

1 witness. I can't promise that I will be done by five,
2 but he's from down in the Little Rock area, so if it's
3 possible, if you don't mind if we could run over if it
4 went over.

5 THE COURT: Let's see how far it's going to
6 go.

7 MR. LAURANS: I call Mr. Christopher O'Hara
8 Carter to the stand.

9 CHRISTOPHER CARTER, being sworn by the Court, testified:

10 DIRECT EXAMINATION by MR. LAURANS:

11 Q Will you please state your name?

12 A Christopher Carter.

13 Q And Mr. Carter, from where did you travel today?

14 A You mean by hotel over in Kansas City, Kansas?

15 Q What about yesterday?

16 A Yellville, Arkansas.

17 Q And could you please provide the Court with your
18 educational and professional background?

19 A I have an associate's degree in secondary education
20 from Montgomery College in Germantown, Maryland,
21 bachelor of arts in history from St. Mary's College of
22 Maryland. I did graduate work at both Duquesne
23 University and Louisiana State University before I
24 entered school at the University of
25 Arkansas-Fayetteville and graduated with a J.D. in

1 December of 1987.

2 In February of '87 I passed the Arkansas bar
3 exam, and I'm a licensed attorney in good standing in
4 Arkansas. In July of -- if I said '87 I meant '88.
5 July of '88 I passed the Missouri bar exam. And I'm an
6 attorney licensed in Missouri in good standing. In
7 January -- excuse me, February of 1990, I was admitted
8 to the bar of the District of Columbia. In January of
9 1993 I was admitted to practice before the United
10 States Supreme Court.

11 Q And can you tell us about your professional experience?

12 A I originally started in private practice in Flippin,
13 Arkansas in 1988, and I continued that until 1993. In
14 1993 I signed a contract with Baxter County, Arkansas,
15 and in addition to my private practice also served as
16 their public defender. I signed a similar contract
17 with Marion County, Arkansas, which is the county I
18 actually live in, in -- also in 1993. That continued
19 up until December of 1997, when the state of Arkansas
20 took over the entire public defender system, and I
21 became the head public defender for the 14th Judicial
22 District, a position that I held for three and a half
23 years, until the legislature created another judicial
24 spot in our district and I was appointed circuit judge.
25 And that term expired on December 31, 2002. And since

1 then I have -- I'm a part-time prosecutor in the 14th
2 Judicial District and I also have a private practice in
3 Yellville, Arkansas.

4 Q In your experience as a judge, did you have opportunity
5 to familiarize yourself thoroughly with ethical
6 standards as pertains to prosecutors?

7 A As a judge, as a public defender, even now as a
8 prosecutor, it's a constant theme that runs through the
9 criminal justice system that you always have to be on
10 the watch for, both for yourself and your opponents.

11 Q And as a judge and a prosecutor, have you had an
12 opportunity to teach others in the bar about such
13 issues?

14 A I've given lectures before at various functions.

15 Q On ethics?

16 A On ethics.

17 Q What about your experience as a judge with respect to
18 the standards enunciated in Strickland v. Washington?
19 Are you familiar with those?

20 A I'm familiar with those. I haven't -- I never really,
21 as a -- sitting as a judge, had an opportunity to use
22 those. I'm far more familiar with it on the
23 prosecutor's side where I've had to defend people under
24 a 29.15 hearing, is in Arkansas we would call a Rule 37
25 hearing. And so I've had to defend defense attorneys

1 on those. And likewise, as a public defender for 12
2 years, in one form or another, I had to be very much
3 aware of it, because occasionally I was the one in the
4 hot seat.

5 Q Can you tell me how many times you've evaluated cases
6 for the presence of any Strickland violations?

7 A It would be difficult to say, because largely it would
8 be on the cases that I would be appointed on after
9 basically someone's money ran out at trial, so I got
10 appointed to do all the post-trial stuff or the
11 appeals. So I would say it's somewhere in the
12 neighborhood of 20 to 25.

13 Q And have you had opportunities in cases to evaluate the
14 performances by state prosecutors and evaluate whether
15 any prosecutorial misconduct occurred?

16 A I have.

17 Q And you've had opportunity to apply the standards
18 enunciated in the rules of professional responsibility
19 to those situations?

20 A I have.

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

23 MR. KELLY: As appropriate, we have no
24 objection.

25 THE COURT: Very well.

1 Q (By MR. LAURANS) Mr. Carter, can you tell me what
2 materials you -- strike that. Did you perform an
3 evaluation in this case?
4 A I did.
5 Q And did you perform an evaluation in regards to
6 performance of trial counsel Bob Duncan?
7 A I have.
8 Q And did you conduct an evaluation in connection with
9 the performance of prosecutor Pat Peters?
10 A I have.
11 Q Let's talk about Mr. Duncan. Can you tell me what your
12 findings were?
13 A Well, basically --
14 Q I'm sorry, let me digress a second. I'm very sorry to
15 interrupt you.
16 Can you tell the Court what materials you
17 evaluated?
18 A I'm glad you asked that question. I have, in
19 Mr. Middleton's situation, read virtually every
20 pleading, every document, every case file of every case
21 he has been involved in in the past 14 years, both
22 civil and criminal.
23 Specifically, in this case, I have read the
24 court file, the trial transcript, the 29.15 transcript,
25 and every single decision handed out in this case, as

1 well as the briefs for both Mr. Middleton and the
2 State, as well as all the motions that I'm aware of
3 that were filed with regard to those.

4 Q With respect to your findings, can you tell me in
5 connection with Bob Duncan's performance what those
6 findings were?

7 A Based upon everything that I reviewed and my experience
8 in criminal law, I found that Mr. Bob Duncan violated
9 the standards set forth in Strickland versus
10 Washington. He was, in essence, ineffective to the
11 point that his omissions, if corrected, would have
12 resulted in a different verdict than what was handed
13 down by the jury in Mr. Middleton's case.

14 Q Can you tell me what the specific findings were with
15 respect to what you saw him do or did not do as trial
16 counsel?

17 A Okay. Now, you have to understand, I've only read the
18 records in this matter and I'm basing my opinion based
19 on everything that I have seen. But first of all, the
20 most flagrant thing that comes to mind is the lack of
21 interview of witnesses. Now, there can -- I'll fully
22 concede, there are trial strategies that you may not
23 want to call somebody, but that is no excuse --
24 especially when someone is charged with first degree
25 murder -- not to interview or at least attempt to

1 interview witnesses.

2 Now I do most of my practice in Arkansas. We
3 can't take depositions in criminal cases. We have a
4 statute that specifically -- that specifically does not
5 allow taking of depositions in criminal cases. The
6 great thing about the state of Missouri is, you have an
7 opportunity to at least find out what people will
8 testify to who just don't want to talk to you. You
9 have that option. And there are quite a number of
10 witnesses in this case that really should have been
11 interviewed.

