UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

BIN WANG **Petitioner-Plaintiff,** **v.** **MICHAEL OVERMYER,** Warden **DISTRICT ATTORNEY'S OFFICE** **Defendant-Respondent.**	)	**Case No. 2:19-cv-357-ER**

Amended Petition for Writ of Habeas Corpus

Petitioner-Plaintiff, Bin Wang, through counsel, respectfully files his *Amended Federal Habeas Petition*, which is presented in good faith and based on the following facts and authorities.

INTRODUCTION

The right to effective trial counsel is the "great engine by which an innocent man can make the truth of his innocence visible[.]" *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016). Bin Wang, unfortunately, did not receive effective representation at his 2008 first-degree murder trial because trial counsel failed to uncover, develop, and present readily available physical evidence that would have made the "truth" of his "innocence" quite "visible."

Trial counsel's ineffectiveness, therefore, represented an extreme malfunction in the state court criminal process – a malfunction that needed remedied by the state courts. The state courts, however, said no such malfunction occurred because trial counsel had retained and presented one forensic expert who told jurors Mr. Wang's wife's death could have been a suicide. The state courts' rulings are objectively unreasonable, and Mr. Wang respectfully asks this Court to rectify the extreme malfunction that happened at his trial when his trial attorney provided prejudicially inadequate representation.

Bin Wang did not shoot and kill his wife Sharon Lin on May 11, 2007. Mr. Wang has always maintained that Sharon shot herself during an argument between the two of them. The physical evidence and scene characteristics supported Mr. Wang's suicide narrative. Initially, trial counsel had the right idea when he retained Dr. Paul Hoyer, a forensic pathologist, to examine the entrance wound at the back of Sharon's head. Trial counsel, rightly and reasonably, hoped to develop evidence from the entrance wound to substantiate Mr. Wang's suicide narrative. Dr. Hoyer's examination of the entrance wound, though, was equivocal, meaning the entrance wound's characteristics supported Mr. Wang's suicide narrative and the Commonwealth's homicide narrative.

After receiving Dr. Hoyer's equivocal opinion, trial counsel ceased his forensic investigation, meaning he didn't hire another qualified forensic expert to examine the remaining items of physical evidence and the scene characteristics and dimensions to

determine if this evidence supported Mr. Wang's suicide narrative. Trial counsel, therefore, had no idea if the remaining items of physical evidence and the scene characteristics represented Mr. Wang's best opportunity to raise reasonable doubt and obtain an acquittal. Despite his total ignorance regarding the remaining items of physical evidence, after he received Dr. Hoyer's equivocal opinion, trial counsel repeatedly told Mr. Wang that his *best opportunity* for an acquittal was going to come from his – Mr. Wang's – trial testimony.

At trial, trial counsel presented Dr. Hoyer, but at the very end of his cross-examination, Dr. Hoyer conceded that the entrance wound's characteristics equally supported suicide and homicide, meaning Sharon Lin's death could easily be a homicide. Mr. Wang testified, but trial counsel presented no physical evidence or expert testimony to corroborate Mr. Wang's suicide narrative. The Commonwealth, on the other hand, presented two forensic experts, Dr. Gregory McDonald and Officer Stott, who both said Sharon Lin couldn't have shot herself because, according to Dr. McDonald, the fatal shot had to have been fired from at least three feet away. The Commonwealth, remarkably, presented and argued three different homicide narratives: one from Dr. McDonald, one from Stott, and one from the prosecutor during closing arguments. Moreover, trial counsel's cross-examinations of Dr. McDonald and Stott were, to be kind, unmitigated disasters because it was obvious trial counsel had no idea how to challenge their testimony and opinions. The jury, unsurprisingly, convicted Mr. Wang of first-degree murder.

During Mr. Wang's PCRA proceedings, undersigned counsel (Cooley) retained Brent Turvey, an experienced forensic expert and reconstructionist to view and examine the physical evidence, scene characteristics, scene dimensions, and Sharon Lin's entrance wound. After his thorough review, Mr. Turvey wrote a comprehensive 35-page affidavit explaining how each item of physical evidence supported Mr. Wang's suicide narrative and undermined the Commonwealth's three homicide narratives. Counsel attached a copy of Mr. Turvey's affidavit to this pleading.[1] Mr. Turvey also said he could've provided his findings and conclusion in 2007 and 2008 had trial counsel consulted with and retained him.

Mr. Wang presented Mr. Turvey's 35-page affidavit to the PCRA court, arguing that trial counsel was ineffective for not developing and presenting the findings and conclusions presented in Mr. Turvey's affidavit. The PCRA court summarily dismissed Mr. Wang's PCRA petition without even granting an evidentiary hearing and without even commenting on Mr. Turvey's 35-page affidavit. The PCRA court said because trial counsel had presented Dr. Hoyer, and Dr. Hoyer had told the jury suicide was a possibility, trial counsel's advocacy couldn't constitute ineffectiveness. Also, despite not mentioning a word about Mr. Turvey's findings and conclusions, the PCRA court said Mr. Wang also couldn't establish *Strickland* prejudice. Mr. Wang appealed, but the Pennsylvania Superior Court affirmed the PCRA court's dismissal.

[1] Ex. 1.

STATEMENT OF FACTS

A. Scene investigation and interviews

On May 11, 2007, around 7 p.m., Sharon Lin suffered a fatal gunshot wound to the left backside of her head in the second-floor bedroom of the home she shared with her husband, Bin Wang.[2] Detectives interviewed multiple witnesses that night.

1. Fact witnesses

Timothy Flemings lived across the street from Mr. Wang and Sharon, and at the time of the shooting, he was standing on his front porch. Flemings said immediately after hearing a gunshot from the second floor of Mr. Wang's residence, he saw Mr. Wang "screaming out the window" to "call an ambulance." Flemings ran to Mr. Wang's residence and when Mr. Wang opened the door, he repeatedly told Flemings, "[S]he shot herself." Flemings then ran upstairs into the bedroom and saw Sharon's body. Flemings "saw [Sharon's] feet on the head of the bed and saw the rest of her body laying on her right side face up[.]" When Mr. Wang entered the bedroom, he told Flemings "he thought [Sharon] was playing." Flemings said when he told Mr. Wang that Sharon was still breathing, Mr. Wang "went to the window and asked someone to call an ambulance[.]" Flemings told detectives he never saw Mr. Wang with a firearm and he did not see blood on Mr. Wang.[3]

[2] Rpp. 246-247.
[3] Rp. 248.

Rick Kern gave a similar statement. Around 7:00 p.m. that night, Kern was in his second-floor bathroom when he heard a "loud bang." Moments later Kern heard Mr. Wang hollering, "somebody call 911," and "that his wife had shot herself." Kern, like Flemings, ran to Mr. Wang's residence. When Kern entered the residence, Mr. Wang "kept screaming about his wife" because he was "so upset."[4] Troy Davis, another witnesses, also told detectives he was on his front porch at the time of the shooting and that moments after he heard a gunshot he saw Mr. Wang "screaming" from the second floor window, "[S]omeone call 911."[5]

2. Mr. Wang's statement

Detectives interviewed Mr. Wang the next day. He told detectives Sharon shot herself during an argument. The argument, he said, started the night before, on May 10, 2007, and resulted in Sharon leaving their residence that night. They argued about the woman Mr. Wang had met on the internet and their money problems. The next morning, May 11, 2007, Mr. Wang went to his body shop business at 9 a.m. and returned home between 9:30 and 10:00 a.m. Sharon was home when he arrived. They argued again for thirty minutes. During this argument, Mr. Wang said he "was so upset" he grabbed his gun and contemplated suicide because he was not sure if he could "take the pressure" anymore. Sharon, though, grabbed the gun from him. Once she took

[4] Rp. 249.
[5] Rp. 250.

the gun from him, they talked "peacefully" until Sharon had to leave for work. Mr. Wang stayed home.[6]

Sometime between 3:00 p.m. and 4:00 p.m., Sharon called Mr. Wang from the body shop. Fifteen minutes later, Sharon returned home and made love to Mr. Wang before the two fell asleep until 6:15 p.m. or 6:30 p.m. When they woke up, though, they argued again. Tired of arguing, Mr. Wang drove to WAWA for cigarettes, but before leaving he grabbed his gun which was on the heater cover in their bedroom. When Mr. Wang returned from WAWA, he placed his gun back on the heater cover, which is where he usually kept it.[7]

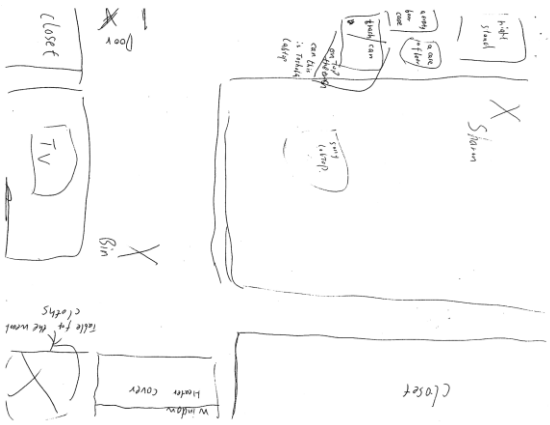
Once back from WAWA, Mr. Wang noticed the T.V. had been moved in the bedroom. When he asked Sharon why she had moved it, they argued again. Mr. Wang said he walked away from the argument and "walked around the house" to collect his thoughts. When he returned to the bedroom, Sharon was laying on the bed with the sheets covering her up to her neck. Unbeknownst to Mr. Wang, Sharon had grabbed the gun from the heater cover and hid it under the covers.[8]

They argued for "several minutes" when Sharon "pulled out the gun, put it at her head and said… 'don't push me, I'm gonna kill myself.'" Thinking Sharon was joking, Mr. Wang turned his head away and sighed in a manner to suggest he did not

[6] Rp. 253.
[7] Rpp. 253-254.
[8] Rp. 254.

believe her threat. Mr. Wang said when she heard him make the "pfft" sound, Sharon "pulled the trigger." Mr. Wang said he was at the right foot of the bed near the T.V. when she shot herself. She was seated near the left head of the bed with her back near or against the head board. Mr. Wang immediately turned and saw Sharon fall to the floor with her "eyes… open." Mr. Wang "ran to the window and screamed to his neighbor across to the street to call the police and ambulance."[9]

The night stand to the left of the bed at the head of the bed was knocked over. When detectives asked how the night stand had been knocked over, Mr. Wang said when Sharon shot herself and her body fell off the bed it struck the nightstand causing it to knock over. Detectives asked Mr. Wang to draw a diagram of the bedroom and identify where they were when Sharon shot herself.[10] Mr. Wang drew the diagram below:



[9] Rp. 254. The above diagram Mr. Wang drew is also at Rp. 261

[10] When discussing directionality when referencing the bed's position, counsel's directions are based on someone standing at the foot of the bed and facing the bed.

