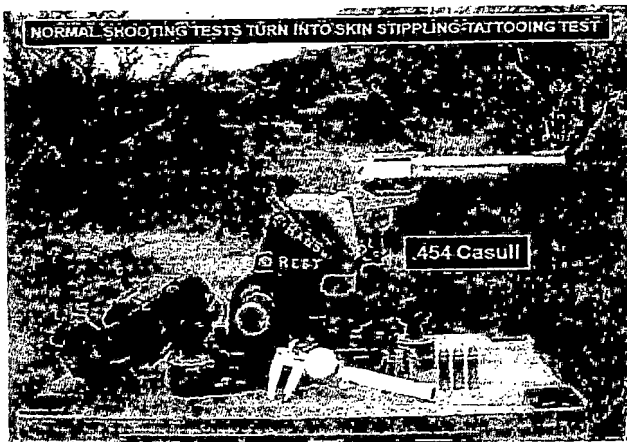


Figure 19: Setup in use during stippling incident

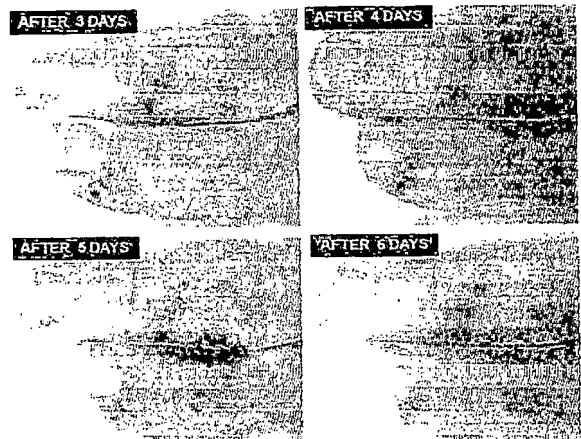


Figure 22: Stippling over time, 3-8 days



Figure 20: Stippling, viewed immediately after incident

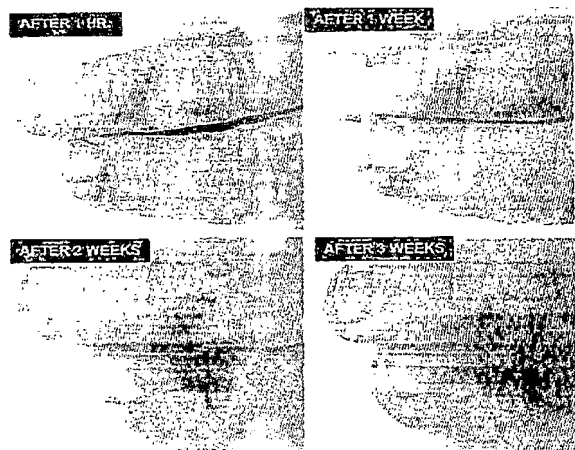


Figure 23: Stippling over time, one hour to three weeks

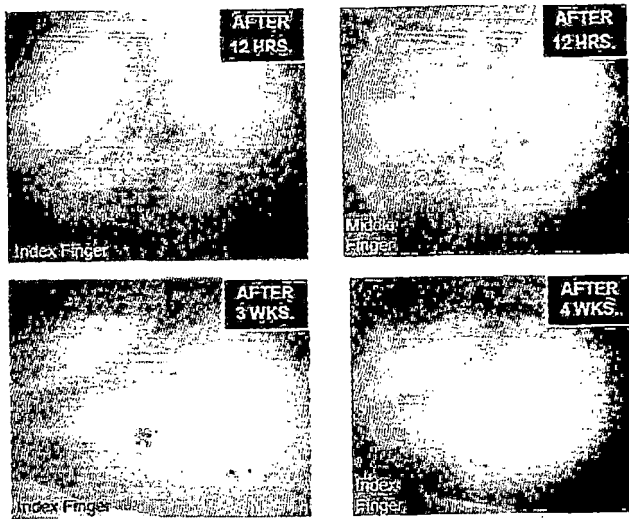


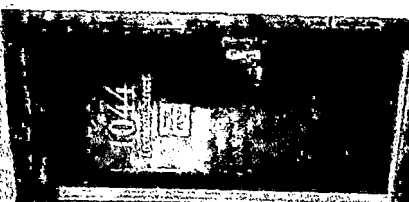
Figure 24: Stippling over time,
12 hours to four weeks

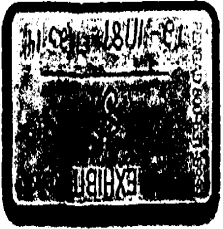
References

- [1] Haag, M.G. and G. Wolberg, "Scientific Examination and Comparison of Skin Simulants for Distance Determinations", *AFTE J.* 32:2 (Spring 2000), pp. 136-142.
- [2] Haag, L.C. and M.G. Haag, "Skin Perforation and Skin Simulants", *AFTE J.* Vol. 34, No. 3 (Summer 2002), pp. 268-286.
- [3] Haag, L.C., "Reference Ammunition for Gunshot Residue Testing", *AFTE J.* Vol. 32, No. 4 (Fall 2000), pp.332-336.
- [4] Di Maio, V.J.M.: *Gunshot Wounds – Practical Aspects of Firearms, Ballistics and Forensic Techniques*, Elsevier Science Publishing Co., NY 1985, pp.57-59, 111-122.
- [5] Di Maio, V.J.M., Petty, C. and I.C. Stone, "An Experimental Study of Powder Tattooing of the Skin", *JFS.* 21:2. (April 1976) pp. 367-372.
- [6] Personal communication with Richard Ernest Jan. 2010.