12 Q Did you see any evidence in the file that there were
13 any depositions taken?

14 A No depositions.

15 Q Did you see any evidence in the file concerning when
16 any experts were consulted?

17 A No experts. And that's -- and when I talk about
18 talking to witnesses, this type of case is what I would
19 call a technical case, in that there's a lot of
20 forensic evidence. And you have to have somebody to be
21 able to explain that forensic evidence, if not to the
22 jury at least to you, so you can sit down with your
23 client and properly explain to them the significance of
24 what is going to be presented by the State and how it
25 can be countered or what -- how it is flawed. And none

1 of that was done. In essence, Mr. Middleton had a
2 trial in which he had a human being sitting in a chair
3 but no representation.

4 Q Let's talk about the trial. When you read the trial
5 transcript, did you see whether there was an opening
6 statement given?

7 A No opening statement. And in a first degree murder
8 case, I cannot understand that. You have to let the
9 jury know how you're proceeding with this case.

10 Q Now, specifically, did you see that Mr. Duncan reserved
11 the opening?

12 A I believe he reserved opening, but he still never took
13 advantage of it. And there was no opening given.

14 Q Was there a record made about him waiving opening after
15 the State's case closed?

16 A I could not see one.

17 Q Did he present any witnesses?

18 A No.

19 Q Did he call any experts?

20 A No.

21 Q What was his decision or advice with respect to
22 Mr. Middleton testifying?

23 A Well, he advised him not to testify. And let me tell
24 you, I have tried, as a defense counsel, perhaps 7 5
25 jury trials. In Arkansas, as a public defender, you

1 have to be death qualified in order to handle death
2 penalty cases. And it is my firm belief that if a
3 defendant has no priors and the defendant claims their
4 innocence, then there is no reason why that defendant
5 should not be put on the stand to testify.

6 Q There was a suppression motion filed. Did you see
7 that?

8 A Yes, there was. There was a suppression motion with
9 regard to certain statements allegedly made by
10 Mr. Middleton. And the Court held a hearing on that.
11 The problem is that after the Court made the Court's
12 ruling, then at trial an additional statement allegedly
13 made by Mr. Middleton at a hospital came into evidence
14 without objection. So the whole purpose of the
15 suppression hearing was in essence waived by trial
16 counsel. And the statement that was allowed in is
17 highly prejudicial, because the allegation in the
18 statement, as the prosecutor put it, was a confession.

19 Q Did you have opportunity to evaluate the police report
20 in connection with that statement?

21 A Yes, I did.

22 Q Would it be a correct characterization that the officer
23 who took it spent the night or spent several hours at
24 Mr. Middleton's bedside in a hospital?

25 A That's what the record indicated.

1 Q Yeah. As a defense attorney, could it be posited in
2 good faith that that was a custodial interrogation?
3 A I don't think there's any question that under those
4 circumstances it was a custodial interrogation. And
5 Mr. Duncan should have known that, if he had obtained
6 Mr. Middleton's medical records. Because
7 Mr. Middleton's medical records had a statement in
8 there that as soon as Mr. Middleton was to be released,
9 that the police should be called. That should have put
10 Mr. Duncan on notice that Mr. Middleton was, in fact,
11 in custody, or at least an issue that he should have
12 further explored. But he never had the medical records
13 at all.

14 I will concede that he did send a letter to
15 try to get them, but he never followed up on it. And
16 the medical records, not only are they important for
17 that suppression motion, but the medical records are
18 also important to explain the medical condition of
19 Mr. Middleton and to counter the description that was
20 given by the State's officers and the paramedics.

21 Q If we were to assume for the sake of argument, without
22 conceding this point, that somehow Mr. Duncan made the
23 trial strategy decision not to have an opening, not to
24 call a witness, not to call an expert, not to have Ken
25 testify, can you see any reasonable basis that

1 cumulatively that would be a sound trial strategy?

2 A Under the facts and circumstances of this case, no.
3 But let me give you a caveat. If you had a situation
4 where someone was caught on videotape, they were
5 dead -- caught dead to right, there's no question that
6 they committed this crime, then you might want to
7 proceed in that way and in fact concentrate on the
8 sentencing phase of it.

9 But if you look at what Mr. Duncan did, he
10 didn't do anything in the sentencing phase either to
11 possibly mitigate anything. I am just absolutely
12 convinced he had no strategy whatsoever, no preparation
13 whatsoever.

14 Q Are you familiar with -- let me back up. Have you
15 conducted your own independent research into
16 Mr. Duncan's affairs at that time?

17 A Yes, I have.

18 Q Can you inform the Court what you found from your
19 research?

20 A What I did was search the Internet under "Duncan" to
21 find out possibly what other cases he was involved with
22 when he was representing Ken Middleton. And
23 Mr. Middleton's trial was in February of 1991. So I
24 went back to about mid 1990 and then all the way
25 through 1994 and read every appellate decision where I

1 could find Mr. Duncan's name.

2 At the time of Mr. Middleton's trial, he had
3 just completed a capital murder trial involving Ed
4 Reuscher. He was representing a fellow by the name of
5 Collier, a fellow by the name of Fuller, and then
6 there's Mr. Middleton. All of these are murder cases,
7 some capital, some first degree. Or let me back up.
8 Some where the death penalty was being sought and some
9 where it was not. But at least I can tell he had four
10 murder cases in some process when he was representing
11 Ken Middleton.

12 Q That have resulted in published appellate opinions?

13 A That's correct.

14 Q It doesn't include pleas or anything else?

15 A I have absolutely no idea what other matters he was
16 handling, but at least through the Internet search I
17 know that with reasonable certainty in February of 1991
18 he was involved with those four cases.

19 Q Are you aware of any standards or guidelines which are
20 prescribed either for or against the handling of a
21 certain number of cases?

22 A The American Bar Association -- and being head public
23 defender for so many years always try to push the state
24 along these lines. The American Bar Association, for
25 public defenders, believes that a public defender

1 should handle no more than two capital cases in which
2 the death penalty is being sought in a year. Now I'm
3 not talking about plus pleas, plus hot check cases, I'm
4 talking about two cases period, nothing else.!
5 Q Would Mr. Duncan's caseload then be in violation of
6 that standard?
7 A It would.
8 Q Let's go back to one -- I hate to jump around, but I
9 want to direct your attention to one other matter. In
10 your evaluation of the file, did you see whether or not
11 Mr. Duncan was aware of the gunshot residue document?
12 A I know he was aware of it, and I know it for two
13 reasons. Number one, he testified at his 29.15 hearing
14 that he had sent a letter. But more important than
15 that, he filed a motion for a continuance and attached
16 the letter to it. So the prosecutor was aware, the
17 Court would have been aware, Mr. Duncan is clearly
18 aware, that there are some tests out there that he
19 would like to see.
20 Q Did you see any indication that Mr. Duncan ever
21 received any resolution or explanation about that
22 gunshot residue document?
23 A No.
24 Q Let me ask you, what significance is that gunshot
25 residue document to a defense attorney?