The neighbors and responding officers saw no blood on Mr. Wang's clothing or hands. Also, no one swabbed Mr. Wang's hands for gunshot residue ("GSR"), nor did anyone collect his clothing for GSR testing.[11]

3. Responding officers and physical evidence

Officer Anthony Magsam was the first responding officer. When he arrived, Sharon's head and back were against the left wall and "tilted right at the corner of the floor."[12] Sharon's legs "went up" at a 45-degree angle and positioned on the bed near the head of the bed, not far from the nightstand positioned in the left corner of the bedroom.[13] Magsam said the distance between the left wall and the bed was 1.5 feet.[14] Officer Joanne Kitz was the second responding officer. She too saw Sharon's feet up on the bed near the head of the bed at a 45-degree angle.[15] Once medics arrived, Kitz helped medics move Sharon's body to the bed. They placed her head at the foot of the bed and her feet at the head of the bed.[16]

They moved Sharon's body before anyone photographed the scene. The only scene photographs, therefore, depict Sharon's body on the bed, not on the floor to the left of the bed. Mr. Wang attached the following photograph/diagram to one of his *pro*

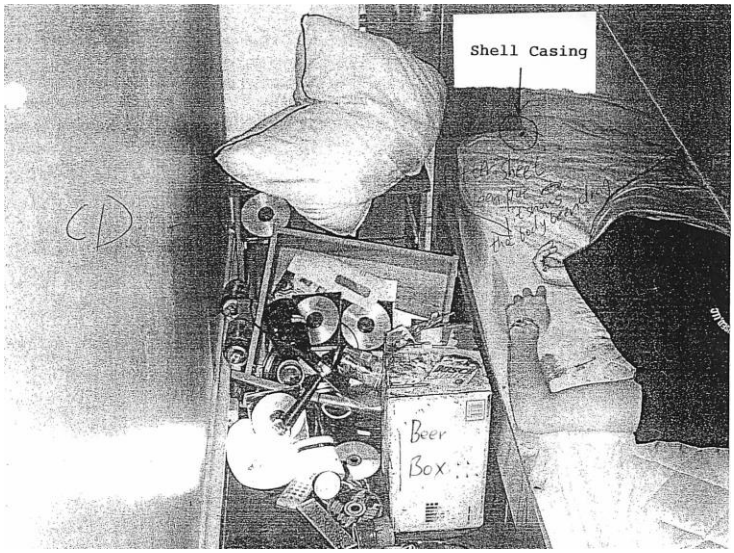
[11] NT, Trial, 11/4/2008, p. 217; NT, Trial, 11/5/2009, p. 138.
[12] NT, Trial, 11/4/2009, pp. 30-31, 45.
[13] NT, Trial, 11/4/2009, pp. 30-31, 45.
[14] NT, Trial, 11/4/2009, pp. 45-46, 47; Rp. 27.
[15] NT, Trial, 11/4/2009, p. 64.
[16] NT, Trial, 11/4/2009, p. 65.

se pleadings depicting the positioning of Sharon's body when responding officers arrived:

Officers located the gun in the second (bottom) drawer of the knocked over nightstand . The first (top) drawer had fallen on top of the second (bottom) drawer.[17] The gun was a Taurus 9mm semi-automatic handgun. Also, officers identified a bullet strike mark above the closet to the right of the bed and recovered the fired cartridge casing ("FCC") at the head of the bed near the nightstand.[18] Officers recovered the bullet between the mattress and bed frame on the left side of the bed near the headboard.[19] The bullet went through Sharon's skull and hit the wall (above the closet) opposite where her body came to rest. The bullet then ricocheted off the wall and came

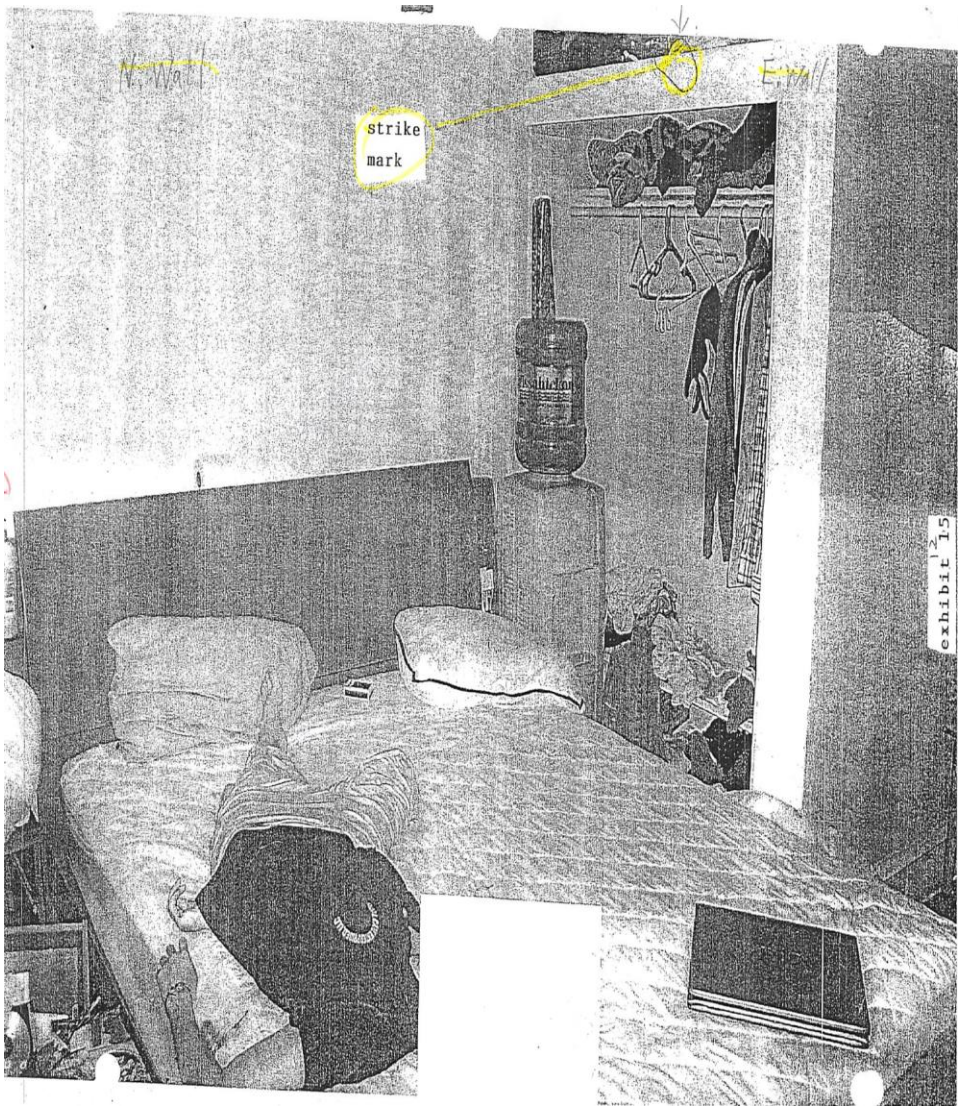
[17] NT, Prelim. Hrg., 7/3/2007, p. 58.
[18] NT, Trial, 11/3/2009, pp. 47-49; Rp. 270. Rp. references refer to the *Reproduce Record* Mr. Wang filed in conjunction with his initial 2254 petition.
[19] NT, Trial, 11/3/2009, p. 55; Rp. 270.

to rest between the mattress and bed frame.[20] The following photograph shows where officers recovered the FCC.



The following photograph shows the location of the strike mark:

[20] NT, Trial, 11/3/2009, p. 53; Rp. 270.



Dr. Gregory McDonald performed Sharon's autopsy the next day (May 12th). The entrance wound was to the left backside of her head. Dr. McDonald described the wound as a gaping 3" x 3 ½" stellate gunshot wound.[21] In the "RANGE" section of the autopsy report, Dr. McDonald reported finding no muzzle stamp, gunpowder, stippling, or soot surrounding the entrance wound and the "depths of the wound" failed

[21] Rpp. 246-247.

"to disclose any gunpowder or soot[.]"[22] Dr. McDonald classified the manner of death as homicide, resulting in Mr. Wang's arrest and charges.

B. Preliminary hearing, trial counsel's limited forensic investigation, and trial

1. Preliminary hearing

McDonald testified at the July 3, 2007 preliminary hearing. Trial counsel represented Mr. Wang at the preliminary hearing. Based on the fact he failed to identify gunpowder, soot, and stippling around the entrance wound and the fact he did not see back spatter or high velocity blood on Sharon's hands, Dr. McDonald opined that the fatal shot was fired at a distance of three feet or more away from Sharon.[23] The wound track, Dr. McDonald said, "proceeded in a leftward, forward, upwards trajectory… through the temporal bone and out the exit wound."[24]

2. Trial counsel's limited forensic investigation

After the preliminary hearing, trial counsel retained Dr. Paul Hoyer, an experienced forensic pathologist, to examine the autopsy photographs of the entrance wound to determine if the entrance wound was a contact wound. If a contact wound, trial counsel believed this finding would support Mr. Wang's suicide narrative. Trial counsel did not ask Dr. Hoyer to examine the scene photographs and other physical

[22] Rpp. 246-247.
[23] NT, Prelim. Hrg., 7/3/2007, pp, 8, 9.
[24] NT, Prelim. Hrg., 7/3/2007, p. 10.

evidence to determine whether the scene characteristics and/or physical evidence supported Mr. Wang's suicide narrative.

On November 29, 2007, Dr. Hoyer wrote trial counsel and described the entrance wound as a "highly atypical gunshot wound" that showed "features often seen in close range firing."[25] In terms of Dr. McDonald's autopsy finding that the entrance wound presented with no soot, stippling, or a muzzle stamp, Dr. Hoyer said these "findings" were "compatible with distant, intermediate[,] and close range gunshot wounds."[26] Dr. Hoyer did not opine that the entrance wound was, in fact, a contact wound.

Based on the type of gun used and its dimensions, Dr. Hoyer wrote,

> If one were to hold the weapon up-side-down by the barrel, the end of the muzzle would be an inch or more from the edge of the hand. A shot fired in this position would have the end of the muzzle an inch or more from the skin. It would not be a contact gunshot wound.[27]

In terms of opining whether Sharon's death was a suicide, Dr. Hoyer wrote:

> It is possible [for Sharon'] to hold the weapon in one hand and fire it with the other hand. This is a commonly used position for suicidal shootings. The [gun's] small size would allow her to place it to the back of her head and shoot herself.[28]

[25] Rp. 262.
[26] Rp. 262.
[27] Rp. 262.
[28] Rp. 262.

On January 29, 2008, after Dr. Hoyer reviewed the digital autopsy photographs, Dr. Hoyer provided another report. This report, though, mimicked, nearly word-for-word, his first report and offered no new opinions regarding the entrance wound.[29]

On February 18, 2008, after reviewing Dr. Hoyer's second report, trial counsel wrote Mr. Wang and said, "Unfortunately, the findings are not as strong as I had hoped. In fact, the conclusions will make the suicide argument a very difficult one for a jury to understand."[30]

On April 2, 2008, trial counsel wrote Mr. Wang and said he had asked Dr. Hoyer "for additional clarification" regarding the exit wound and "soot particulars."[31]

On April 3, 2008, trial counsel had a "very long conversation" with Dr. Hoyer regarding his findings and conclusions.[32]

On April 4, 2008, trial counsel wrote Mr. Wang and summarized Dr. Hoyer's findings and conclusions. Trial counsel wrote that while the entrance wound is "large," this "by itself does not indicate close-range firing" according to Dr. Hoyer.[33]

On May 19, 2008, in response to Mr. Wang's questions regarding Dr. Hoyer's expected trial testimony, trial counsel wrote Mr. Wang and told him that it was his trial testimony, and not Dr. Hoyer's testimony or the physical evidence, that represented his best chance for obtaining an acquittal:

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[29] Rp. 263.
[30] Rp. 266.
[31] Rp. 267.
[32] Rp. 267.
[33] Rp. 267.

> In response to your recent letter, let me make this perfectly clear that Dr. Hoyer is not saying that Sharon's death was absolutely, positively a suicide. He agrees with the physical findings of the medical examiner but comes to a different conclusion as to cause of death. It is your testimony that will persuade the jury that this was a suicide. Dr. Hoyer cannot supply… more information.[34]

In the same letter, trial counsel also told Mr. Wang, "If you want a second opinion and the possibility of a second autopsy (if the body is available), you will need to provide an advance [sic] budget of several thousand dollars."[35] In response to trial counsel's statement regarding hiring another forensic expert, Mr. Wang sent trial counsel an additional $3,000.[36] Mr. Wang also sent trial counsel several diagrams of the bedroom identifying the location of various items of physical evidence and explaining how these locations disproved Dr. McDonald's preliminary hearing opinion that the fatal bullet had to have been fired from a distance of at least three feet away.[37]

On August 9, 2008, after receiving the $3,000, trial counsel wrote Mr. Wang and said, "I'm not going to hire a second doctor until we have wrapped up Dr. Hoyer as a witness."[38] Trial counsel did not explain what he meant by "wrapped up Dr. Hoyer as a witness." Trial counsel also stressed to Mr. Wang that the "key" to his case was his testimony: "As I have said from the start, your testimony, clear and concise, is the key

[34] Rp. 268.
[35] Rp. 268.
[36] Rp. 269.
[37] Rp. 269.
[38] Rp. 269.

to your case."[39] Lastly, trial counsel asked Mr. Wang to stop sending him scene diagrams because they were "not helpful."[40]

After receiving Dr. Hoyer's reports and opinions regarding the entrance wound, trial counsel did not consult with or retain another forensic expert to examine the entire bedroom to determine if the remaining items of physical evidence, besides the entrance wound, supported Mr. Wang's suicide narrative.