EXHIBIT 6

EXHIBIT 9





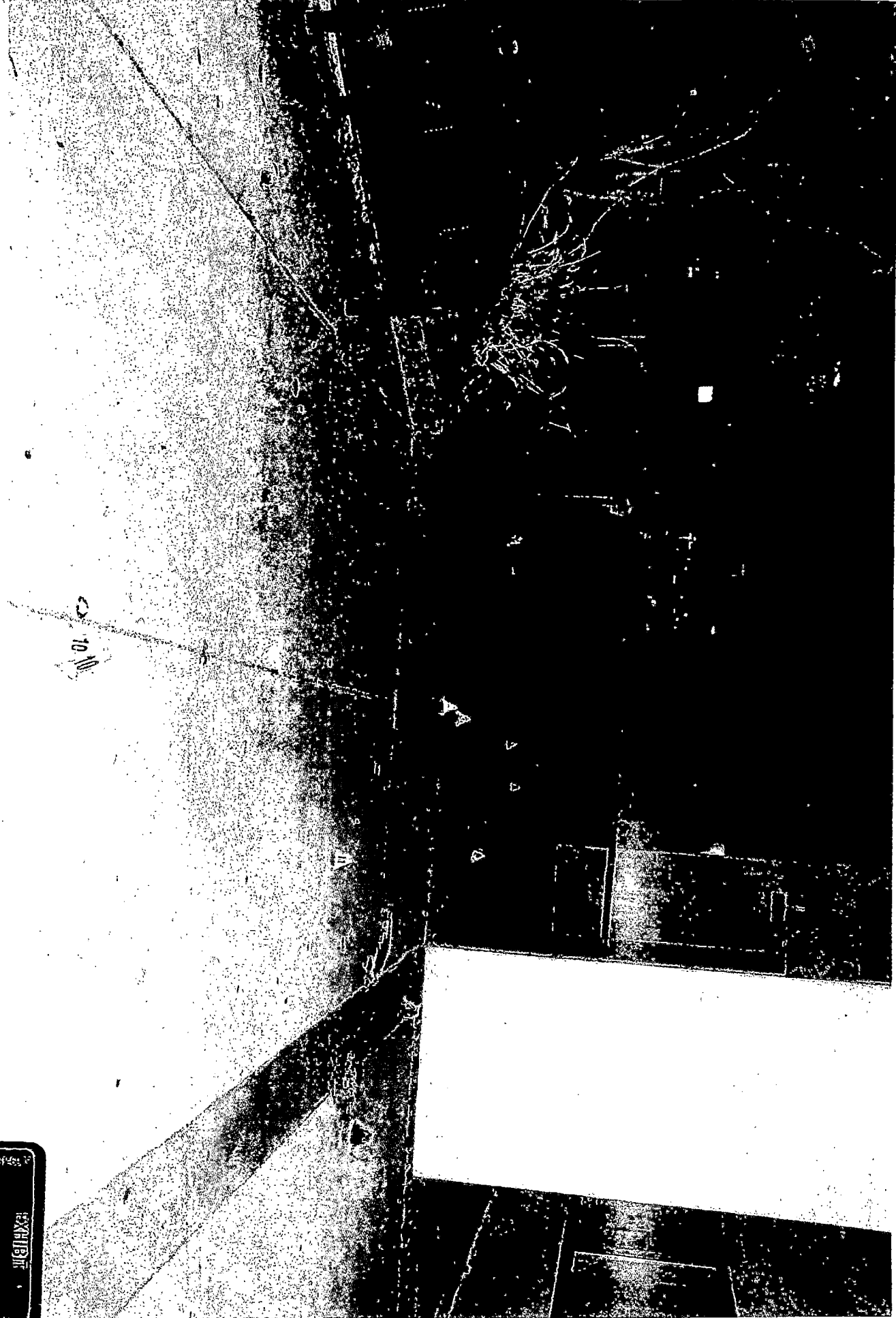


EXHIBIT 7

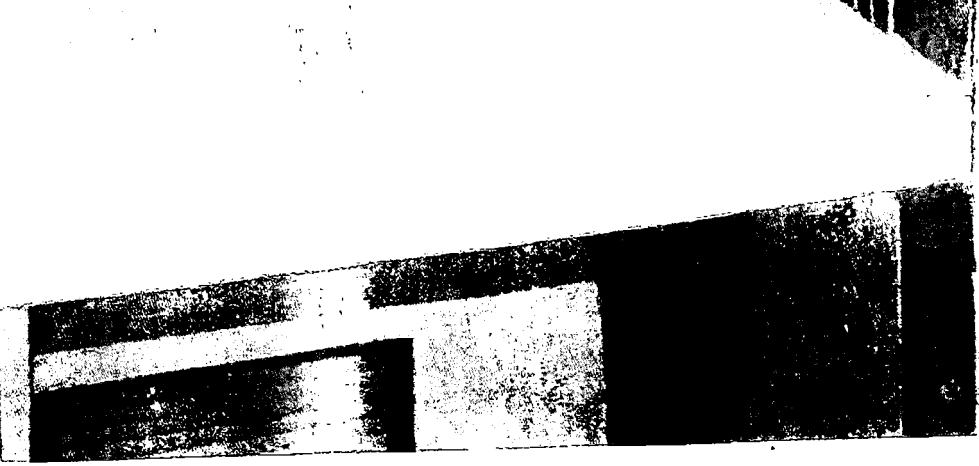
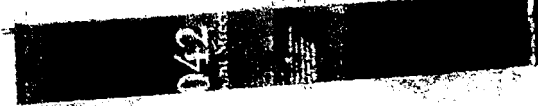
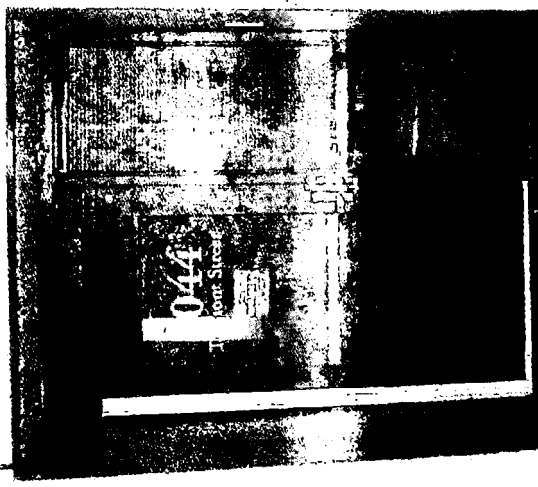
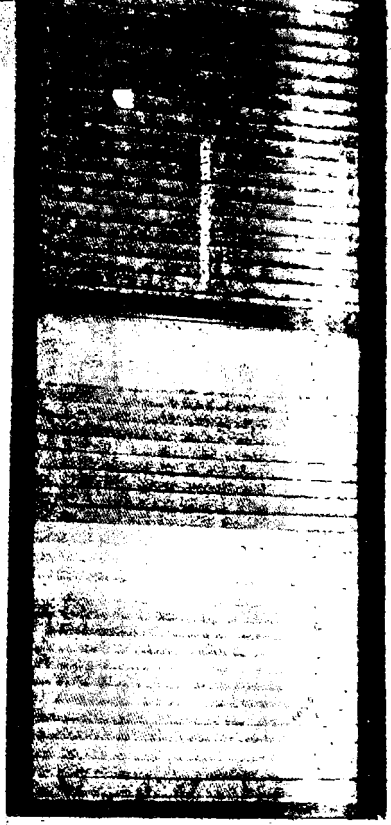
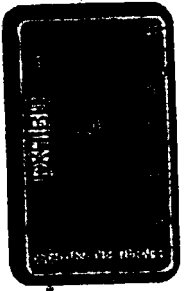


EXHIBIT 8

COMMONWEALTH OF MASSACHUSETTS**OFFICE OF THE CHIEF MEDICAL EXAMINER****REPORT OF AUTOPSY**

CASE No. 2012-13065

I, Kimberley M. Springer, M.D., Medical Examiner, hereby certify that I have performed an autopsy on the body of Deandrea Russ on 10/30/2012 at the Boston Office of the Chief Medical Examiner of the Commonwealth of Massachusetts.

EXTERNAL EXAMINATION:

The body is of a well-developed, well-nourished, average-framed, 5'7 1/2", 172 pound, Black male whose appearance is consistent with the given age of 22 years. The hair is black and curly, up to 1/2". The eyes have brown irides. The conjunctivae are edematous. The ears are unremarkable. The facial bones are stable. The oral cavity has natural teeth in good repair and an atraumatic mucosa. The neck is unremarkable. The chest, abdomen, and back have patchy hypopigmentation. The left side of the chest, near the shoulder, has a 2 1/2" x 1/2" well-healed scar with suture marks. The left side of the chest, in the axillary area, has a 3" x 1/16" well-healed scar. The chest and abdomen are otherwise unremarkable. The middle aspect of the back has a 1/2" x 3/8" well-healed scar. The inferior, midline aspect of the back has a 1/2" x 1/16" horizontally oriented well-healed scar. The external genitalia are of a normal adult. The posterior side of the right shoulder has a 1/2" x 1/4" well-healed scar. The superior aspect of the left shoulder has a 5" x 1/4" well-healed scar with suture marks. The left arm has several faint, linear, well-healed scars up to 2" long over a 10" x 4" area. The posterior side of the left forearm has faint well-healed scars that may spell out letters, the first of which resembles "D". Superimposed is a complex area of scarring over 5 1/2" x 3 1/2". Distal to that, near the wrist, is a round, 1/2" diameter well-healed scar. The posterior side of the right thigh has an area of patchy skin hyperpigmentation. The anterior side of the right knee has a 4 1/2" x 3 1/2" area of well-healed scars up to 1" in greatest dimension. The lateral side of the left thigh has a 6" x 3/8" well-healed scar.

TATTOOS: The anterior side of the right forearm has a professional, black tattoo of praying hands with a rosary. Distal to that is a professional, black tattoo of, "NANY."