1 A In this case, depending on what evidence the Court was
2 going to allow based upon suppression motions, it would
3 in essence be the focus of the defense. You have a
4 house in which you have two individuals, a total of
5 four hands. Three hands are tested, three hands are
6 negative. There's a fourth hand there that belongs to
7 the victim that we don't have test results of. Any
8 competent attorney would make that the thrust of the
9 case and hammer that home to the jury. Remember,
10 defense attorney only has to show reasonable doubt.
11 And in this case not only is it not part of his
12 strategy, it's not mentioned. He doesn't bring it up
13 and drive it home to the jury.
14 Q In your opinion, under Strickland v. Washington, could
15 there be a reasonable trial strategy for --
16 A None, absolutely none. I can understand possibly not
17 calling the defendant to the stand. There would be
18 reasons for that. But there's absolutely no reason,
19 under the facts and circumstances of this case, to make
20 that a nonissue. And he knew about it. He knew enough
21 about it to specifically write a letter to say -- to
22 Mr. Peters to say, I need this stuff. He knew enough
23 about it to attach that letter to a motion for
24 continuance to the Court, reminding the Court that he
25 does have a busy trial schedule and, by the way,

1 there's certainly things I've not received yet.

2 Q In your opinion was there a sufficient challenge to the
3 crime scene investigation by Mr. Duncan on
4 cross-examination?

5 A No. And the reason I say that is that this crime scene
6 was not the ideal situation, if you're the State. They
7 had to go back in, take additional photographs. In
8 post-trial pleadings, Mr. Duncan did get on the ball
9 and there were some photographs that showed the full
10 range of the room. But he didn't do that prior to
11 trial, and so he in essence waived a great deal of
12 that. There's just no excuse for that.

13 He needed to hammer home the fact that,
14 ladies and gentlemen of the jury, this situation that
15 we have and these photographs are reconstructed
16 photographs. They're not the actual scene. He needed
17 to hammer home the idea that, well, here's the State's
18 theory. She was grabbed, she was shot, Mr. Middleton
19 put his boot in the wall. Well, what does the forensic
20 evidence show? It doesn't support any of that. And
21 Mr., -- some of that was right there in front of him.
22 Some of it he could have easily discovered by talking
23 to a forensics expert, which he didn't do.

24 Q Could he have objected to the crime scene photos that
25 were reconstructed by Link's memory?

1 A Well, I'm not sure that's a fair question. The answer
2 is, yes, he could have objected to them. The question
3 is, would it have had an effect on the outcome of the
4 trial? Because as you know, Counselor, you can object
5 to almost anything you want. Whether you're sustained
6 is another question.

7 But in this situation, the prejudicial effect
8 of going back in, without a search warrant, and
9 retaking photographs clearly should have been objected
10 to and should have been vehemently argued in a pretrial
11 motion.

12 Q In your opinion was there a sound basis upon which a
13 motion to suppress the seizure of evidence could have
14 been filed?

15 A Very solid. And I'm talking about the physical
16 evidence. Because he did file that motion to suppress
17 statements. He just dropped the ball on that one with
18 regard to a later statement. And I don't know whether
19 he had a copy of that. I'm assuming, based on the
20 police reports, he in fact had a copy of the statement.
21 He didn't really bring that statement out in his
22 suppression motion. But given the Court's ruling, once
23 that testimony came out at trial, he should have
24 objected.

25 Getting back to the physical evidence, yes,

Mincey v. Arizona, 437 U.S. 385 (1978);
Thompson v. Louisiana, 469 U.S. 17 (1984);
Flippo v. West Virginia, 528 U.S. 11 (1999).

1 there was a -- we do not have an exception for a murder
2 scene in terms of exigent circumstances. It just
3 doesn't exist. They should have obtained a search
4 warrant before conducting a search of the --
5 Mr. Middleton's house.

6 Q Now sometime ago you said something that caught my
7 attention. You said he should have objected to the
8 statement when it came in through testimony.

9 A That's correct.

10 Q Are you talking about Officer Spartz' imputation of a
11 statement to Middleton at the hospital?

12 A That's correct, at trial.

13 Q Should he have also objected at opening or did it
14 matter?

15 A He should have objected at opening and asked to
16 approach the bench and say, Your Honor, we just had a
17 suppression hearing and you indicated that certain
18 statements could not be used. Here's Mr. Peters in his
19 opening statement making this. At the very least he
20 should have asked for an admonishment to the jury to
21 ignore that. But he did neither, so it got in. Then
22 it got in at trial. And obviously, since
23 Mr. Middleton -- they chose not to call Mr. Middleton,
24 then the only thing really that this jury heard from
25 Mr. Middleton is that one statement.

1 And along those lines, I -- I've tried to
2 figure out the trial strategy for this, but the 911
3 phone call from Mr. Middleton was read into the record
4 by Mr. Peters and Mr. Duncan. That tape should have
5 been played. The jury needed to hear from
6 Mr. Middleton about his hysterics. And that's the way
7 all the police reports describe him on that day. And
8 there is no -- I still don't understand why the 911
9 tape was not played so the jury could actually hear
10 Mr. Middleton. If Mr. Duncan's trial strategy was not
11 to call Mr. Middleton, at the very least, at some point
12 they should have heard his voice.
13 Q Let's talk about some witnesses. Have you had an
14 opportunity to read Mr. Link's deposition?
15 A I have. And I've seen the videotaped deposition of
16 his.
17 Q Correct me if I'm wrong, did he testify that he always
18 tests both hands?
19 A That's what he testified to.!
20 Q Can you think of a reasonable, sound strategy decision
21 why Mr. Duncan would not have called Mr. Link?
22 A None whatsoever. Because you have to make that the
23 focus of the defense in a case and situation like this.
24 And in order to establish what you want to establish,
25 you've got to have that particular witness there. I

1 mean that was absolutely vital to Mr. Middleton's
2 defense.

3 Q Do you know who Michelle Brockman is?

4 A That is Mr. Middleton's niece.

5 Q Have you read her statement to the police?

6 A Yes, I did.

7 Q Can you think of any reasonable basis not to have
8 called her?

9 A No. And in fact, from the information that I have at
10 the time of the trial, she was in Arizona. Here you
11 have a niece of Mr. and Mrs. Middleton who lives with
12 them who has told the police that she saw no marital
13 discord or anything, and all of a sudden she's shipped
14 off to Arizona. Mr. Duncan should have, at the very
15 least, talked to her, if not gone to the expense to
16 bring her back here to testify.