3. Trial

a. Commonwealth's case

At trial, during opening statements, the prosecutor said,

> When you see the pictures in this case and you hear from two people at least, the medical examiner [Dr. McDonald], and the firearms examiner [Officer Robert Stott], you will know that Sharon [Lin] did not shoot herself… [and] that this was a cold-blooded killing[.][41]

(1). Officer Stott's testimony and opinion

Officer Terrance Lewis testified that Taurus 9mm semi-automatic handguns ejected their FCCs to the right.[42] Officer Stott concurred with Lewis's testimony.[43] Stott also opined that Sharon had to have been seated near the left edge of the bed, near the bed's midline, facing the closet to the right of the bed, when Mr. Wang fired.[44]

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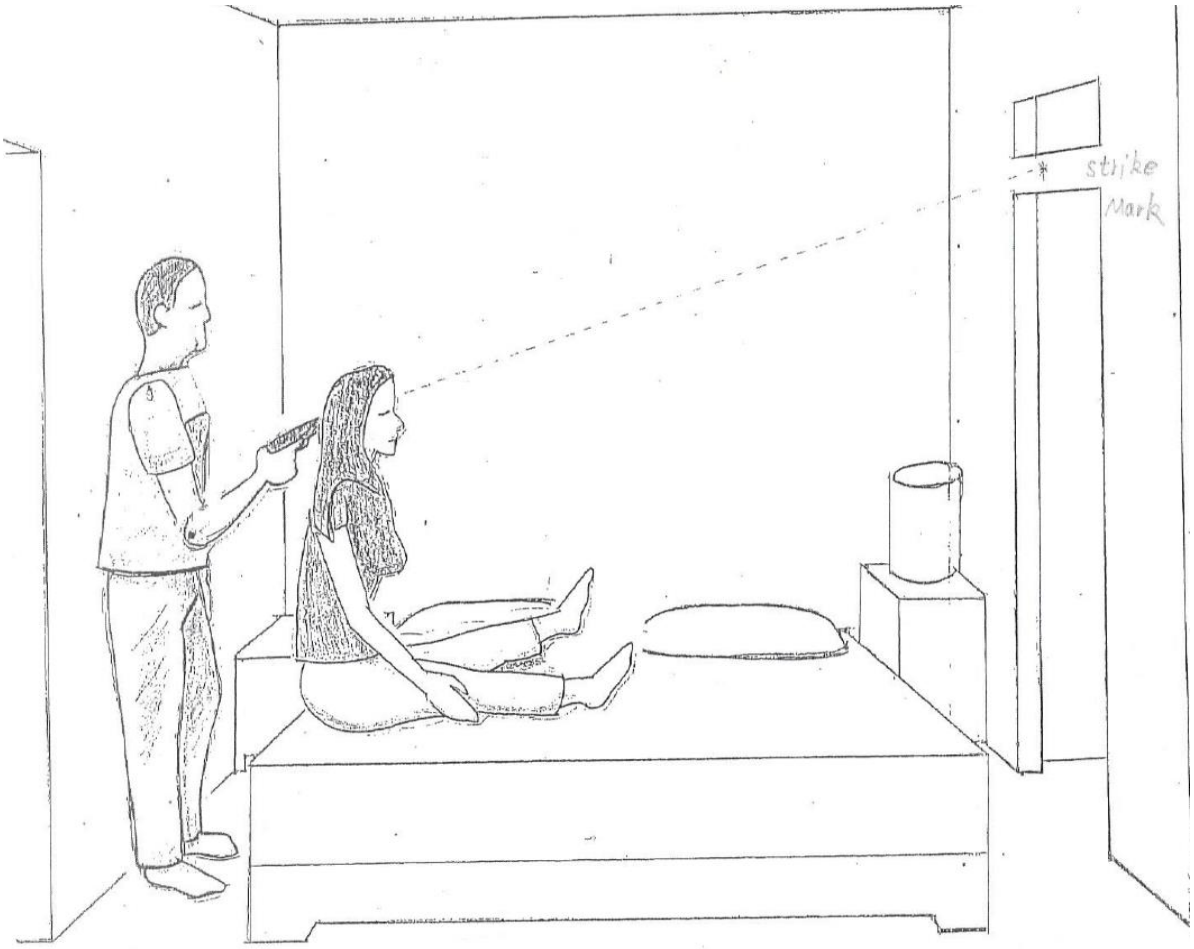
[39] Rp. 269.
[40] Rp. 269.
[41] NT, Trial, 11/3/2008, p. 23.
[42] NT, Trial, 11/3/2009, pp. 66-67.
[43] NT, Trial, 11/4/2009, pp. 150-151.
[44] NT, Trial, 11/4/2009, pp. 158, 163.

Stott said this position was "more plausible" than Sharon being seated against or near the headboard left of center.[45]

Stott based his opinion on the strike mark's location, the location where Sharon's body came to rest, the blood spatter on the wall to the left of the bed, and the minimal blood spatter on the head board.[46] Based on these same considerations, Stott also opined that Sharon could not have been seated with her back near or against the headboard facing forward when the fatal shot was inflicted. Based on where Sharon was seated when shot, *i.e.*, near the left edge of the bed near its midline, and the strike mark's location, Stott opined that Mr. Wang had to have fired the fatal shot while standing directly behind Sharon in the 1.5 foot space between the bed and the left wall.[47] Stott reiterated these opinions on cross-examination.[48]

The diagram below visually explains Stott's positioning opinion.

[45] NT, Trial, 11/4/2009, p. 158.
[46] NT, Trial, 11/4/2009, pp. 162-163.
[47] NT, Trial, 11/4/2009, pp. 153-155, 157.
[48] NT, Trial, 11/4/2009, pp. 170-171, 172-173, 174.



(2). Dr. McDonald's testimony and opinion

Dr. McDonald said he found no soot or gunpowder on Sharon's clothing.[49] He also testified he had shaved the hair around the entrance wound, visually examined the shavings, without a microscope, for stippling and soot, and found none.[50] He also testified the Medical Examiner's Office did not swab Sharon's hands for GSR.[51]

[49] NT, Trial, 11/5/2009, p. 12.
[50] NT, Trial, 11/5/2009, pp. 16, 36.
[51] NT, Trial, 11/5/2009, p. 35.

Based on the absence of stippling and soot in Sharon's hair shavings and entrance wound, Dr. McDonald opined that the gun had to have been three feet or more away from Sharon when fired,[52] making suicide impossible.[53] Dr. McDonald also based his three feet determination on the lack of blood spatter on Sharon's hands.[54] Dr. McDonald also opined that if Sharon was seated against or near the headboard when shot, he would have expected to see blood spatter on the headboard and the left corner walls near the nightstand.[55] Dr. McDonald classified the manner of death as homicide.[56]

b. The defense's case

Mr. Wang testified in his own defense and his trial testimony mirrored his statement to detectives.[57]

Dr. Hoyer testified and described his "basic findings" in the following manner:

> I will start at the beginning. Do I agree that Mrs. Wang died of a gunshot wound to the head? Yes. You have to start at the beginning. We have two wounds connected by a track. So she died of a single gunshot wound to the head. The issues, as I see them, and the questions I was asked was which was the entrance wound, which was the exit wound and what can we say about range of fire and is it possible with this weapon to have inflicted the observed wound. Could [Sharon] have held the weapon? I can never say for sure she did or did not. All I can say is it is possible.[58]

[52] NT, Trial, 11/5/2009, pp. 16-17, 19.
[53] NT, Trial, 11/5/2009, p. 18.
[54] NT, Trial, 11/5/2009, pp. 19, 26.
[55] NT, Trial, 11/5/2009, p. 21.
[56] NT, Trial, 11/5/2009, p. 29.
[57] NT, Trial, 11/5/2009, pp. 97-138.
[58] NT, Trial, 11/5/2008, p. 54.

Dr. Hoyer described the entrance wound as "very atypical,"[59] but he agreed with Dr. McDonald that the entrance wound was not a contact wound.[60] Dr. Hoyer, though, disagreed with Dr. McDonald's opinion that the lack of soot and stippling automatically meant the fatal shot had to be fired at a distance of three feet or more.[61]

Dr. Hoyer mentioned the hair shavings and said standard practice is to microscopically examine them.[62] Dr. Hoyer said the lack of evidence regarding range of fire "relate[d]" to the second question trial counsel had presented to him:

> This then relates to the second question which is it possible for [Sharon] to have shot herself? If it is a close gunshot wound, it is. It is a small weapon. She can turn it around and hold it in two hands and fire it, so it is possible for her to have shot herself. I wasn't there. I don't know who did what. All I can say is it is possible.[63]

Dr. Hoyer, therefore, opined if Sharon had fired the fatal shot, she likely did so with two hands. Dr. Hoyer also testified that the entrance wound's location is one "frequently" seen in suicidal shootings.[64] At the close of direct-examination, Dr. Hoyer opined that "it is possible" Sharon held the gun "in her hands and shot herself."[65]

[59] NT, Trial, 11/5/2008, p. 54
[60] NT, Trial, 11/5/2008, pp. 54-55.
[61] NT, Trial, 11/5/2008, pp. 55-56.
[62] NT, Trial, 11/5/2008, p. 55.
[63] NT, Trial, 11/5/2008, p. 56.
[64] NT, Trial, 11/5/2008, p. 57.
[65] NT, Trial, 11/5/2008, pp. 57-58.

On cross-examination, when the prosecutor informed Dr. Hoyer that Sharon's body and hair shavings were still at the Medical Examiner's Office, Dr. Hoyer said he had been unaware of these facts,[66] and that had he known of their availability, he would have viewed Sharon's body and hair shavings.[67] Dr. Hoyer also told the prosecutor he agreed with Dr. McDonald that the entrance wound was "not a contact wound,"[68] but said he could not determine whether the entrance wound was a close, intermediate, or distant wound.[69]

When the prosecutor asked if it was "normal" for "someone" to "hold a weapon in one hand and fire it with the other," Dr. Hoyer testified, "For a suicidal gunshot wound of the head, I believe that is the most common way of holding the weapon.[70] When the prosecutor pressed Dr. Hoyer for his manner of death opinion, he testified, "My opinion is she is shot in the back of the head. We can't determine the range of fire and it could be a suicide[.]"[71] In the end, the prosecutor got Dr. Hoyer to concede that the entrance wound's characteristics made it equally plausible Sharon's death was a homicide:

> Prosecutor: You can't determine the range of firing?
>
> Dr. Hoyer: I don't believe there is any scientific information that would support going beyond this is not a contact wound.