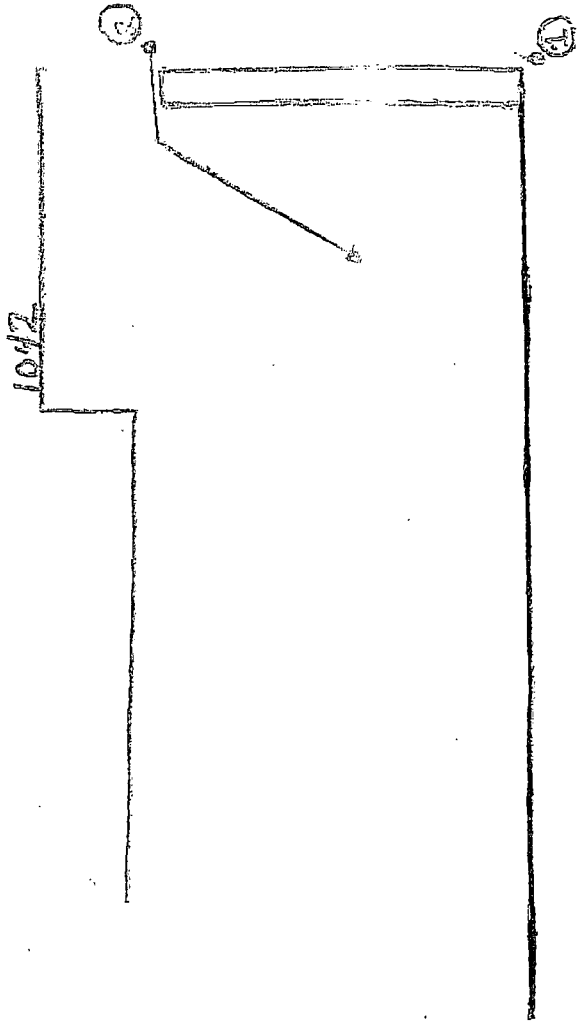
POSTMORTEM CHANGES:

There is moderate rigor mortis of the upper and lower extremities, neck, and jaw. Lividity is partially fixed, pink/purple, inconspicuous, and predominantly posterior. The body is cool and the corneas are clear.

THERAPEUTIC PROCEDURES:

In place are a bandage over a wound (A; see Injuries) on the forehead, a bandage over stapled incisions and a drain at the top of the head, a bandage at the right/posterior aspect of the head over a wound (B), a neck brace, a right thoracostomy tube, intravascular catheters in the left wrist, left forearm (2), right antecubital fossa, right forearm, and right hand, a bandage over a wound of the left 2nd finger, bandages over wounds of the left thigh (C and D) and right leg (E and F), and a Foley catheter. There are needle puncture marks in the right subclavian area. The drain from the head extends into the right frontal lobe of the brain.

EXHIBIT 9



1-Russ
2-Yarde

TREMPONT ST
↓

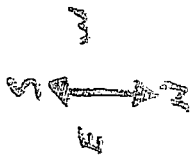


EXHIBIT 10

- 1 A Yes.
- 2 Q Now, if you have a live round or a piece of
3 ammunition that has not been fired in a weapon,
4 are you able to do much analysis with that?
- 5 A It all depends on what the request is for the
6 examination of that item. If the item is
7 believed to have been cycled through a weapon I
8 could examine that live cartridge to see if it
9 had cycling marks that came from a particular
10 weapon.
- 11 Q And did you do that in this case?
- 12 A In this case no, I did not.
- 13 Q With this case were you asked to look at any .9
14 millimeter firearm that was recovered from
15 either Tremont Street or the area around Tremont
16 Street?
- 17 A No, I was not.
- 18 Q Were you able to analyze any .9 millimeter
19 firearm that you were able to determine was the
20 firearm that was used that fired the six spent
21 shell casings recovered from the front of
22 Tremont Street?
- 23 A No, I was not.
- 24 MS. HIGGINS: Your Honor, may I
25 approach the witness?

EXHIBIT 11

Examination of Four Consecutively Manufactured Bunter Tools

A Technical Report By Carlo J. Rosati, Firearms and Toolmark Examiner, FBI Laboratory

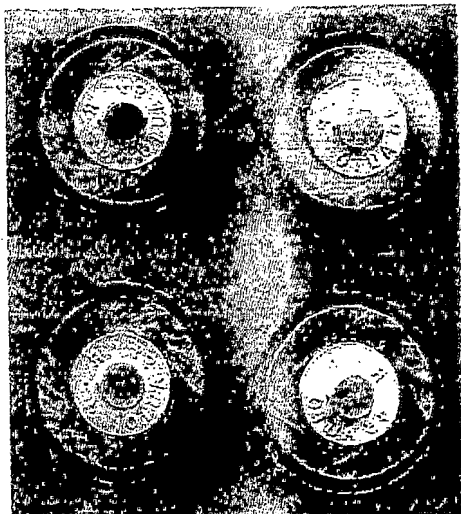
ABSTRACT

The following report describes the results of examinations conducted on four consecutively made bunter tools. This study was conducted to determine the uniqueness of each bunter tool through an examination of the microscopic features of the bunter tool working surface. This examiner traveled to the Remington ammunition manufacturing plant in Loanoke, Arkansas, and observed the process involved in the production of .45 Auto caliber cartridge cases.