17 Q Did you see any evidence that he did either thing?

18 A None.

19 Q Are you familiar at all with the forensics and
20 ballistics in this case?

21 A I am.

22 Q I'm not asking you if you're an expert. I'm asking you
23 if you're familiar with some of the testimony.

24 A I'm glad you're not asking me as an expert. That's why
25 I consult experts.

1 Q That was going to be my next question. Can you think
2 of any reasonable, sound trial strategy not to have had
3 your own expert evaluate this file if you're Duncan?
4 A The only possible one would be that you just believe
5 everything that the State says. And if that's your
6 position, you really shouldn't be a defense attorney.
7 There is no real basis to not have things independently
8 examined. You owe that to your client.
9 Q Do you have an opinion as to whether there is
10 cumulative ineffective assistance here or cumulative
11 error?
12 A Well, there's a number of things that I think in and of
13 itself is just completely in violation of the
14 Strickland standards.
15 Q What are those?
16 A Not interviewing witnesses, not making -- the lack or
17 complete investigation with regard to the --
18 Mrs. Middleton's hand and it not being tested. I mean
19 to me those things standing alone would be a violation.
20 But when you look at all the things that I have
21 testified about, there's no question that there is
22 cumulative error with regard to Mr. Duncan. And like I
23 indicated, he was a body sitting in a chair.
24 Q I'll represent to you that earlier today Pat Peters,
25 who prosecuted this case, made a statement to the

1 effect that not only was Mr. Duncan effective but he
2 did above and beyond. Would you agree or disagree with
3 that opinion as paraphrased?

4 A I would completely, completely disagree with that view.
5 But, you know, Mr. Peters was the prosecutor in the
6 case and there's some problems there, and I can
7 understand why he would make that statement. But the
8 fact is, there is no evidence to support that Bob
9 Duncan was competent in this case whatsoever. In fact
10 it's all to the contrary.

11 Q Let's turn our attention to Mr. Peters then. Let's
12 start off, have you had an opportunity to evaluate the
13 bond order he secured?

14 A Oh, yes.

15 Q All right. Can you tell us when that -- whether there
16 are any ethical problems with that bond order?

17 A There's a huge one. And, you know, in dealing with
18 Mr. Middleton, I've talked to Missouri defense
19 attorneys whom I respect, Jay DeHardt here in Kansas
20 City, Dee Wampler of Springfield. I've never seen a
21 bond requirement like that at all.

22 Q Which part of the bond requirement are you talking
23 about?

24 A That Mr. Middleton cannot get rid of any marital assets
25 without seeking permission of the prosecutor and the

1 probate court.

2 Q Was there a probate proceeding going on at that time?

3 A It hadn't been filed at that point, nor had it -- and
4 when it was filed a few days later, there was no
5 administrator appointed. So the probate court in
6 essence had no authority, one way or another, and could
7 never have authority, at least until somebody is
8 appointed administrator. There was a petition filed,
9 but it had never been followed up on. So probate court
10 really didn't have the authority to act, and a defense
11 attorney or a defendant is hardly going to go to a
12 prosecutor and say, I need to sell this house, I need
13 to sell this, so I can pay my defense attorney.

14 Q Now let's back up a second. If there's no effective
15 probate authority from whom to seek permission, then by
16 default does that leave the sole discretion for the
17 releasing of assets in the hands of the prosecutor?

18 A Well, that's calling for an interpretation of that
19 bond. But the only one who would have legal authority
20 to say yes or no would in essence be the prosecutor.
21 And the one thing I would not want is the prosecutor
22 running my defense cost.

23 Q And is that also a conflict of interest for the
24 prosecutor?

25 A I think it's a huge conflict of interest for the

1 prosecutor.

2 Q In all your years, have you ever seen a prosecutor
3 impose that kind of a condition on a bond, that you
4 have to seek his permission as well as the judge's?

5 A No.

6 Q You've seen them where you have to ask a judge for
7 permission, that's not uncommon?

8 A Well, it is if -- and when I say it is, it's generally
9 not the criminal judge, the judge hearing the criminal
10 case, that you have to ask. Because in the situation
11 like this, there would be another judge or another
12 court or another division of the court that would be
13 handling it. And once that's set up, you have to ask
14 that judge anyway.

15 Q But -- I'm sorry?

16 A You just can't go and ask for it yourself.

17 Q But it's absolutely improper to also have to ask a
18 prosecutor for permission to dispose of a defense
19 asset?

20 A Absolutely. !

21 Q That wasn't just marital, it was jointly held?

22 A Jointly held.

23 Q Did you happen to review documents pertaining to
24 Mr. Peters' father?

25 A I have.

1 Q Can you tell us where he was at the time?

2 A Well, he was of counsel of the law firm that had filed

3 the civil action against Mr. Middleton.

4 Q And we're not talking about probate, correct?

5 A No, the civil action.

6 Q When you say civil action, do you mean probate or

7 wrongful death?

8 A There are so many cases involving Mr. Middleton.

9 The -- when I say the civil action, I am talking about

10 the civil action filed in Jackson County.

11 Q And that's for wrongful death?

12 A For wrongful death. Not the probate matter. Plus

13 there's an interpleader in there from -- for some life

14 insurance in there also.

15 Q Okay. And then there's also a probate matter that was

16 handled by the same firm?

17 A That's correct.

18 Q So they handled the probate and the wrongful death?

19 A That's correct, and the interpleader.

20 Q Now, is there such thing as a Chinese wall between of

21 counsel and the rest of a firm?

22 A Not that I'm aware of.

23 Q Now, let's talk about these rings. Have you had an

24 opportunity to evaluate documents and statements such

25 as that from Ray Vasquez in connection with these

1 rings?

2 A Yes, I have.

3 Q Can you lay out for us what your findings are with
4 respect to the timeline?

5 A If I could start at the beginning. Initially, we have
6 the bond tying everything up. It talks about, you
7 know, that you have to go to probate court. Well, some
8 four days later, Mr. Peters' father's law firm files an
9 action in probate court. And during the pendency of
10 Mr. Middleton waiting to go to trial, a wrongful death
11 action was also filed against Mr. Middleton.

12 Then we ultimately get to trial,
13 Mr. Middleton is convicted. The only family member of
14 his wife, Kathy Middleton, who testified against him
15 was Mildred Anderson, Mr. Middleton's sister-in-law.
16 And based upon the documentation, the Blue Springs
17 Police Department was authorized to release \$18,500
18 worth of jewelry, basically, Mrs. Middleton's jewelry,
19 to Mildred Anderson.

20 Q Mildred wasn't the only sister, correct?

21 A She wasn't the only heir. The two sisters and a
22 brother and -- see, here --

23 Q Actually, I was going to ask -- am I incorrect, did not
24 Ray Vasquez actually call Pat Peters personally and
25 ask? Is that what Mr. Vasquez said in his deposition,

1 that he called Mr. Peters and said, Mildred Anderson's
2 here, should I release this jewelry to her?