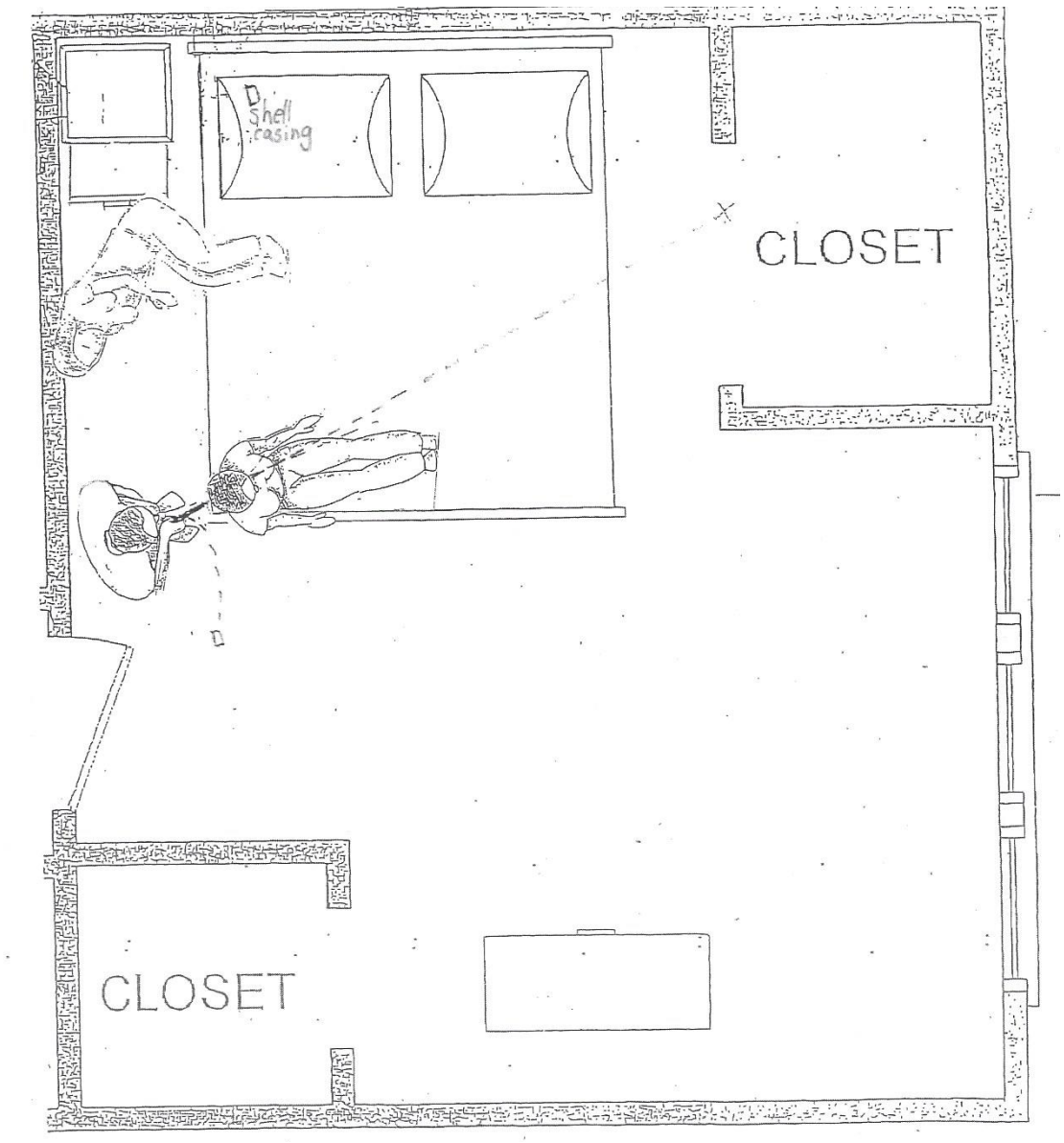
[66] NT, Trial, 11/5/2008, p. 59.
[67] NT, Trial, 11/5/2008, pp. 59, 65.
[68] NT, Trial, 11/5/2008, p. 60.
[69] NT, Trial, 11/5/2008, p. 63.
[70] NT, Trial, 11/5/2008, pp. 71-72.
[71] NT, Trial, 11/5/2008, pp. 72-73.

> Prosecutor: So what would be the difference of [Mr. Wang] coming up behind her and shooting her at close range in the back of the head?
>
> Dr. Hoyer: The different between what?
>
> Prosecutor: Between what you are saying and what I am saying?
>
> Dr. Hoyer: None, because I agree that that's possible.
>
> Prosecutor: So you are saying it is possible this is a homicide?
>
> Dr. Hoyer: Yes.[72]

c. Closing arguments

During closing arguments, the prosecutor argued Sharon had to be seated at the left foot of the bed when Mr. Wang grabbed her by the hair and shot her in the head.[73] The diagram below visually explains the prosecutor's positional theory:

[72] NT, Trial, 11/5/2008, p. 73.
[73] NT, Trial, 11/5/2009, pp. 209, 212-213.



C. Post-conviction proceedings and Brent Turvey's affidavit

After Mr. Wang filed his *pro se* PCRA petition, he ultimately retained undersigned counsel (Cooley), who consulted and retained forensic expert and reconstructionist Brent Turvey. Mr. Turvey reviewed the autopsy report, scene reports, digital autopsy photographs, scene photographs, and Dr. Hoyer's reports. Based on his exhaustive review, Mr. Turvey wrote a comprehensive 35-page, single-spaced affidavit explaining

why the totality of the physical evidence and scene characteristics were far more indicative of suicide than homicide.[74]

1. The Commonwealth's three homicide narratives

Mr. Turvey first addressed the plausibility of the Commonwealth's three homicide narratives provided by Stott, Dr. McDonald, and the prosecutor.

a. Stott's homicide narrative

Stott, as mentioned, opined that Sharon had to have been seated on the left edge of the bed with her back toward the left wall and facing the closet to the right of the bed. Moreover, based on the strike mark's location above the closet and the blood pooling to the left of the bed, Stott opined Mr. Wang had to have been standing directly behind Sharon in the narrow 1.5 foot space between the bed and left wall when he fired the fatal shot. According to Mr. Turvey, Stott's opinions are not supported by the physical evidence, the bedroom's dimensions, and Dr. McDonald's testimony.

First, Mr. Turvey opined that Stott's opinion directly contradicts Dr. McDonald's opinion. Dr. McDonald opined that the fatal shot had to have been fired from a distance of three feet or greater. However, the distance between the left wall and the edge of the bed is only 1.5 feet or 18 inches. The only way Stott's and Dr. McDonald's opinions could co-exist is if Sharon was seated in the middle of the bed, not on the

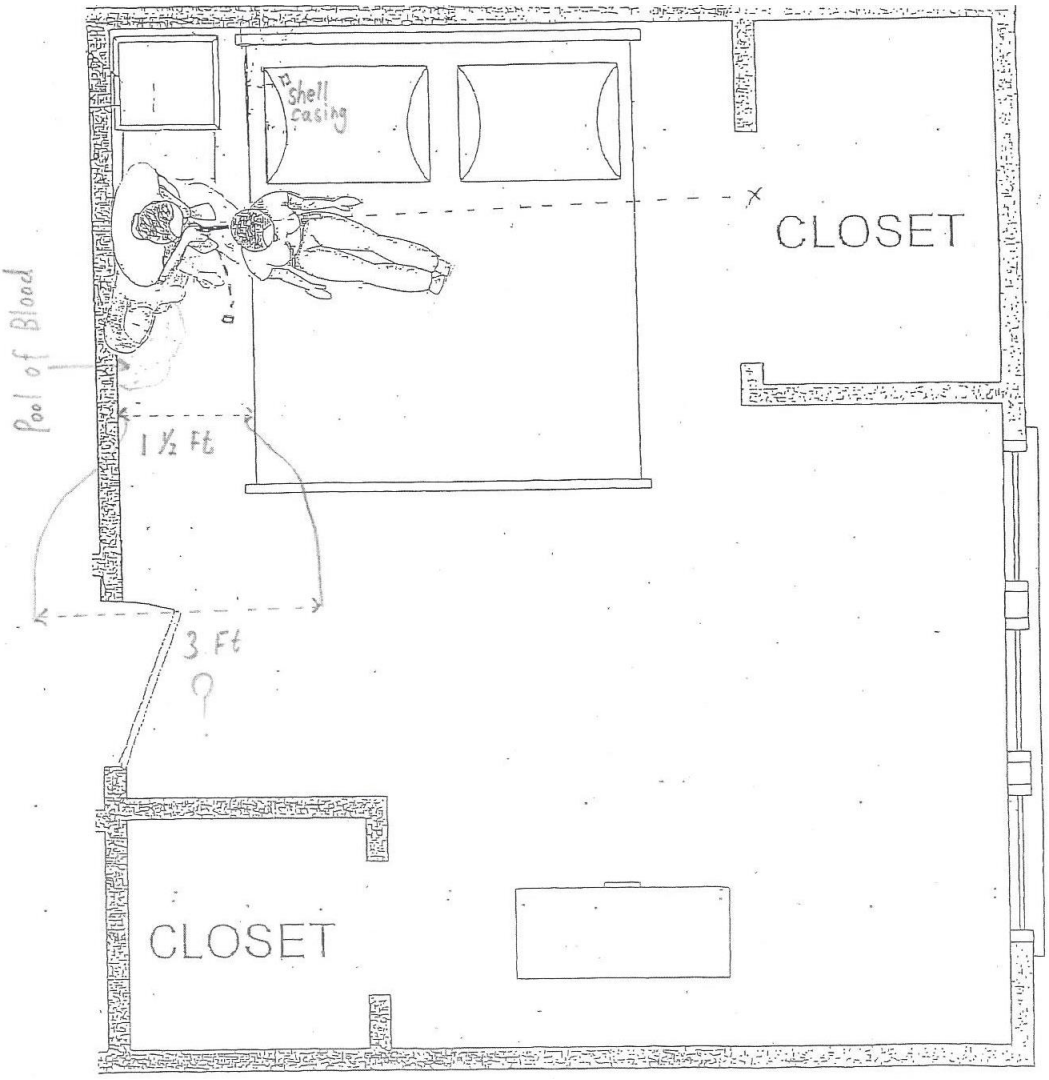
[74] Rpp. 115-149.

edge. This, however, contradicts Stott's own opinion. Also, if Sharon was seated in the middle of the bed, she would not have fallen off the bed.[75]

Second, Mr. Turvey said the FCC's location undermined Stott's opinion. According to Mr. Turvey, if Mr. Wang stood in the narrow area between the bed and the left wall when he fired the fatal shot, the FCC would have ejected to the right with great force and would have landed either at the foot of the bed or on the floor near the left foot of the bed, not at the head of the bed near the nightstand.[76]

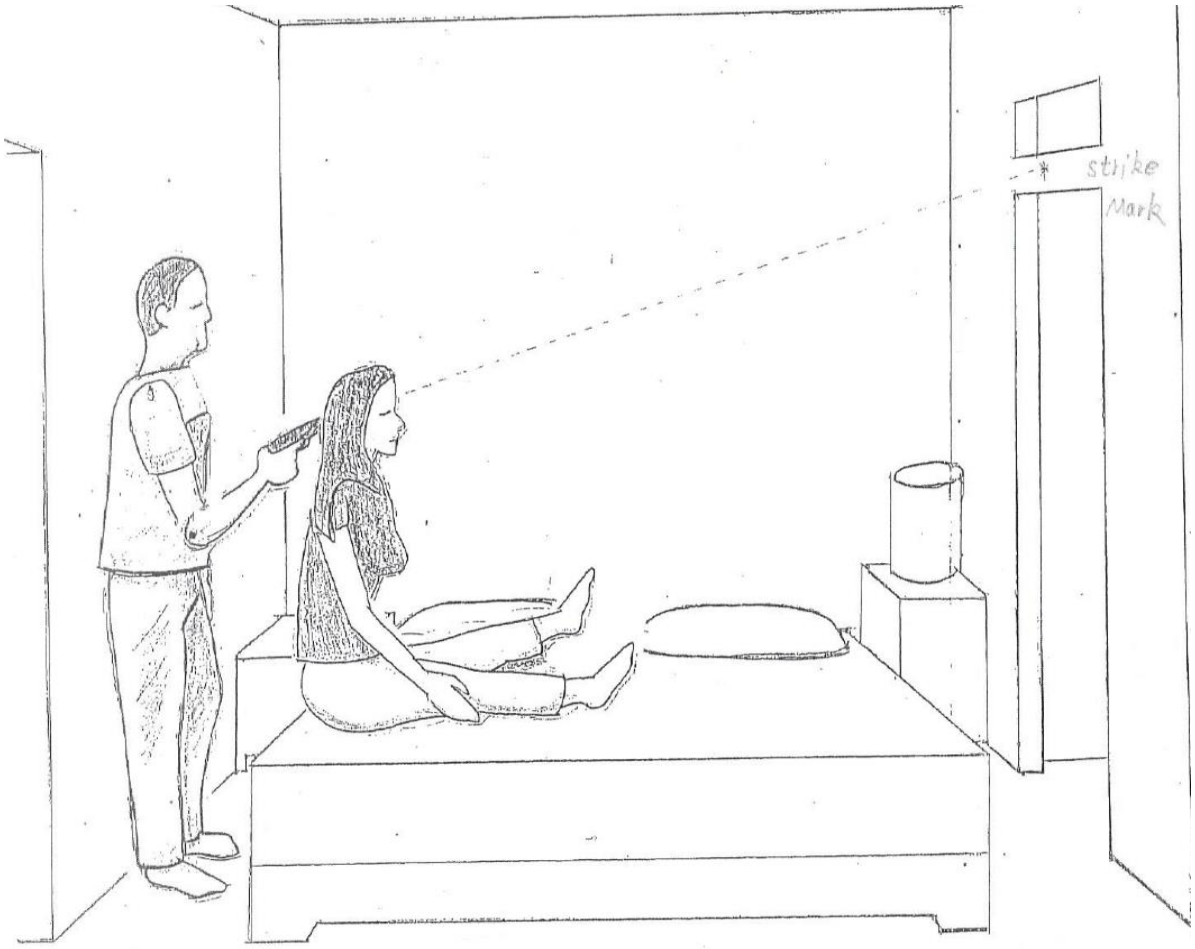
Stott testified that FCCs fired from Luger 9mm handguns tended to bounce when they hit the floor, the ground, or a hard object. According to Mr. Turvey, if the FCC contacted the foot of the soft mattress first, the likelihood that it then bounced all the way back to the head of the bed was highly improbable. Likewise, if the FCC contacted the floor at the foot of the bed first, the likelihood that it then bounced back up over the bed and all the way to the head of the bed was highly improbable.[77] The diagram below depicts the problem with Stott's testimony.