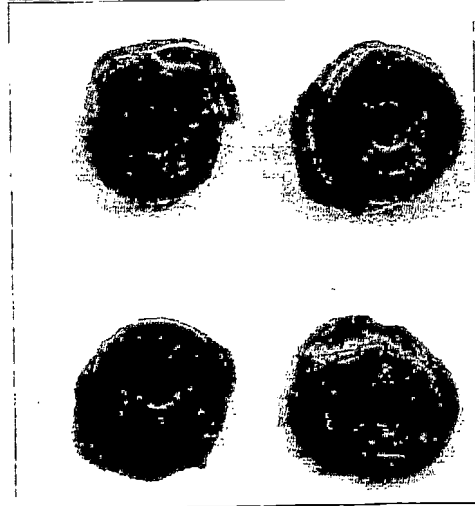
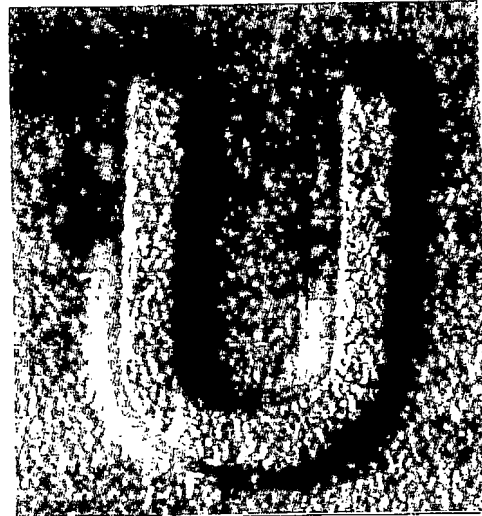
Remington policy requires a bunter tool to be removed and discarded after an eight-hour production run. At the end of such a run, 100,000 to 120,000 .45 Auto caliber cartridge cases will have been produced by a single bunter tool. The bunter tool is removed from production because of concerns over tolerances. The primer pocket punch, an essential part of the bunter tool, will flatten and increase in diameter with repeated stamping. The resultant increase in cartridge case primer pocket diameter can affect the fit of the primer in the cartridge case.

The bunter tools utilized by Remington are manufactured by an outside source. This source agreed to supply the FBI Laboratory with four new .45 Auto caliber bunter tools for this project. The bunter tools (see photograph 1) were visually examined and found to bear surface characteristics consistent with the Electric Discharge Machining (EDM) process (see photo 2).

Because of its ability to capture minute detail, Theftgate



Photograph 1: Four bunter tools produced for Remington Arms.



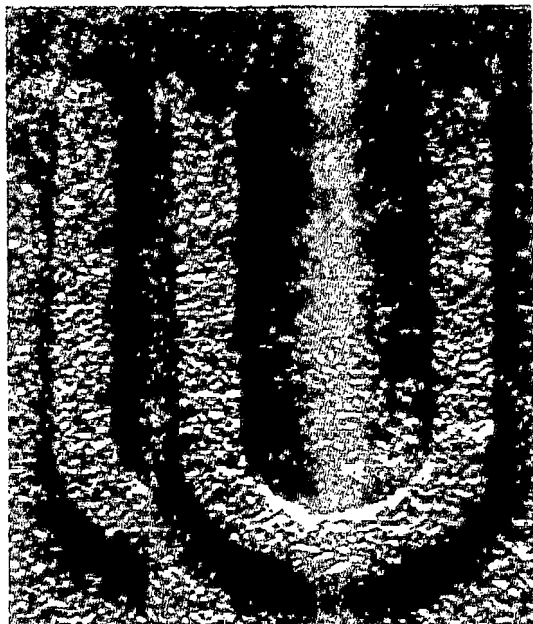
Photograph 2 (top): Cast of bunter under increased magnification. Each character exhibited the signature of Electrical Discharge Machining (EDM)

Photograph 3 (bottom): Theftgate casts of bunter tools.

casting material was used to produce comparison-quality casts of the bunter tool working surfaces (see photograph 3).

These casts were examined under the comparison microscope (see photograph 4) and it was found that each bunter tool bears a unique, random microscopic identity on its working surface which it passes on to the cartridge case it strikes. Accordingly, headstamps on cartridge cases which are found to exhibit sufficient matching detail can be identified as having been produced by a single bunter tool.

In addition, several of the characters had toolmarks on them which were produced by a finishing (machining) process (see photo 5). These toolmarks are generally located at the bottom of the alpha-numeric characters. The



Photograph 4. Side by side comparison of two bunter casts.



Photograph 5: Machining marks on two bunter casts. Several of the characters bore toolmarks which were produced by a finishing (machining?) process.

source of these toolmarks, however, has not yet been determined.