3 A That was my understanding of it. And again, I've not
4 reviewed that in a few weeks. But nevertheless, at the
5 time it was released, it was based on Mr. Peters'
6 say-so. Now the problem with this is, number one, it
7 was -- I think sentencing was on a Friday and this was
8 on a Monday, the following Monday. And the one person
9 who testified against him receives all this jewelry.!

10 In and of itself, that might not be unusual.
11 However, no letters of administration have been
12 released, no -- and ultimately, once the probate case
13 was completed, that jewelry never showed up in the
14 probate estate whatsoever. It is basically a gift to a
15 witness.!

16 Q The probate proceeding --

17 THE COURT: Let me -- I've got to stop you.
18 I have to make a telephone call. I've got to change
19 plans for tonight.

20 (A recess was taken.)

21 THE COURT: Okay. You may proceed.

22 MR. LAURANS: Thank you, Judge. Can I have
23 my last question read back?

24 THE COURT: I'm sorry.

25 (The last question was read by the reporter

1 as follows:

2 "Q. Actually, I was going to ask -- am I
3 incorrect, did not Ray Vasquez actually call Pat Peters
4 personally and ask? Is that what Mr. Vasquez said in
5 his deposition, that he called Mr. Peters and said,
6 Mildred Anderson's here, should I release this jewelry
7 to her?")

8 THE COURT: The answer was, Let me go back to
9 the beginning, and that's when I took the break, so --
10 I think that's right.

11 Q (By MR. LAURANS) And just for clarification,
12 Mr. Carter, did the transfer of rings from Vasquez to
13 Mildred Anderson occur after the trial, before
14 sentencing, or after the sentencing?

15 A I want to say it occurred after the trial but before
16 sentencing.

17 Q Trial ended on either Thursday or Friday, correct?

18 A The 22nd, I believe, is -- no, excuse me, was it
19 19th? 19th, I believe, is when the trial ended.

20 Q Sentencing was a few days thereafter, correct?

21 A More than a few days after.

22 Q But the ring was only a few days after?

23 A Rings, I believe, was the 22nd of February.

24 Q So --

25 A I don't have my paperwork in front of me, and I brought

1 one-tenth of what I have on this case with me, so
2 you've got to forgive me if I can't spit the dates out
3 as well as I would like.

4 Q Would it be fair to characterize, as we say the ink
5 wasn't even dry yet?

6 A That would be a very fair characterization.

7 Q Prosecutors have an obligation to avoid even the
8 appearance of an impropriety, correct?

9 A That's correct. In fact Missouri has a number of cases
10 that specifically spell that out. And the federal
11 courts have a number of cases also.

12 Q How would you characterize the transfer of the rings
13 from Vasquez to Anderson with Peters' knowledge?

14 A Standing alone, it probably shouldn't have been done,
15 and clearly it wasn't done properly. But standing
16 alone, it might not have been that big of a problem.
17 But when you tie it in with the father's law firm, the
18 bond, and I think it's page 536 of the transcript in
19 closing statements, Mr. Peters said something to the
20 effect of, we got to do something to him so he doesn't
21 go out and spend her money. When you tie all that
22 together, there's a huge violation.! That just should
23 not happen. Mr. Peters shouldn't have prosecuted the
24 case if he was prosecuting the case solely for
25 financial gain for this law firm, and all the evidence

1 supports that.

2 Q Are you familiar with Mildred Anderson's testimony in
3 the Arkansas Chancery Court?

4 A Oh, yes.

5 MR. LAURANS: I'm sorry, Judge. I've lost my
6 page.

7 A If I may help you out, are you talking about at trial
8 or in deposition?

9 Q (By MR. LAURANS) Deposition.

10 A Okay.

11 Q What I'm -- oh, okay, I have it now. Page 28 of
12 Ms. Anderson's deposition within Exhibit 44, are you
13 familiar with her testimony concerning whether or not
14 Mildred and her family went down and actually talked to
15 Pat Peters?

16 A I am.

17 Q Can you tell us what -- can you summarize -- I mean the
18 testimony's in the record, but can you summarize it for
19 us?

20 A Well, it would be a whole lot easier if I had the
21 deposition.

22 Q Tell me what Ms. Anderson's talking about there.

23 A Ms. Anderson admitted that the family went down and
24 talked to Mr. Patrick Peters. And if you go to the
25 bottom of the page, you'll see where they agree that

1 their law firm sent out various letters trying to tie
2 up Mr. Middleton's assets. And it's those letters that
3 have Mr. Patrick Peters' father on the letterhead. In
4 addition, Mr. Duncan represented Mr. Middleton in all
5 the civil cases.

6 Q Given your findings and conclusions with respect to
7 Mr. Peters' involvement in this case, do you have an
8 opinion as to his conduct?

9 A When I was on the bench, I wouldn't have allowed that
10 if I'd known all the facts. I consider it
11 reprehensible. As a prosecutor today, I would step
12 aside in any case in which there is even the potential
13 that I would have some sort of financial interest.
14 That's just required. In addition, the American Bar
15 Association has special rules for prosecutors. And
16 they have to see that justice is done, and they have to
17 have an appearance that they are representing the
18 State. Because as you know, charges are filed by the
19 State, charges aren't filed by individuals. And that
20 line seems to have been blurred in this case.

21 Q Now Mr. Peters -- we don't have any evidence, do we,
22 that Mr. Peters was individually personally benefitting
23 from the wrongful death or probate, correct?

24 A That's correct, we have no evidence of that whatsoever.

25 Q But we do know his father was in a firm where there

1 were fees to be made?

2 A Based on \$1.35 million judgment, very large fees to be
3 made.

4 Q Is that the value of the judgment that was ultimately
5 rendered against Ken Middleton in the wrongful death
6 suit?

7 A Yes. It's to grown to some two and a half million
8 dollars today, counting interest and everything.

9 Q In closing, I want to ask you, have you done some
10 investigation into the objective facts within public
11 records concerning the Ed Reuscher case?

12 A I have.

13 Q All right. Can you tell the Court the date that trial
14 started?

15 A I believe the trial started November 30 of 1990. It
16 was completed just prior to Christmas of 1990. There
17 were a few post-trial proceedings, and he was
18 sentenced, I believe, on January 15th, 1991.

19 Q There was actually a sentencing proceeding because it
20 was a death case, correct?

21 A That's correct.

22 Q It wasn't just a show up and a hearing, it was days of
23 witnesses?

24 A That's what should have happened, yes.

25 Q So we're looking at a six-week death penalty trial,

1 correct?

2 A That would be about right.

3 Q Because 30 days are in November, correct?

4 A That's correct.

5 Q You pick a jury on the 30th maybe if you're lucky?

6 A Well, see, I count it as 47 days, so it's almost seven

7 weeks, actually.

8 Q Okay. Now, that trial ended, what, exactly one month

9 prior to the beginning of Mr. Middleton's?

10 A That's correct.

11 Q All right. What do we know about Mr. Reuscher's

12 appeal? Who handled it?