[75] Rp. 130, ¶¶ 21(a-b).
[76] Rp. 130, ¶¶ 21(c-d).
[77] Rp. 130, ¶¶ 21(c-d).



Third, based on Stott's positional and directional theory, Mr. Wang had to have shot Sharon at a very close range. According to Mr. Turvey, the likelihood this occurred was slim because if Mr. Wang had shot Sharon at such a close range, his clothing and hands would have very likely had back spatter on them. Moreover, the back spatter that would have struck Mr. Wang's clothing and person would have created a void

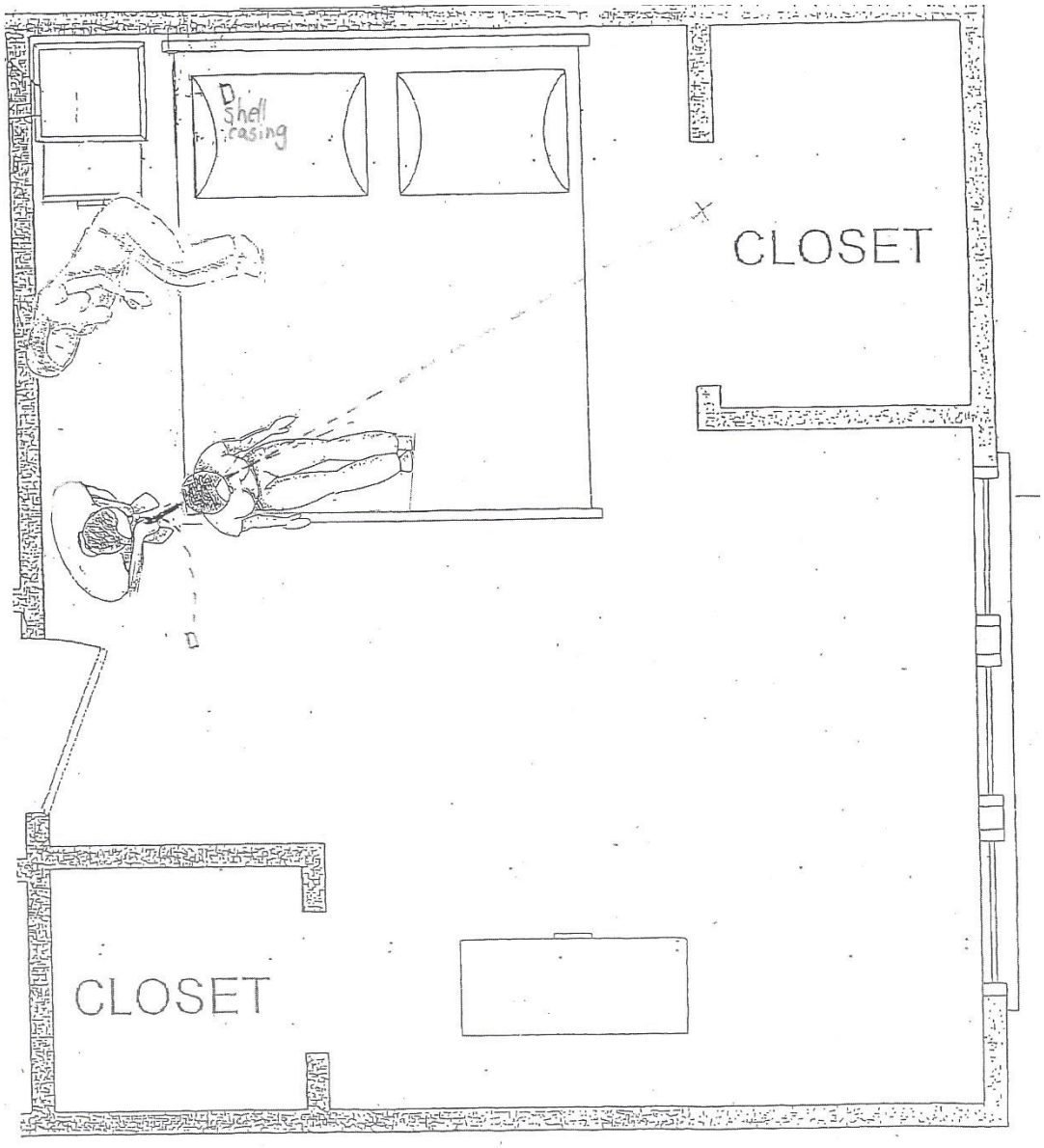
pattern on the left wall.[78] Based on Mr. Turvey's review of the photographs of the left wall, he saw no discernible void patterns.[79] The diagram below depicts how close Mr. Wang would have been to Sharon had he fired from the position Stott identified.



[78] "A void occurs when a person or object blocks the path of the blood. They are important because voids can show investigators if objects are missing from the scene, where a person or persons were at the time of the incident, and if a body was moved… Void patterns are most useful for establishing the position of the victim(s) and assailant(s) within the scene." www.forensicsciencesimplified.org/blood/principles.html (last visited April 2, 2017).
[79] Rp. 131, ¶ 21(e).

b. The prosecutor's homicide narrative

The prosecutor argued Sharon was seated at the left foot of the bed, near the edge of the bed, when Mr. Wang grabbed her by the hair and shot her.[80] The diagram below reflects the prosecutor's positional and directional theory:



[80] NT, Trial, 11/5/2009, pp. 209, 212-213.

According to Mr. Turvey, the prosecutor's theory is not supported by the physical evidence, the bedroom's dimensions, or Dr. McDonald's and Stott's opinions.

First, it contradicts Stott's testimony because Stott placed Sharon on the left edge of the bed near the bed's midline.

Second, it contradicts Dr. McDonald's testimony, who said the fatal shot had to have been fired from three feet or more away.

Third, responding officers saw no evidence of a struggle on the bed.[81]

Fourth, based on the prosecutor's positional theory, the FCC's rightward trajectory would have resulted in it landing on the floor feet from the foot of the bed.

Fifth, if Mr. Wang shot Sharon at close range, his clothing and hands would likely have had back spatter on them.

Sixth, if Mr. Wang shot Sharon at the left foot of the bed, it would have been impossible for Sharon to have knocked over the nightstand and for her feet to be on the edge of the bed near the head of the bed.[82] The diagram below depicts how Sharon was found.

[81] Rpp. 132-133, ¶¶ 23(a-c).
[82] Rp. 133, ¶¶ 23(d-f).

Seventh, Mr. Turvey opined that the location of the firearm in the nightstand's bottom drawer does not support the prosecutor's theory. According to the prosecutor, after shooting Sharon at the foot of the bed, Mr. Wang either threw the gun to the left corner toward the nightstand or he walked over Sharon's body and placed the gun in the dresser drawer himself. According to the prosecutor, Mr. Wang did one or the

other for the sole purpose of hiding the firearm.[83] Mr. Turvey opined it is highly unlikely Mr. Wang did either.

To begin with, when responding officers asked Mr. Wang where the gun was, he immediately pointed toward the left corner of the bedroom, near the nightstand and the area where Sharon's body fell to the floor.[84] From a behavioral perspective, if Mr. Wang threw the gun toward the nightstand in the hopes of hiding it, he would not have then immediately identified the firearm's location once officers arrived.[85]

Next, if Mr. Wang concocted the suicide narrative to mask the homicide, as the prosecutor argued, Mr. Wang would not have hidden the gun after the shooting. Based on Mr. Turvey's experience, when a perpetrator attempts to stage a homicide shooting to look like a suicide, he places the firearm near the victim's trigger hand because he assumes this is where investigators would expect to find the firearm in a suspected suicide. The perpetrator does not hide the firearm because doing so defeats the suspect's false suicide narrative.[86]

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[83] During closing arguments, the prosecutor argued, "You know what happened here. He tried to hide the gun. He moved the gun. He shot her. He didn't know what to do. He threw it in the drawer in hopes that nobody would find it and then he concocts this whole suicide story." NT, Trial, 11/5/2009, p. 215.

[84] NT, Trial, 11/5/2009, p. 137. At trial, Mr. Wang made clear that when he pointed in the nightstand's direction he did so only because he "assumed" that was where the gun ultimately came to rest after Sharon had shot herself. Mr. Wang did not actually see where the gun ultimately came to rest. *Id.* Mr. Wang said Sharon shot herself at the left head of the bed near the nightstand. Thus, it was entirely reasonable for him to assume the gun had come to rest somewhere in that general vicinity of the bedroom.

[85] Rpp. 133-134, ¶¶ 23(h)(i-ii).

[86] Rpp. 133-134, ¶¶ 23(h)(i-v).

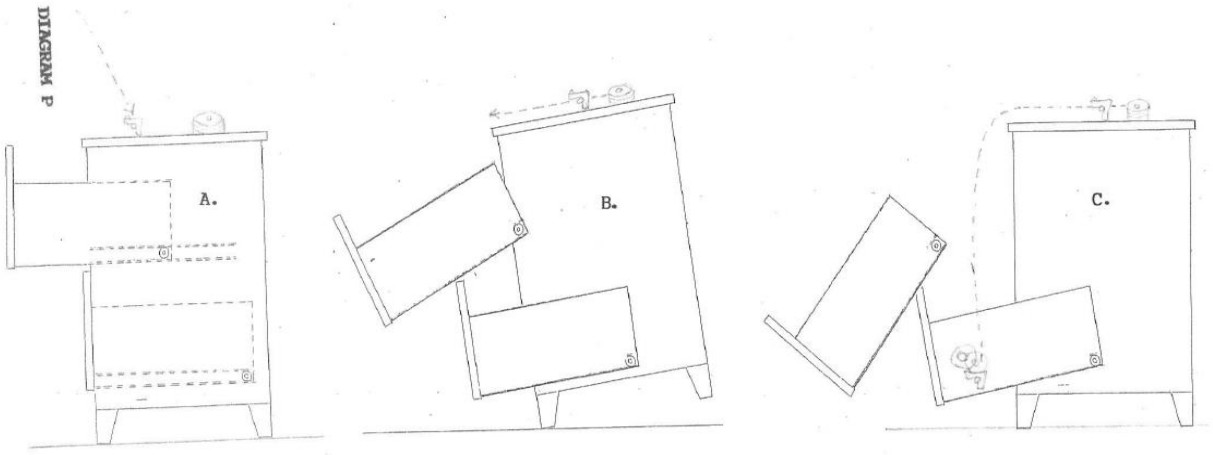
Also, if Mr. Wang walked the gun over to the nightstand and placed it into the bottom drawer, Mr. Wang would have had to walk over Sharon's body. Had he done so, the likelihood of blood transferring to his clothing and shoes was tremendous given the amount of blood flowing onto the floor from the entrance and exit wounds. Mr. Wang's person, clothing, and shoes, however, had no blood on them. Moreover, Timothy Flemings, Rick Kern, and Troy Davis each said that immediately after hearing the gunshot they saw and heard Mr. Wang at the second-floor window screaming for someone to call an ambulance because his wife had just shot herself. Based on the timing between the gunshot wound and seeing Mr. Wang at the window, it is highly unlikely Mr. Wang carefully walked over Sharon's body, placed the firearm into the bottom drawer, and then carefully walked back over Sharon's body before running to the window and yelling help.[87]

Mr. Turvey also disagreed with the prosecutor's argument it would have been impossible for the firearm to come to rest in the nightstand's bottom drawer if Sharon had shot herself.[88] According to Mr. Turvey, the prosecutor failed to consider the concept of evidence dynamics, which refers to any influence that changes, relocates, obscures, or obliterates physical evidence, regardless of intent. Here, it is entirely plausible that after Sharon had shot herself, she and the gun both fell toward and against the nightstand, that the momentum and impact of her fall caused the nightstand to

[87] Rp. 134, ¶ 23(h)(iv).
[88] NT, Trial, 11/5/2009, pp. 214-215.

tumble forward, and that the gun ultimately came to rest in the bottom drawer.[89] This diagram demonstrates how evidence dynamics could have caused the night stand to fall forward and for the firearm to land in the second draw under a CD.