Further research on bunter tools and bunter toolmarks is being conducted by the Firearms-Toolmarks Unit of the FBI Laboratory and will be reported in future AFTE journals. ©

Curriculum Vitae
LEWIS H. GORDON

Telephone: 413.896.9729 Email: forensiclg@gmail.com

EDUCATION

UNIVERSITY OF NEW HAVEN, New Haven, CT

Masters of Science in Forensic Science (2000)

Certificate in Advanced Investigations

WESTERN NEW ENGLAND SCHOOL OF LAW, Springfield, MA

Juris Doctorate (1996)

WESTERN NEW ENGLAND COLLEGE, Springfield, MA

Bachelors of Science in Law Enforcement (1990)

FIREARMS EXPERIENCE

FORENSIC EVIDENCE & Investigations (2014 - Present)

Owner and operator of full service firearms examination laboratory

TIGHT GROUP FIREARMS, L.L.C., Monson, MA (2011 - 2018)

Firearms instructor

INVESTIGATIVE & FORENSIC SERVICES, LLC, Springfield MA (2002 - 2014)

Investigation of criminal, civil matters and forensic consulting and Firearms Examination

FORENSIC FIREARMS ASSOCIATES, Meriden, CT (2010 - 2013)

Firearms consultant on shooting reconstruction, function testing, examination and comparison of physical evidence.

AFFILIATIONS & MEMBERSHIPS

NORTHEASTERN ASSOCIATION OF FORENSIC SCIENTISTS, Member

NATIONAL RIFLE ASSOCIATION, Member

CERTIFICATIONS

NATIONAL RIFLE ASSOCIATION

Pistol Instructors Course (May 2014)

Home Firearm Safety Instructor Course (May 2014)

COMMONWEALTH OF MASSACHUSETTS BASIC FIREARMS SAFETY COURSE

Instructor (2016)

INTERNATIONAL FIREARMS SPECIALISTS ACADEMY

Certified Firearms Specialist (2016)

FIREARMS TRAINING - FORENSIC

New York Microscopical Society - 2nd Annual Law Enforcement Lecture Series (June 2016)

Modern Illumination & Imaging Techniques for Firearm & Toolmark Comparison Microscopy

INTERNATIONAL FIREARMS SPECIALISTS ACADEMY (January 2016)

Court Testimony

Any Other Weapon

Machine Guns/Clandestine Conversions

Ammunition

Firearm Markings

Destructive Devices

Short barreled Shotgun-Rifle and Weapons Made from Shotgun Rifle

Firearm Classification

Firearm Curios and Relics

Firearm Nomenclature

Firearm Safety and Clearing

Silencers

Firearm Mechanical Operation

Firearm Cycle of Operation

Machineguns and Machinegun Conversions (AFTE, May 2015)

Projectile Deflection (AFTE, May 2015)

AFTE (ASSOCIATION OF FIREARM AND TOOL MARK EXAMINERS)

46th Annual Training Seminar - Dallas, Texas (May 2015)

PENN FOSTER CAREER SCHOOL

Career Diploma, Gunsmith (February 2015)

ARNOLD MARKLE SYMPOSIUM-Presented by Henry C. Lee Institute of Forensic Science

Management and Investigation of Shooting Incidents (October 2014)

AFTE (ASSOCIATION of FIREARM AND TOOLMARK EXAMINERS)

Fall Training, Quantico, VA (October 2014)

FORENSIC SCIENCE CONSULTANTS, LLC

Forensic Shooting Incident Reconstruction Course (2012)

NORTHEAST ASSOCIATION of FORENSIC SCIENTISTS

Attendance - Microscopy Workshop (June 2016)

Attendance (October 2014)

Attendance (September 2013)

JOHN JAY COLLEGE - Microscope Day

Identification and Recognition of Cartridge Cases, Multi Caliber Firearms (April 2014)

TRACE EVIDENCE ON BULLETS

8 hour workshop, Hershey, PA (November 2014)

SIG SAUER ACADEMY

Bullets and Vehicles (2012)

North East Association of Forensic Scientists

3 Day Shooting Incident Reconstruction course at Boston Police Range (May 2018)

Northeastern University

Traces, Historical Science and the Crime Scene: The Role of the Scientist/Investigator

Training Via Zoom Meeting

ARMORERS COURSES

Ring of Fire (AFTE, May 2015)

Bryco, Davis, Lorcin, Jennings, Jimenez

Hi-Point Firearms Familiarization (AFTE, May 2015)

STURM, RUGER & COMPANY, INC.

Armorer's Course (May 2015)

SIG SAURER ACADEMY

1911 Operator/Armorer Course (2012)

M16, M4, AR-15 Armorer Course (2012)

SMITH & WESSON

Revolver Armorer Course (2012)

M&P Pistol Armorer Course (2012)

GLOCK, Inc.

Glock Pistol Armorer Course (2012)

FACTORY TOURS

Seecamp Firearms/ Factory Tour (September 2013)

Charter Arms Firearms/ Factory Tour (September 2013)

Smith & Wesson / Thompson Center (2012)

Savage Arms (2012)

PRESENTATIONS

POST UNIVERSITY, CSI ACADEMY

Forensic Firearms Examination (2012)

Blood Stain Pattern Analysis (2012)

Forensic Firearms Examination (2011)

Blood Stain Pattern Analysis (2011)

FIREARMS TRAINING - PRACTICAL

CRITERION TACTICAL

Tactical Fighting Pistol Course (June 2014)

Tactical Night Fighting Pistol (June 2014)

UNIVERSAL SHOOTING ACADEMY

- 2010- Advanced pistol course with instructor Emmanuel Bragg
- 2009- Intermediate/advanced & advanced course with Instructor Emmanuel Bragg
- 2008- Intermediate/advanced course with Instructor Emmanuel Bragg
- 2007- Two day private instruction with Instructor Frank Garcia