13 A Robert Duncan handled it.

14 Q And there was a direct appeal that went up to the

15 Missouri Court of Appeals and was affirmed, correct?

16 A That's what the records reflect and that's what I

17 found.

18 Q Does it sound like 827 S.W.2d, page 10?

19 A That could be the cite. I mean that would be about the

20 approximate time, based on the 827 number.

21 Q I'll represent that to you as the affirmance of his

22 direct appeal. In order for Mr. Duncan to have handled

23 the direct appeal, what would he have had to do before

24 the notice of appeal?

25 A I hope he is there asking the Court for a new trial.

1 And given a seven-week trial and sentencing, he had
2 better have been putting a lot of time in it, since the
3 man was given the death penalty. !
4 Q So we don't know for sure if Mr. Duncan was working on
5 that motion for new trial between January 15 and
6 February 15 of '91, but --
7 A I don't know with any degree of certainty, but it seems
8 pretty clear he wasn't working on Mr. Middleton's
9 trial.
10 Q Well, he would have had to at some point done a motion
11 for new trial for Mr. Reuscher, because --
12 A That's under Missouri rules, that's correct.
13 Q -- there was a direct appeal perfected, correct?
14 A That's correct.
15 Q There's a likelihood that from January 15 of '91 to
16 February 15 of '91 he may have been working on
17 Reuscher's case?
18 A Better have been working on it.
19 Q And we know, whether he was working on Reuscher or not,
20 he was in court from November 30 to January 15?
21 A That's correct. And in fact, the file of this case
22 reflects that, because in his motion for continuance,
23 he sets out, Judge, I can't have a trial this time and
24 I move for a continuance because I'm in court
25 elsewhere. Can't have a trial here.

1 This case was set finally for January 7th and
2 on January 4th he filed a motion for continuance and
3 attached to it the all-important letter, and asked for
4 a continuance again, because he's in court. Well, the
5 only case he could be in court in at that point is
6 Mr. Reuscher's case.

7 Q Mr. Reuscher's initial ineffective assistance of
8 counsel claim failed; is that correct?

9 A That's correct.

10 Q It's 887 S.W.2d at 588?

11 A That's correct.

12 Q All right. What happened to Mr. Reuscher's case
13 thereafter?

14 A Subsequently, the State confessed ineffective
15 assistance of counsel on Bob Duncan and Mr. Reuscher's
16 conviction was reversed.!

17 Q I'm going to hand you what's been marked as Movant's
18 Exhibit 57 and ask you to identify that.

19 A This is an order by the Supreme Court of Missouri, John
20 C. Holstein, Chief Justice, remanding Ed Theodore
21 Reuscher, III, that -- with the judgment of conviction
22 and sentence vacated.!

23 Q This is essentially the 1997 order from the Supreme
24 Court throwing out Mr. Reuscher's conviction for
25 ineffective --

1 A That is correct.

2 MR. LAURANS: Judge, this is my only copy. I
3 didn't provide a copy to Mr. Kelly, but I've shown it
4 to him. And, of course, it can also be verified. I'd
5 ask you to take judicial notice, but Mr. Reuscher's
6 conviction was thrown out.

7 THE COURT: Very well.

8 MR. LAURANS: I'd move for admission of
9 Exhibit 57.

10 MR. KELLY: No objection.

11 THE COURT: All right. The exhibit's
12 received.

13 MR. LAURANS: Thank you, Mr. Carter. No
14 further questions.

15 THE COURT: Cross?

16 MR. KELLY: Yes, Judge.

17 CROSS-EXAMINATION by MR. KELLY:

18 Q Let me go back to some of your testimony, so take
19 yourself back a little bit.

20 Mr. Carter, you testified as one of your
21 findings and leading to your conclusion, that
22 Mr. Duncan did not conduct any witness interviews?

23 A That's correct.

24 Q In truth it would be fair to say that based upon the
25 records you have we don't know if he conducted any

1 witness interviews?

2 A That's correct. But he called no witnesses, I can't
3 see where he took any depositions.

4 Q Okay.

5 A And we can't find anybody that he possibly interviewed.

6 Q I understand that. But we don't know that for a final
7 fact?

8 A With a 100-degree percent of certainty, no, we don't.

9 Q Okay. And we know we always -- lawyers have to ask
10 that question.

11 When -- you've had a lot of trials, both on
12 defense side, prosecutor's side, it sounds like. Is
13 that fair to say?

14 A I've had far more trials on the defense side than I
15 have on the prosecutor's side, because I've only been a
16 deputy prosecutor for 18 months.

17 Q Okay, fantastic. Have you ever had a case to that you
18 went to trial on where, for whatever reason, you didn't
19 interview any witnesses?

20 A All the time.

21 Q Okay.

22 A Traffic tickets, whatever, but never a felony case.

23 But in misdemeanor court, heck, sometimes your client
24 never comes to see you, they show up, we just put them
25 on and try the case.

1 Q You've never had a felony case where you didn't
2 interview witnesses?

3 A No.

4 Q Let's talk a little bit about the fact that Mr. Duncan
5 never had an opening. Have you ever reserved your
6 opening? Just put it that way.

7 A I have done it one time.

8 Q You can certainly see -- foresee a strategic reason why
9 a lawyer might want to do so?

10 A Yes.

11 Q Particularly if he's not real sure what's going to come
12 out of his client's mouth or something or what the
13 evidence is ultimately going to show?

14 A That would be possible. My -- the one case I did it, I
15 had it for a totally different reason. My client
16 wasn't a nice guy, he did what the State said he did,
17 but he wasn't guilty of a crime. And I don't want to
18 stand up and tell the jury in the beginning, State's
19 right about everything.

20 It was a hot check case. And under Arkansas
21 law, if you write a hot check but you already owe the
22 person the money, it's not a hot check. It's what we
23 refer to as a warm check and it's not a crime.

24 And that's what the fellow did. He wrote a
25 check for \$1,200 to this guy, it clearly bounced. But

1 he owed him like \$1,400 and he still owed him. And you
2 don't want to stand up and give an opening statement
3 and tell all that to the jury, because that's going to
4 tick you off. I just let the State put on their whole
5 case and then told them what the law was.

6 They went out, asked the judge, Can we acquit
7 him but make him pay the money back? Hey, I -- hey,
8 the jury went out, sent a message to the judge that in
9 essence said, Can we acquit him but still make him pay
10 the money back? And I said to myself, hey, at that
11 point I've won. And he was ultimately acquitted. But
12 that's the only time I ever risked not giving an
13 opening statement. Because I think a jury wants to
14 know what your theory is and where you're going with
15 it.