A. The top drawer have been halfway open. When the gun fell off her hand, it landed on top of the nightstand. There were a stack of CD on top of the nightstand as well.
B. When she fell on top of top drawer, she knocked both drawers out of the nightstand, causing it to tip forward, that in a chain reaction, causing the gun and CD's to slide off the nightstnd.
C. The top drawer had fallen on top of the halfway out bottom drawer, but it did not it, creating a gap for the gun and the CD's to be able to fall into the bottom drawer.

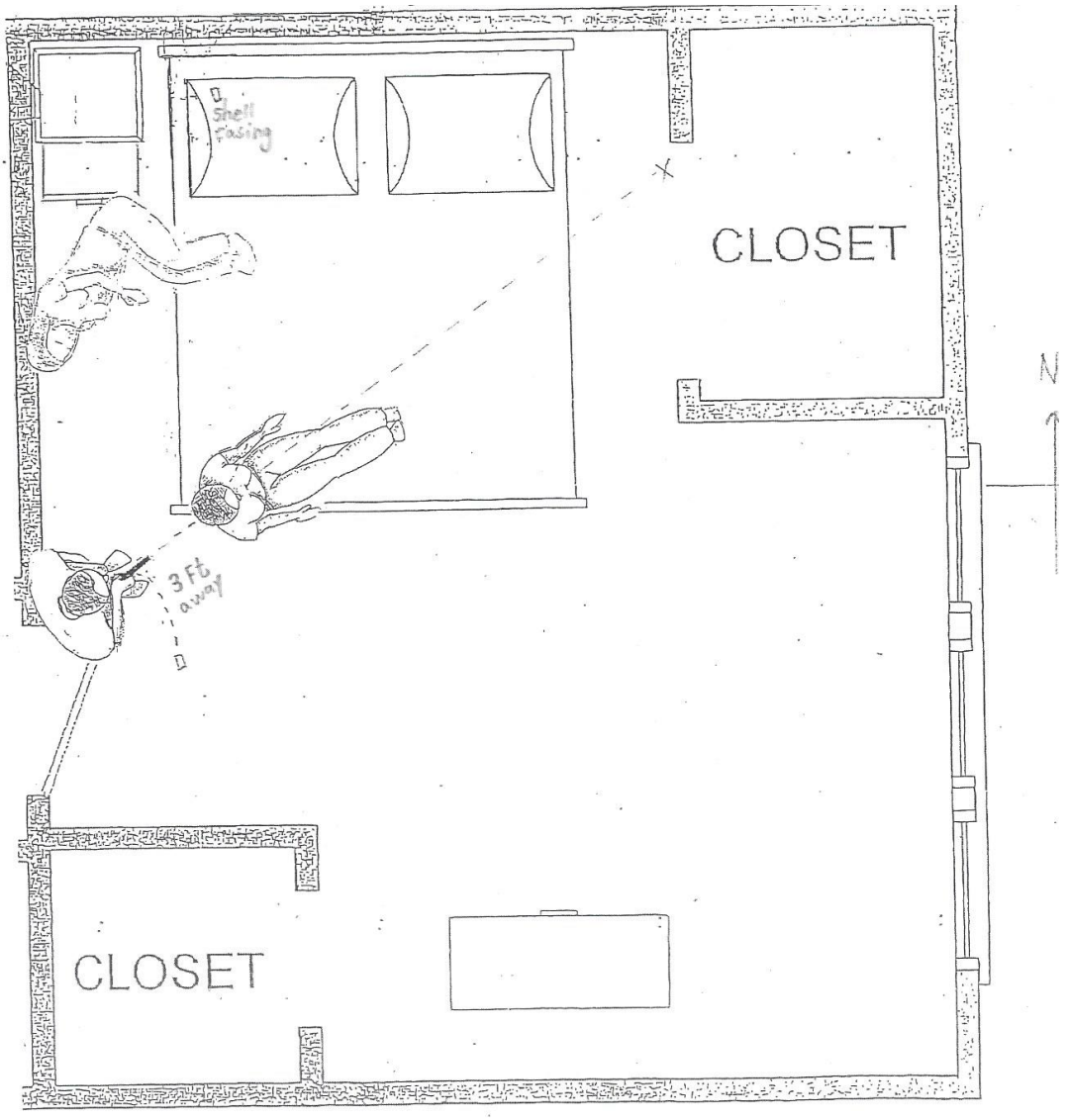


c. Dr. McDonald's homicide narrative

Dr. McDonald opined that the fatal shot had to have been fired three feet or more away from Sharon. According to Mr. Turvey, based on the bedroom's dimensions and the bed's placement in the bedroom, this eliminates Mr. Wang standing in the narrow 1.5 foot space between the bed and the left wall.[90] Moreover, based on the strike mark's location above the closet to the right of the bed and Sharon's final

[89] Rpp. 134-135, ¶¶ 23(7)(v) & 24, 25.
[90] Rp. 270.

resting position, Dr. McDonald's three feet or more opinion means Mr. Wang had to have fired the fatal shot at the foot of the bed to the left of the bed and he had to be standing at least three feet from the bed. The diagram below depicts where Mr. Wang had to be standing if Dr. McDonald's three feet or more opinion is correct.



According to Mr. Turvey, the physical evidence does not support Dr. McDonald's homicide theory.

First, if Mr. Wang shot Sharon standing three feet or more away, it would have been impossible for the FCC to have come to rest at the head of the bed. The FCC would have ejected to the right and come to rest on the floor feet from the foot of the bed. Mr. Turvey also opined that the likelihood the FCC bounced off the floor, while traveling away from the bed, and ricocheted in a direction back toward the bed and all the way back to the head of the bed was virtually impossible.[91]

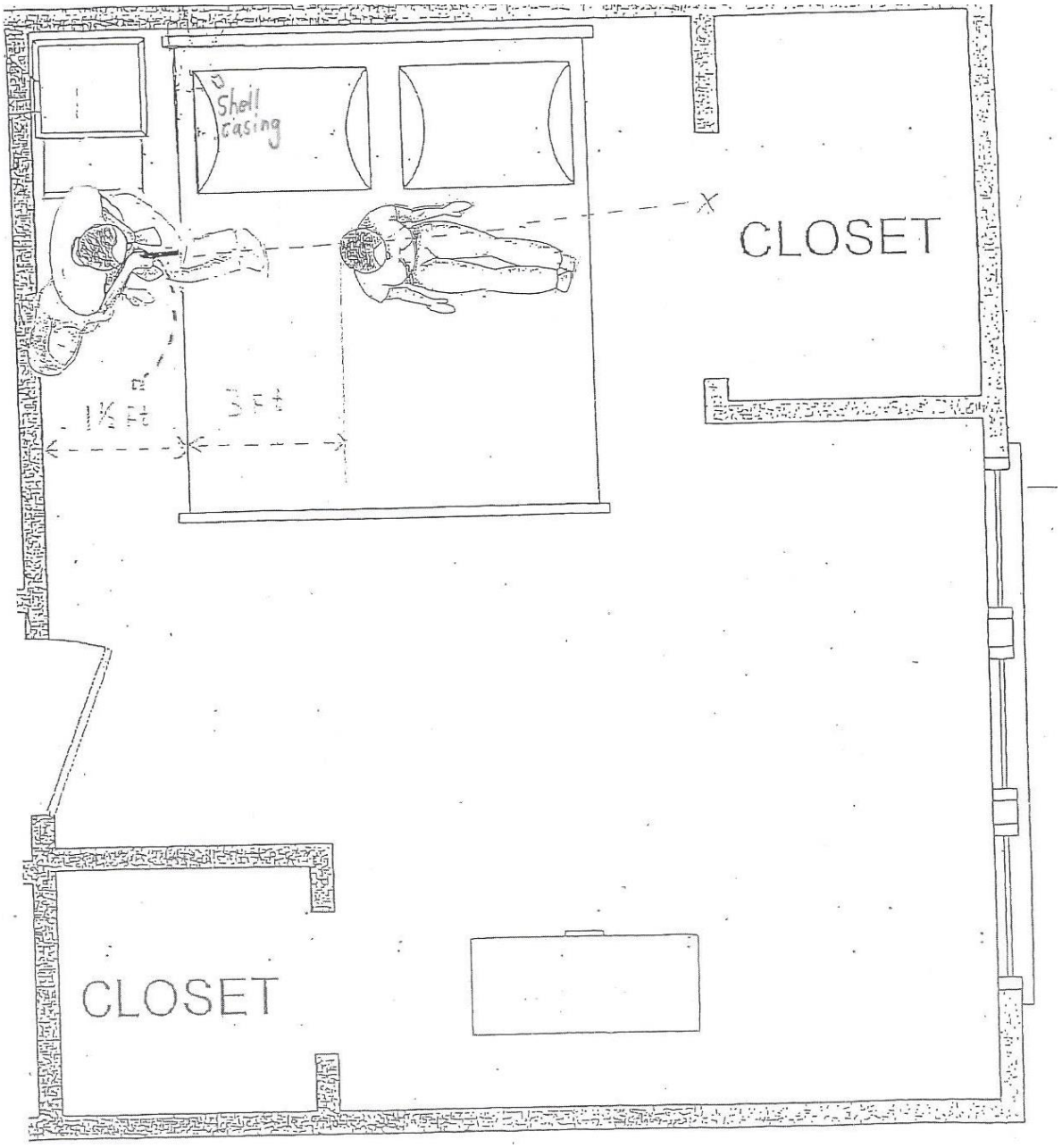
Second, according to Mr. Turvey, the only plausible way Mr. Wang could have created the strike mark above the closet is if he positioned the firearm at an upward trajectory when he fired it. Based on Mr. Wang's height (5'7") and the fact he had to be standing three feet or more away when he fired, it is extremely unlikely Mr. Wang would have had the gun positioned at an upward trajectory when he fired it.[92] For Dr. McDonald's theory to be correct, therefore, Mr. Wang would have had to fire the fatal shot while kneeling on one or both knees or holding the gun near his hip when he fired. That Mr. Wang did either is extremely unlikely because, again, the FCC would have landed feet from the foot of the bed making it virtually impossible for it to have ricocheted all the way back to the head of the bed.[93]

[91] Rp. 136, ¶ 27(a).
[92] Rp. 136, ¶ 27(b).
[93] Rp. 136, ¶ 27(c).

Third, for Dr. McDonald's three feet or more opinion to be remotely plausible, Sharon had to have been seated at the foot of the bed near the left edge. This positioning, which is similar to the prosecutor's positional theory, cannot be correct according to Mr. Turvey. If Mr. Wang shot Sharon at the left foot of the bed, it would have been impossible for Sharon to have knocked over the nightstand and for her feet to be in the position they were when officers arrived.[94]

Furthermore, if Sharon was positioned in the middle of the bed and Mr. Wang stood to the left of the bed near the nightstand, there could be three feet between them. However, if Sharon was positioned in the middle of the bed, the likelihood of her falling off the bed would have been zero. The below diagram depicts this problem:

[94] Rp. 137, ¶ 27(d).



Fourth, Dr. McDonald's theory also requires Mr. Wang to have placed the firearm in the bottom drawer after shooting Sharon. The physical evidence and behavioral analysis disprove this theory. According to Mr. Turvey, based on the physical evidence and evidence dynamics, the most plausible explanation regarding the gun's final resting

place is that Sharon's body caused the nightstand to tumble forward opening the top and bottom drawers and allowing the gun to come to rest in the bottom drawer.[95]

2. The evidence is more indicative of suicide than homicide

Besides discrediting the Commonwealth's three homicide narratives, Mr. Turvey identified multiple facts, items of physical evidence, and scene characteristics that supported Mr. Wang's suicide narrative.