TODD JARRETT, INSTRUCTOR

- 2008-Advanced Pistol Course
- 2004-Advanced Shooting Course
- 2004-Intermediate Competitive Pistol Course

SIG SAUER ACADEMY

Force on Force Operator Course (2008)

SMITH & WESSON ACADEMY

Law Enforcement Firearms/Pistol Instructor (2006)

SCOTT WARREN, INSTRUCTOR

- 2006 -Pistol Course

SEVIGNY PERFORMANCE, LLC

- 2005 -Pistol Course

JERRY MICULEK, INSTRUCTOR

Dynamics of Single Action Pistol (2004)

NIGHTHAWK SYSTEMS

Officer Safety and Tactics (1994)

MASSACHUSETTS CRIMINAL JUSTICE TRAINING COUNCIL -Agawam Academy

Reserve/Intermittent Police Officers (1993)

SCOTTI SCHOOL OF DEFENSIVE DRIVING

VIP Protection Program (1988)

CHAPMAN PRACTICAL SHOOTING ACADEMY

Intermediate Pistol Craft Course (June 1985)

JUNIOR OLYMPIC TRAINING CAMP

Small Bore Rifle (August 1980)

FIREARMS QUALIFICATIONS AND AWARDS

HAMPDEN COUNTY SHERIFF'S DEPARTMENT LAW ENFORCEMENT DIVISION

Firearms Qualification (1993-2017)

INTERNATIONAL DEFENSIVE PISTOL ASSOCIATION

Master Classification in Stock Service Pistol

Master Classification in Enhanced Service Pistol

Expert Classification in Stock Service Revolver

Expert Classification in Custom Defense Pistol

CONNECTICUT STATE IDPA CHAMPIONSHIPS

2nd Place Expert – CDP (2010)

High Law Enforcement (2009)

High Law Enforcement (2008)

2nd Place Expert –SSP (2007)

1st Place Sharpshooter –SSP (2006)

MASSACHUSETTS STATE IDPA CHAMPIONSHIPS

2nd Place Expert – CDP (2010)

2nd Place Expert – SSP (2008)

2nd Place- Expert – SSP (2007)

SMITH & WESSON WINTER CHAMPIONSHIPS

2nd Place- Expert – CDP (2010)

2nd Place- Expert – SSR (2006)

NEW ENGLAND REGIONAL CHAMPIONSHIPS

High Law Enforcement (2009)

2nd Place Expert – E. S. P. (2009)

1st Place Expert – E.S.P. (2008)

1st Place Sharpshooter (2004)

NEW ENGLAND REGIONAL CHAMPIONSHIPS – DEFENSIVE PISTOL CHAMPIONSHIPS

1st Place Expert – SSP (2008)

4th Place Expert – SSP (2007)

1ST Place Sharpshooter –SSR (2004)

NATIONAL IDPA CHAMPIONSHIPS

4th Place Expert – SSP (2007)

NORTHEAST REGIONAL, REVOLVER CHAMPIONSHIP

1st Place Expert – SSR (2006)

1st Place Expert – SSR (2004)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUFFOLK SUPERIOR COURT
DOCKET NO.: 2012-11181

_____)
COMMONWEALTH)
)
v.)
)
DAVID YARDE)
_____)

AFFIDAVIT OF ATTORNEY JARRETT ADAMS

I, Jarrett Adams, do hereby depose and state the following:

1. I have been an attorney in good standing in the State of New York since July 2016.
2. I was retained to represent Mr. David Yarde to advance a Motion for New Trial after he was convicted by a Suffolk County Jury on August 6, 2014, on the charge of second degree murder and possession of a firearm.
3. I filed this Motion for New Trial on February 1, 2019. It appears on his docket as pleading #153.
4. Prior to filing this motion, I reviewed the entire case file, but where my primary focus was upon the transcribed trial testimony and the exhibits at trial
5. A portion of the exhibits included video footage of the events leading up to the shooting, as well as immediately thereafter. The video footage introduced at trial did not capture the shooting itself.
6. I also focused upon the testimony of the Commonwealth's expert, Dr. Kimberly Springer, who represented herself as a "forensic pathologist".

7. I further note that trial counsel for Mr. Yarde did not cross-examine this Commonwealth witness, nor did he present any theory (based upon forensic science) to either impeach Dr. Springer, or advance any theory of his own – and particularly that Mr. Yarde could not have been the shooter. It would appear his defense relied upon (in total) upon the witness testimony and other circumstantial evidence suggesting a third-party culprit.
8. In advancing Mr. Yarde's Motion for a New Trial, I believe that trial counsel should have done more than rely upon eyewitness testimony, and was ineffective in not either cross-examining Dr. Springer, or presenting his own forensic expert to advance what I saw to be evident – that: a) Mr. Yarde could not have committed this crime from his last known position; or b) any other position as defined by the temporal limitations dictated by this case.
9. My review of the video footage showed that in a general theoretical sense, and considering the testimony of Dr. Springer, that due to the stippling of gun powder burns on Mr. Russ' body, that so long as Mr. Yarde was within that "stippling" distance (of approximately 3 feet give or take a half of a foot) of Mr. Russ at the time the fatal shot rang out, he could have been the shooter.
10. Since we were guided only by the video footage which existed at trial, the only question really to answer was whether it was possible for Mr. Yarde to be within stippling distance on either side of the column (there was a column which separated Mr. Yarde from Mr. Russ) and therefore could have shot Mr. Russ.
11. To this end, I hired the services of a Dr. Elizabeth Laposata - - a forensic pathologist, and in her opinion she rendered the following:

“[i]t is *impossible* for the shots to have originated from Mr. Yarde’s position [seen in the surveillance video]”.