16 Q But to be fair, there are reasons why you --

17 A There are reasons.

18 Q -- you at least reserve the opening?

19 A That's correct.

20 Q Okay. Now, putting that to the side, have you ever
21 been in a situation where you had a trial and you fully
22 intended to, one, put on evidence and, two, probably
23 even put on your defendant, and you get to the end of
24 the State's evidence and you huddle up and you decide,
25 you know what, we're just going to close up the tent,

1 we're going to go home, because it didn't come in so
2 great? Have you ever had that situation?

3 A I've done it a number of times.

4 Q So certainly you could foresee a situation where you
5 start out reserving opening, you get to the end, and
6 for strategic reasons you say, we're just closing up,
7 and actually an opening never happens?

8 A That -- that is correct. In fact one case I reserved
9 it, I actually never did give an opening, I just gave a
10 closing.

11 Q Fair enough. You also talked about the fact that he
12 had won this motion to suppress.

13 A That's correct.

14 Q But then it was brought up, specifically by the
15 prosecutors?

16 A That's correct.

17 Q Okay. Could you foresee a situation where, as a
18 defense attorney, the bell's already been rung and you
19 could say, Gee, you know, if I get up and make a big
20 deal out of this, it's not going to help my case, I'm
21 just going to sit here and let it go?

22 A Absolutely. All the time you make conscious decisions
23 that, hey, this is hearsay or this is this, but if I
24 stand up and object, I bring attention to it, and
25 hopefully if I don't bring attention to it -- because

1 my theory is, when you stand up and object, all those
2 jurors who are half paying attention, now paying
3 attention. Here's something I need to pay attention
4 to. And that has always been my philosophy.

5 But in this case, that -- this is just too
6 vital a thing to allow in. A confession or what you're
7 going to characterize a confession of your client, you
8 cannot do that.

9 Q And what would have been the remedy? Would it not be
10 to ask the judge to tell, admonish the jury, You need
11 to ignore that?

12 A Well, at the very least you have to ask to have the
13 jury admonished. But given the nature of the case, I
14 would have asked for a mistrial. And if the Court
15 denied the mistrial, at the very least say, Judge,
16 admonish the jury and explain to them that they are not
17 to consider this in their deliberations.

18 Q Fair enough. You also mentioned -- and correct me if
19 I'm wrong. You took him to task a little bit for
20 failing to do some mitigation in the sentencing phase?

21 A That's correct.

22 Q He was convicted of first degree murder?

23 A That's correct.

24 Q And the state of Missouri, if you're not given the
25 death penalty, it's life without parole, regardless?

1 A I understand.

2 Q So --

3 A He still had letters and things that he needed to at
4 least make a record of.

5 Q And under Strickland, cause and prejudice, so what? I
6 guess that's my point.

7 A With regard to that, you're correct. Nevertheless, I
8 still believe he had to make that effort. Because at
9 no point in this trial can I see that Kenneth Middleton
10 was humanized. And that's what you have to do in a
11 murder case. You have to have the jury see and
12 understand this man, and that wasn't done.

13 Q Okay.

14 A They never heard Ken Middleton's voice.

15 Q No, they didn't. You also talked about his failure to
16 move to suppress some of the physical evidence that was
17 obtained apparently without a search warrant. Am I
18 right?

19 A That's correct.

20 Q Okay. Can you see a situation, especially in this
21 case, because they went in after the fact to stage the
22 area, if you will, that a judge looking at that would
23 have said, You know, if you'd have come and got a
24 search warrant, I'd have certainly done it, sort of
25 inevitable discovery kind of situation? Where's the --

1 I guess I'm trying to pull out of you, is there some
2 prejudice there, some cause?

3 A Absolutely. Because the key thing in -- when you're a
4 defense attorney, especially in a first degree murder
5 case, is laying a record. Now, ultimately, if the
6 judge allows it in, fine. You have an issue for
7 appeal. That issue was completely waived.

8 And the motion is a very, very good motion
9 under the facts and circumstances of this case.

10 Because if they obtained a search warrant, potentially
11 they would have told the judge, Judge, we need the
12 search warrant because we need to go in there and
13 rearrange the furniture and take some pictures because
14 we forgot to do or we didn't get our crime scene
15 developed. Those are all factors for a court to decide
16 as to whether or not they were going to issue the
17 search warrant in the first place.

18 Q Could you foresee a person sitting in Bob Duncan's
19 situation thinking to themselves, You know what, I
20 could file that motion, but knowing this court and the
21 circumstances and the prosecutor, they're just going to
22 ask for continuance, they're going to get their search
23 warrant, they're going to go back in and redo it and
24 it's a big so what, we've wasted some more time? I
25 mean could you foresee that as a possible thought

1 pattern?

2 A No, I can't, not one year later. And based upon the

3 file that I've seen, there was a motion for discovery

4 filed, but the next work that I really saw by -- after

5 Mr. Middleton's arraignment, the bond hearing, a motion

6 for discovery, it's December before I saw anything else

7 in the file that Mr. Duncan had really done anything,

8 and that was only the letter to Mr. Peters. Obviously,

9 even though I didn't see it contained in the file, he'd

10 moved for a continuance a number of times, whether

11 telephone or whatever, but he had done that.

12 Q Okay. And I want to turn your attention to the

13 ballistics. Well, not the ballistics, rather, the

14 gunshot residue issue. Obviously, you're taking him to

15 task for failing to follow up on that. Would that be a

16 fair statement?

17 A That would be a very fair statement.

18 Q Okay. Would -- and the possible harm that comes out of

19 that, I mean that sort of goes to, hey, that left hand

20 could have had gunshot residue on it, right?

21 A That's correct.

22 Q Now --

23 A And if it had, this case would have just folded -- more

24 than likely folded up, gone away, never had a trial.!

25 Q However, if it didn't, are you -- does it make any

1 difference? I guess that's my point. If they didn't
2 find gunshot residue there, is that just one more thing
3 you've crossed off your list that, okay, we've checked
4 that out?

5 A That's right. You have an obligation to your client to
6 check that out and that wasn't done.

7 Q And I'm not going to argue with that, about that. I
8 just want to make sure that there's nothing else there
9 besides that, that key issue, that you know should have
10 been done.

11 Let's say that we get to a position -- and
12 this is hypothetical, I really just want to know what
13 your thoughts are. Down the road there's a new trial,
14 the State comes forward and says, We don't know if one
15 was ever done. The evidence doesn't exist anymore. We
16 can tell you that the right didn't have any, but we
17 don't know anything about the left. Where are you at?

18 A That would be the focus of the defense.

19 Q Exactly. And certainly Bob Duncan could have gone
20 there even without knowing, could he not?

21 A That's correct.

22 Q And he didn't?

23 A He didn't. And that's why he's really ineffective in
24 this particular case.

25 Q And I understand you feel that way, but we really can't

1 climb inside his head and decide if he was going
2 somewhere else, can we?

3 A Well, what we can do is look at the entire trial
4 transcript and say, Okay, he's not going there, but
5 where is he going? And when you read that transcript,
6 nobody can figure out where Bob Duncan was going with
7 this case.