First, Mr. Turvey explained how the Occam's razor principle supported his opinion.[96]

Second, Mr. Turvey opined that Sharon's entrance wound is consistent with a contact wound. As Mr. Turvey pointed out, according to the preeminent forensic pathologist treatise, MEDICOLEGAL INVESTIGATION OF DEATH by Werner Spitz, the image below represents a classic contact wound:

[95] Rp. 137, ¶ 27(e)

[96] Occam's razor is "a scientific and philosophical rule that entities should not be multiplied unnecessarily which is interpreted as requiring that the simplest of competing theories be preferred to the more complex or that explanations of unknown phenomena be sought first in terms of known quantities." www.merriam-webster.com/dictionary/Occam's%20razor. The simplest explanation of the totality of the physical evidence is that Sharon shot herself. The fact the Commonwealth presented three inconsistent theories of how Mr. Wang allegedly shot Sharon proves this point. If the Commonwealth's homicide narrative was so simple and plain to see, it would have presented one coherent narrative as to where Sharon was seated when Mr. Wang shot her and where Mr. Wang was standing when he shot Sharon.

The star-shaped pattern is indicative of a contact wound. Sharon's entrance wound is similar because it too has a stellate or star-shaped appearance that is unlike the round or oval perforating wounds seen in other non-boney regions of the body. A photograph of Sharon's entrance wound is below:

[97]

Third, Mr. Turvey identified multiple reasons why Sharon's hands presented with little to no back spatter and why the area in and around the entrance wound presented with no soot. According to Mr. Turvey, Dr. McDonald never considered how Sharon's long thick hair and the small size and power of a 9mm semi-automatic handgun would have impacted the amount of back spatter produced upon discharge or the amount of soot and stippling seen in and around the entrance wound. Likewise, Mr. Turvey identified several steps Dr. McDonald failed to take to conclusively establish the absence of soot in and around the entrance wound. The failure to take these additional steps undermines his testimony that there was no soot in and around the entrance wound.[98]

[97] Mr. Turvey incorporated these two photographs into his affidavit. Rp. 144.
[98] Rpp. 143-146, ¶¶ 44-46.

Fourth, Mr. Turvey acknowledged that the mere fact the entrance wound was, in his opinion, a contact wound, did not automatically prove Sharon had fired the fatal shot. It was "possible Mr. Wang fired the fatal shot," but Mr. Turvey opined that this was "unlikely" for at least two reasons. Based on the concentration of blood and evidence dynamics on the left wall and in the left corner of the bedroom, Mr. Turvey opined that the fatal shot was fired somewhere at the head of the bed near the nightstand. Thus, if Mr. Wang fired the fatal shot, he had to have been standing in the narrow 1.5 foot space between the left wall and bed. If Mr. Wang fired from this location, Mr. Turvey opined there would have been back spatter on Mr. Wang or his clothing and a void pattern on the left wall.[99] Also, if Mr. Wang stood over Sharon as he shot her (as the prosecutor suggested), the gun would have been positioned at a downward trajectory, not an upward trajectory as indicated by the strike mark above the closest to the right of the bed.[100]

Fifth, Mr. Turvey identified several reasons why the physical evidence supported Mr. Wang's statement and trial testimony that Sharon was seated near the head of the bed when she fired the fatal shot.[101]

[99] Rpp. 146-147, ¶ 46(a).
[100] Rp. 147, ¶ 46(b).
[101] Rpp. 146-147, ¶¶ 47 (a-c).

Sixth, Mr. Turvey opined there were "multiple indicators" Lin "was emotionally and psychologically unstable in the months and days leading to her death[.]"[102] These "multiple indicators," according to Mr. Turvey, corroborate Mr. Wang's suicide narrative.[103]

Lastly, Mr. Turvey said he based his opinions on information, literature, and scientific research that was available before Mr. Wang's trial in November 2009 and that had trial counsel contacted him in 2008 or 2009, he would have been willing and available to testify and would have testified to the findings, conclusions, and opinions contained in his affidavit.[104]

[102] Rp. 137, ¶ 29.
[103] Rpp. 137-143, ¶¶ 28-41.
[104] Rp. 149, ¶ 49.

AEDPA REQUIREMENTS

AEDPA's requirements reflect a "presumption that state courts know and follow the law," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002); *accord Burt v. Titlow*, 571 U.S. 12, 18-19 (2013), and AEDPA "is designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). AEDPA, therefore, demands that "state-court decisions be given the benefit of the doubt[.]" *Felkner v. Jackson*, 562 U.S. 594, 598 (2011). In short, AEDPA "create[d] an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007).

AEDPA's purpose, consequently, "is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (2011). While AEDPA's "standard is demanding," it is "not insatiable," *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005), because "deference does not imply abandonment or abdication of judicial review" nor does it "by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

A. Timeliness

Under 28 U.S.C. § 2244(d)(1)(A), once a state prisoner's conviction and sentence become final, he has one-year to file his 2254 petition. *Jimenez v. Quarterman*, 555 U.S. 113, 114 (2009). A state conviction and sentence become final "when the availability

of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

Under 28 U.S.C. § 2244(d)(2), if a defendant "properly filed" his initial-review post-conviction petition within one-year of his conviction becoming final, the one-year limitations period is tolled. Tolling "provides both litigants and States with an opportunity to resolve objections at the state level, potentially obviating the need for a litigant to resort to federal court." *Wall v. Kholi*, 131 S.Ct. 1278, 1288 (2011). A timely filed PCRA petition, is considered "properly filed" under § 2244(d)(2). *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005).

AEDPA's one-year limitation period is "tolled only while state courts review the application," meaning if a post-conviction petitioner files a certiorari petition with the U.S. Supreme Court after the state courts have rejected the federal claims in his initial-review post-conviction petition, the time between the certiorari petition's filing and denial is not tolled because the U.S. Supreme Court is not a "state court." *Lawrence v. Florida*, 549 U.S. 327, 332 (2007).

B. Exhaustion and fair presentation

Before seeking 2254 relief, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1)(A), thereby giving the State the "opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)). The petitioner bears the

burden of demonstrating he exhausted all available state remedies. *O'Halloran v Ryan*, 835 F.2d 506, 508 (3d Cir. 1987).

To "fairly present" a federal claim, a petitioner must present the federal claim's factual and legal substance to the state courts in a manner that puts them on *notice* that a federal claim is being asserted. *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. at 277-278. Stated differently, "petitioners must have communicated to the state courts *in some way* that they were asserting a claim predicated on federal law." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999) (emphasis added). Thus, "whether a federal claim has been fairly presented, 'the appropriate focus… centers on the *likelihood* that the presentation in state court alerted that tribunal to the claim's federal quality and approximate contours.'" *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1232 (3d Cir. 1992) (quoting *Nadworny v. Fair*, 872 F.2d 1093, 1098 (1st Cir. 1989) (emphasis in original)).

While specific citations to federal cases or the Federal Constitution work best at providing notice to the state courts, *Baldwin v. Reese*, 541 U.S. 27, 32 (2004), fair presentation does *not* require a petitioner to have cited "book and verse" the Federal Constitution. *Picard v. Connor*, 404 U.S. at 277; *accord McCandless v. Vaughn*, 172 F.3d at 261. Rather, a petitioner can fairly present his federal claims through: "(a) reliance on pertinent federal cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that

is well within the mainstream of constitutional litigation." *Nara v. Frank*, 488 F.3d 187, 197-198 (3d Cir. 2007); *accord McCandless v. Vaughn*, 172 F.3d at 261; *Evans v. Court of Common Pleas*, 959 F.2d at 1232.

C. Merit analysis of exhausted claims

A federal court may grant AEDPA relief with respect to any claim that was adjudicated on the merits in state court when the state court's adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) & (2).

1. Adjudicated on the merits

Under the "adjudicated on the merits" prong, "a judgment is normally said to have been rendered 'on the merits' only if it was 'delivered after the court… heard and *evaluated* the evidence and the parties' substantive arguments." *Johnson v. Williams*, 568 U.S. 289, 302 (2013) (emphasis in original). Moreover, "if the state-law rule subsumes the federal standard–that is, if it is at least as protective as the federal standard–then the federal claim may be regarded as having been adjudicated on the merits." *Id.* at 1096; *accord Early v. Packer*, 537 U.S. 3, 8 (2002).

2. Clearly-established federal law

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court said "clearly established Federal law" under § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of [the] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412; *accord Howes v. Fields*, 565 U.S. 499, 505-506 (2012); *Carey v. Musladin*, 549 U.S. 70, 74 (2006). "[C]ircuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" *Glebe v. Frost*, 135 S.Ct. 429, 431 (2014). AEDPA, consequently, "prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is "clearly established." *Lopez v. Smith*, 135 S.Ct. 1, 2 (2014). However, "an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent[.]" *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013).

If the specific constitutional violation or duty presented by a petitioner has not been clearly-established by the Supreme Court's holdings, AEDPA relief is not warranted. *Bobby v. Dixon*, 565 U.S. 23, 28-29 (2011); *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *Wright v. Van Patten*, 552 U.S. 120, 125 (2008); *Carey v. Musladin*, 549 U.S. at 76. However, if the petitioner's federal claim is based on a "more general standard," *e.g.*, *Brady* or *Strickland* claims, AEDPA relief is warranted "if the state-court decision unreasonably applied the more general standard[.]" *Knowles v. Mirzayance*, 556 U.S. at 122; *accord Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

3. "Contrary to" or "unreasonable application" prong

a. The *Harrington* standard

A federal court's § 2254(d)(1) review "is limited to the record that was before the state court that adjudicated the prisoner's claim on the merits." *Greene v. Fisher*, 565 U.S. at 38; *Cullen v. Pinholster*, 563 U.S. 170, 181-182 (2011). An "unreasonable application" of a clearly-established Supreme Court principle must be "objectively unreasonable," not merely wrong; even "clear error" will not suffice. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003); *White v. Woodall*, 572 U.S. 415, 419-420, (2014); *Cavazos v. Smith*, 565 U.S. 1, 2 (2011). Thus, if the state court's rejection of a federal claim was "reasonable," AEDPA relief is unwarranted. *Hardy v. Cross*, 565 U.S. 65, 72 (2011).

A state court's rejection of a federal claim is reasonable "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. at 101. Stated differently, the petitioner "must show that the state court's ruling… was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

b. Application of *Harrington*

To determine whether a state court unreasonably applied a clearly-established rule, the federal court must consider the rule's nature and specificity. *Renico v. Lett*, 559 U.S. 766, 776 (2010). The "more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. at

664; *accord Parker v. Matthews*, 567 U.S. 37, 48 (2012); *Renico v. Lett*, 559 U.S. at 776. Thus, "where the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *White v. Woodall*, 572 U.S. at 424. Moreover, if the "circumstances of a case are only 'similar to' [the Supreme Court's] precedents, then the state court's decision is not 'contrary to' the holdings in those cases." *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015).

Section 2254(d)(1), however, does not require an "identical factual pattern before a [clearly-established] legal rule must be applied.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *accord Marshall v. Rodgers*, 569 U.S. at 62; *Carey v. Musladin*, 549 U.S. at 81 (Kennedy, J., concurring in judgment). To the contrary, state courts must reasonably apply the rules "squarely established" by the Supreme Court's holdings to the facts of each case. *Knowles v. Mirzayance*, 556 U.S. at 122. "[T]he difference between applying a rule and extending it is not always clear," but "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. at 666; *accord Wright v. West*, 505 U.S. 277, 308-309 (1992) (Kennedy, J., concurring in judgment). To require such specificity and identicalness runs contrary to the writ's long-standing purpose of rectifying extreme malfunctions in state criminal justice systems. *Cf. Carey v. Musladin*, 549 U.S. at 79 (Stevens, J., concurring in judgment) (AEDPA "itself provides sufficient obstacles to obtaining habeas relief without placing a judicial thumb on the warden's side of the scales.").

When "the requirement set forth in § 2254(d)(1) is satisfied[,] [a] federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti v Quarterman*, 551 U.S. at 953; *Lafler v. Cooper*, 566 U.S. 156, 174 (2012); *Vickers v. Superintendent Graterford SCI,* 858 F.3d 841, 848-889 (3d Cir. 2017).