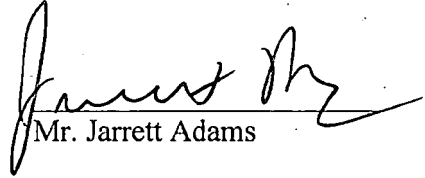
12. Dr. Laposata reached this opinion based upon a trajectory analysis/argument. In essence, she found that the shots which impacted the victim had to have come from his left side, extrapolating that location from: a) analysis of the location of the shell casings which had laid to rest; b) the bullets entering the left side of the victim’s body; and c) the testimony from witness/Hawthorne, stating that the shooter ejected his weapon from the east side of the pillar (or the left of Mr. Russ). Since Mr. Yarde from his last known position was not to the left of Mr. Russ, but actually to his right, she rendered it an “impossib[ility]” that he was the shooter.
13. Also, and since Dr. Laposata opined that the bullets entered the left side of the victim’s body, I attempted to prove that Mr. Yarde could not have traveled to the left side of the victim from his last known position under the time constraints dictated by this case.
14. To that end I hired the services of Rampion Visual Productions LLC, to analyze the video data, frame by frame, and determine how much time Mr. Yarde would have had to fire any weapon during the void of camera footage between the different cameras on scene capturing the area.
15. The people at Rampion opined that it would be under a second – somewhere between a half a second and three-quarters of a second – and thus the conclusion would be apparent that Mr. Yarde would have only had that period of time to move into a position where he was able to inflict the fatal shot which took the life of Mr. Russ.
16. Armed with both the opinions of Dr. Laposata and Rampion, I filed Mr. Yarde’s Motion for New Trial, arguing that: a) according to Dr. Laposata, Mr. Yarde could not have fired

the fatal shot from his last known position – it had to be from Mr. Russ’ left side, and b) Mr. Yarde could not have moved to Mr. Russ’s left side in under a second.

17. At oral argument, the Court never even addressed argument “b” but challenged whether Dr. Laposata’s report brought anything material to the table that would have changed the outcome of the trial. I attempted to counter-argue that Dr. Laposata opined that Mr. Yarde could have not fired the shot from his last known position, but Judge Kaplan dismissed her opinion on that issue, opining himself that she would be unable to render that opinion as a forensic pathologist, highlighting that forensic pathologists only act in the capacity as a medical examiner, such as performing autopsies and determining cause of death. Judge Kaplan emphasized that I would not be able to elicit from Dr. Laposata at trial (or any other forensic pathologist including Dr. Springer) any opinions about “impossibilities” as it pertained to the placement of people as she would have seen after the fact.
18. As a result, Judge Kaplan didn’t feel it necessary to address argument “b” of my presentation, as it appeared that he didn’t find part “a” as persuasive.
19. I have since reviewed the report of crime scene reconstructionist Lewis Gordon who provided evidence and his opinion to support arguments “a” and “b”.
20. In preparing Mr. Yarde’s Motion for New Trial, I did not consider using a crime scene reconstructionist to support arguments “a” and “b”.
21. I believed at the time the presentation was sufficient using the report from Dr. Laposata, and from Rampion. This was not a strategic decision to do so – meaning using one expert over the other, but simply what I believed to be a sufficient showing at the time.

22. Although I had co-counsel with me on the case – Mr. Carlton Williams, the ultimate decision-making on the case was mine alone.

Signed under the pains and penalties or perjury this 28th day of June, 2021.


Mr. Jarrett Adams

California Notary Attached!



CALIFORNIA ACKNOWLEDGMENT

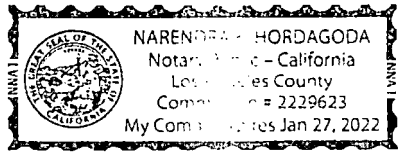
CIVIL CODE § 1189

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California }
County of Los Angeles }

On 06/28/2021 before me, Narendra K. Hordagoda, Notary Public
Date Here Insert Name and Title of the Officer
personally appeared Jarrett Adams
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.
WITNESS my hand and official seal.

Signature [Handwritten Signature]
Signature of Notary Public

Place Notary Seal and/or Stamp Above

OPTIONAL

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Capacity(ies) Claimed by Signer(s)

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<input type="checkbox"/> Partner – <input type="checkbox"/> Limited <input type="checkbox"/> General	<input type="checkbox"/> Partner – <input type="checkbox"/> Limited <input type="checkbox"/> General
<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact	<input type="checkbox"/> Individual <input type="checkbox"/> Attorney in Fact
<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator	<input type="checkbox"/> Trustee <input type="checkbox"/> Guardian or Conservator
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Other: _____
Signer is Representing: _____	Signer is Representing: _____