8 Q Would you -- you spoke that he didn't talk to
9 Michelle -- it's Brockman?

10 A That's correct.

11 Q Mr. Middleton's niece, correct?

12 A Mr. Middleton's niece.

13 Q Would you call her potential testimony even possibly
14 case dispositive?

15 A Yeah. Well, not dispositive of the case, but it's
16 absolutely important testimony. Because you have
17 Mildred Anderson testifying and at least Mr. --
18 Ms. Lockhart and Ms. Anderson giving statements to the
19 police that seem to indicate that there's some violence
20 there, with Mrs. Anderson there's some marital
21 problems. These are sisters-in-law. Here is a person
22 living in the house with them. Who would know better?
23 There's just not any excuse, given the possible witness
24 list, not to interview her. I seriously doubt it would
25 be completely dispositive of the case, but it's

1 important to counter the State.

2 Q Okay. I appreciate that. Would you agree with me that
3 the defendant really has three fundamental decisions to
4 make: whether to plead or go to trial, whether to
5 testify or not, and whether to appeal or not? No trick
6 here.

7 A Those are the three basic. I mean there's some
8 subparts to it, because I think a defense attorney has
9 to sit down and explain the strategy or why or why not
10 we are going to call this witness. But ultimately it
11 needs to be the client's decision as to whether or not
12 you choose this particular defense as opposed to this
13 particular defense.

14 Q And with respect to many of the items that you've taken
15 Mr. Duncan up on today, certainly had Mr. Middleton
16 decided to take the stand on his own behalf and
17 testify, he could have remedied a lot of the
18 shortcomings that we're here dealing with today.
19 Wouldn't you agree?

20 A He would have only remedied the shortcoming about his
21 testimony. It's not going to remedy failure to follow
22 through with the suppression motion, failure to object
23 to his confession, because you have a police officer
24 says he did it. Mr. Middleton would take the stand.
25 One would assume that Mr. Middleton would say he didn't

1 do it. But all that's done is just created an issue.
2 By allowing that statement in, you've created -- if he
3 had kept it out, which would have been in line with
4 what the evidence supports and with what the court
5 ruling was, then keeping Mr. Middleton off the stand
6 might have been something to consider.

7 Q But by his own testimony, he certainly could have
8 filled in many of the gaps, i.e., we had a good
9 marriage, explain exactly how the alleged accident took
10 place, things like that, that didn't come in otherwise?

11 A But -- and I am sure that you've argued this numerous
12 times -- he's the defendant. He has a self-interest in
13 the outcome of the case. Mr. Peters is no dummy and he
14 would have clearly pointed that out. That is the
15 importance of having other witnesses to bolster your
16 case.

17 Q Want to move on a little bit to the prosecutor, Pat
18 Peters, in this case. The first thing that you took
19 him to task for was the fact that somehow the bond
20 requirement was that Mr. Middleton not dispose of
21 marital assets; is that correct?

22 A That's correct.

23 Q Is it fair to say that in a case where money could
24 potentially be a motive, that the State and even the
25 court might have an interest in preventing disposal of

1 assets pretrial?

2 A I'm sure that the State and the court or at least the
3 court would have an interest in it. Now I'm not sure
4 that the State necessarily has an interest in it. And
5 when I say the court, I'm talking about the probate
6 court.

7 Q Well, I'm specifically talking about a criminal case,
8 where you have a situation where the allegation from
9 the State, the motive -- which, of course, we all know
10 is not an element but sort of helps a jury -- is, you
11 know, he killed her because there's a lot of money at
12 stake. And if money is not there when the State goes
13 to put on its case, then a jury is left to say, Well,
14 what money? So following that line of reasoning, would
15 it be fair to say that, sure, there are going to be
16 times when money and the preservation of assets is
17 important?

18 A Shouldn't be important to the State or the court
19 whether there's a preservation of assets or not a
20 preservation of assets, not unless the State was
21 seeking a million dollar fine or something and wanted
22 to make darned sure that they could get their hands on
23 it.

24 Q Fair enough. You've been a prosecutor for a while?

25 A Yes.

1 Q And I know you were on the defense side and had many
2 conversations with prosecutors, I'm sure.

3 A On a daily basis.

4 Q In Arkansas, do members of the police department, do
5 they ever contact prosecutor's office and say, We have
6 this property, the -- this person is telling us it's
7 not important to the case, can we release it? Have you
8 ever had that happen?

9 A All the time. Because I do the drug cases, so I deal
10 with the civil forfeitures also. So I get that on a
11 weekly basis.

12 Q Okay. And I think -- I wanted to revisit this idea
13 about Pat Peters' father's law firm being involved in
14 the civil case. Are you aware, after reviewing all the
15 documents that you reviewed, that there's any evidence
16 in there that suggests that Mr. Peters himself had a
17 financial interest in his father's firm?

18 A No.

19 Q Is there any evidence to further suggest that if his
20 father was enriched he somehow would be?

21 A My philosophy on that is, the wealthier my father is,
22 at some point, hopefully, that will trickle down to me.

23 Q One can only hope.! But certainly there's no -- there
24 was no direct evidence in the files itself to suggest
25 that anything of that nature ever took place?

1 A That is correct.

2 Q Okay.

3 MR. KELLY: Judge, that's all I have.

4 THE COURT: Redirect?

5 MR. LAURANS: Judge, I don't have any

6 redirect.

7 THE COURT: Can the witness be excused?

8 MR. LAURANS: Yes, Judge.

9 THE COURT: Yes?

10 You may step down, sir. You are excused.

11 THE WITNESS: Thank you, Your Honor.

12 (Witness excused.)

13 THE COURT: Does the movant have any

14 additional testimony to present?

15 MR. LAURANS: Just -- no other witnesses,

16 just two housekeeping matters.

17 THE COURT: And does the State have evidence

18 to present?

19 MR. KELLY: No, Your Honor. We did that this

20 morning.

21 THE COURT: Okay. What we're going to do

22 then, we're going to conclude for the evening. It's

23 ten minutes to six. And we will pick this up at ten

24 o'clock. Do you have the -- I think --

25 MR. KELLY: We have a sentencing set at

REPORTER'S CERTIFICATE

I, Susan L. Steen, Certified Court Reporter, hereby certify that I am the official court reporter for Division 12 of the Jackson County Circuit Court, that on DECEMBER 18, 2003, and JUNE 24 and 25, 2004, I was present and reported all of the proceedings had in the case of KENNETH MIDDLETON, Movant, vs. STATE OF MISSOURI, Respondent, CASE NO. CV91-23437. I further certify that the foregoing 304 pages contain a true and accurate reproduction of the proceedings transcribed.

 , CCR, RMR
Susan L. Steen, C.C.R. #0283
Official Court Reporter, Div. 12

Transcript completed: July 12, 2004