4. Unreasonable factual determinations

Under 28 U.S.C. § 2254(e)(1), state court factual findings are "presumed to be correct," but the petitioner can rebut this presumption with "clear and convincing evidence." *Rice v. Collins*, 546 U.S. 333, 338-339 (2006); *Miller-El v. Dretke*, 545 U.S. at 240. The "question whether a state court errs in determining the facts is a different question from whether it errs in applying the law." *Rice v. Collins*, 546 U.S. at 342. While "[t]he term 'unreasonable' is no doubt difficult to define," *Williams v. Taylor*, 529 U.S. at 410, the Supreme Court has held that "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010); *accord Williams v. Taylor*, 529 U.S. at 411. Thus, even if "[r]easonable minds reviewing the record might disagree" about the factual finding(s) in question, "on habeas review that does not suffice to supersede the trial court's… [factual] determination[s]." *Rice v. Collins*, 546 U.S. at 342.

5. Trial counsel ineffectiveness claims

When "reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when

there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 135 S.Ct. at 1376. This is especially true for trial counsel ineffectiveness claims, where AEDPA review must be "doubly deferential" to afford "both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. at 15; *accord Cullen v. Pinholster*, 563 U.S. at 190.

THE PCRA PROCESS

The Post Conviction Relief Act ("PCRA") provides the sole means by which Pennsylvania state court prisoners may obtain collateral relief. 42 Pa. C.S. § 9542. The PCRA court (Common Pleas Court) has original jurisdiction over PCRA proceedings. *Id.* § 9545. If necessary for the petition's disposition, the PCRA court may hold an evidentiary hearing regarding the petitioner's claims. *Id.* § 9545(d), § 9545(a); *Commonwealth v. Khalifah*, 852 A.2d 1238, 1240 (Pa. Super. 2004) (PCRA court may refuse evidentiary hearing if claim is "patently frivolous and has no support either in the record or other evidence"); *Commonwealth v. Jordan*, 772 A.2d 1011, 1014 (Pa. Super. 2001) (holding right to evidentiary hearing on post-conviction petition not absolute, but rather within PCRA court's discretion).

A petitioner may appeal the PCRA court's ruling to the Pennsylvania Superior Court (intermediate appellate court). The Superior Court's review of the PCRA court's denial of relief is limited to examining whether the lower court's findings are supported by the record and the order is otherwise free of legal error. *Commonwealth v. Jermyn*, 709 A.2d 849, 856 (Pa. 1998); *Commonwealth v. Lambert*, 765 A.2d 306, 323 (Pa. Super. 2000);

Commonwealth v. Stokes, 440 A.2d 591, 595 (Pa. Super. 1982) ("Our task is not to engage in a *de novo* evaluation of the testimony presented."). The PCRA court's credibility determinations are binding on the reviewing court where there is support in the record for those determinations. *Commonwealth v. White*, 734 A.2d 374, 381 (Pa. 1999); *Commonwealth v. Howard*, 749 A.2d 941, 946 (Pa. Super. 2000).

Accordingly, when the Superior Court's review is contingent upon a factual finding that was never made, either because the PCRA court failed to hold an evidentiary hearing at all, or failed to make the specific finding at issue, the common practice is to remand to the PCRA court for the necessary findings. *Commonwealth v. Williams*, 782 A.2d 517, 522-523 (Pa. 2001); *Commonwealth v. Basemore*, 744 A.2d 717, 737-738 (Pa. 2000).

TIMELINESS, EXHAUSTION, AND FAIR PRESENTATION AS THEY RELATE TO MR. WANG'S 2254 PETITION

Mr. Wang's 2254 petition is timely.

Mr. Wang's conviction became final on November 9, 2011. Mr. Wang, though, filed his *pro se* initial-review PCRA petition on November 7, 2011 – two days *before* his conviction became final. Thus, Mr. Wang did not use *any* of the 365 days allotted to him under 28 U.S.C. § 2244(d)(1) because by the time his conviction became final, he already had a "properly filed" initial-review PCRA petition pending, which stopped AEDPA's one-year clock. 28 U.S.C. § 2244(d)(2).

On January 5, 2018, the Pennsylvania Superior Court affirmed the dismissal of Mr. Wang's initial-review PCRA petition.[105] Under state law, Mr. Wang had thirty days to petition the Pennsylvania Supreme Court for discretionary review. Pa.R.App.P. 1113(a). Thus, Mr. Wang had until February 4, 2018 to seek discretionary review. Although Mr. Wang did not seek discretionary review from the Pennsylvania Supreme Court, these thirty days are nonetheless tolled under 28 U.S.C. § 2244(d)(2). *Swartz v. Meyers*, 204 F.3d 417, 421 (3d Cir. 2000).

Accordingly, ADEPA's one-year clock started on February 4, 2018 and Mr. Wang had 365 days to file his 2254 petition, meaning he had to file his 2254 petition on or before February 4, 2019. Mr. Wang filed his 2254 petition on January 23, 2019, making his 2254 petition timely.

B. Fair presentation and exhaustion

Mr. Wang exhausted each federal claim raised in his 2254 petition and his instant amended petition. Mr. Wang fairly presented to the state courts the same claims, the same facts, and same legal theories he is now presenting to the federal courts. *Landano v. Rafferty*, 897 F.2d 661, 669 (3d Cir. 1990).

[105] Rpp. 377-385.

AEDPA'S APPLICATION TO MR. WANG'S CASE

Claim #1: Trial counsel was ineffective for not expanding the scope of his forensic investigation by consulting with and retaining a forensic expert like Brent Turvey to conduct a holistic examination of all the physical evidence. Trial counsel's ineffectiveness prejudiced Mr. Wang because there's a reasonable probability the outcome of his trial would've been different because the physical evidence, as Mr. Turvey's 35-page affidavit makes clear, supported Mr. Wang's suicide narrative far more than the Commonwealth's homicide narrative. U.S. Const. admts. 5, 6, 8, 14.

A. State court litigation of Claim #1

Mr. Wang raised and fairly presented this exact claim before the PCRA court and the Pennsylvania Superior Court. The PCRA court adjudicated *Strickland's* deficient performance and prejudice prongs. According to the PCRA court, an ineffectiveness claim "cannot succeed through comparing, in hindsight, the trial strategy employed with alternatives not pursued."[106] The PCRA court then conducted a single-page analysis of this fact-intensive claim and said:

> In [Mr. Wang's] case, trial counsel's strategy was to show that the [Sharon's] gunshot wound was self-inflicted. Trial counsel engaged an expert, pathologist Dr. Paul Hoyer, who testified that, based upon his review of the autopsy report, the [autopsy] photographs, the discovery[107] and digital images of the gun, it was his expert opinion that it was possible that Sharon Lin committed suicide; the weapon would be upside down, held in either hand and fired with the thumb of the other hand. Dr. Hoyer testified that, for a suicidal gunshot wound to the head, this was the most common way of holding the weapon. It was his opinion that

[106] Rp. ____ (pg. 9)

[107] The PCRA court's finding that Dr. Hoyer reviewed "the discovery" is objectively unreasonable. Dr. Hoyer did not review "the discovery." As documented in his PCRA petitions and opening brief before the Superior Court, Dr. Hoyer only reviewed the black/white and color photographs of Sharon's autopsy.

> the evidence showed only that the wound was not a contact wound, not that the gun muzzle was three feet away when it was fired as Dr. McDonald opined.
>
> When assessing whether counsel had a reasonable basis for his act or omission, the question is not whether there were other courses of action that counsel could have taken, but whether counsel's decision had any basis reasonably designed to effectuate his client's interest. The record establishes that the strategy chosen by trial counsel had a reasonable basis designed to effectuate [Mr. Wang's] interests, namely that Sharon Lin's death was a suicide. Moreover, [Mr. Wang] has failed to demonstrate that the suggested alternative strategy identified by his hindsight approach (presenting an expert who would refute Dr. McDonald's opinion that the shot was fired from 2-3 feet away, and Robert Stott's opinion that [Mr. Wang] fired the shot while standing to the left of the bed), offered a reasonable probability of a different outcome at trial.[108]

On appeal, the Pennsylvania Superior Court affirmed the PCRA court's decision, by simply making the following statement:

> The Honorable Sheila Woods-Skipper, sitting as the PCRA court, has authored a comprehensive, thorough, and well-reasoned Opinion, citing to the record and relevant case law in addressing [Mr. Wang's] claims. The record supports the PCRA court's findings and the Order is otherwise free of legal error.[109]

The Superior Court then cited the PCRA court's opinion and noted it "properly dismissed" Mr. Wang's PCRA petition "because… trial counsel's decision to call an

[108] Rpp. ___ (pp. 9-10).
[109] Rp. 383.

expert pathologist to support his suicide theory at trial had a reasonable basis designed to effectuate his interests[.]"[110]

B. SCOTUS's clearly-established trial counsel ineffectiveness case law

1. The state courts adjudicated both prongs of this *Strickland* claim on the merits

The PCRA court's substantive analysis of this *Strickland* claim consumed a single page. However, under the Supreme Court's "adjudicated on the merits" case law, the PCRA court's perfunctory analysis nonetheless means it adjudicated the deficient performance and prejudice prongs of this claim "on the merits." *Harrington v. Richter*, 562 U.S. at 98-99. The Pennsylvania Superior Court adopted the PCRA court's findings and conclusions. AEDPA deference, therefore, is applicable. Thus, this Court must "look through" the Superior Court's opinion and evaluate the PCRA court's perfunctory analysis to determine if its adjudication was objectively unreasonable.

2. *Strickland* and its progeny

Mr. Wang has a right to effective trial counsel. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Trial counsel's purpose is to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). The right to effective representation, consequently, is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."

[110] Rpp. 383-384.

United States v. Cronic, 466 U.S. 648, 656 (1984). Trial counsel, as a result, "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 468 U.S. at 688. Consequently, unless a defendant receives effective representation, "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). In short, the right to effective representation is the "great engine by which an innocent man can make the truth of his innocence visible[.]" *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016).

a. *Strickland*, *Wiggins*, and *Rompilla* clearly-establish trial counsel must conduct reasonable investigations

"Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. at 688. To ensure the defendant's trial is "reliable," trial counsel "has a duty to investigate." *Id.* at 690. "Unquestionably, investigation is essential to the lawyer's duties as both advisor and advocate. After all, the effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role." *Blystone v. Horn*, 664 F.3d 397, 419 (3d Cir. 2011). More specifically, "counsel has a duty to make reasonable investigations[.]" *Strickland v. Washington*, 466 U.S. at 691. If counsel thoroughly investigates his client's case and makes trial decisions based on his "through" investigation, his "strategic choices" are "virtually unchallengeable." *Id.* at 690.

Importantly, it is clearly-established that "a cursory investigation" does *not* "automatically justif[y] a tactical decision with respect to [trial] strategy." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Instead, it is clearly-established that when "assessing the reasonableness of an attorney's investigation… a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.*

For instance, "[c]ounsel can make a strategic decision to halt an avenue of investigation if he has completed a foundation of investigation to reach that decision, but decisions not to investigate certain types of evidence cannot be called 'strategic' when counsel fails to seek rudimentary background information." *Abdul-Salaam v. Sec'y of Pa. Dep't of Corr.*, 895 F.3d 254, 268 (3d Cir. 2018). Likewise, "[a] lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance." *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006).

b. *Wiggins* and *Rompilla* clearly-establish that trial counsel's decision to limit the scope of his investigation, by ceasing all investigation, will be considered objectively unreasonable when the investigation preceding the decision to stop investigating is, itself, unreasonable

Strickland identified a general duty to investigate. It did not, however, define the parameters or scope of this duty. *Wiggins* and *Rompilla* did, though.

(1). *Wiggins*

In *Wiggins*, the defendant alleged trial counsel had failed to adequately investigate, develop, and present mitigation evidence during his capital sentencing hearing. From the Supreme Court's perspective, in deciding whether trial counsel exercised "reasonable professional judgment," the issue was "not whether [trial] counsel should have presented a mitigation case," but "whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins's background was itself reasonable." *Wiggins v. Smith*, 539 U.S. at 522-523. From the Supreme Court's perspective, the investigation preceding trial counsel's decision not to present a mitigation case was unreasonable in scope.

Wiggins's attorneys limited their mitigation investigation to two sets of records: the PSI and DSS records. Trial counsel, though, did not retain a forensic social worker to prepare a "social history report," even though it was "standard practice" in Maryland capital cases to prepare one. *Id.* at 524. Trial counsel, therefore, "abandoned their investigation of [Wiggins's] background after having acquired only *rudimentary* knowledge of his history from a narrow set of sources." *Id.* (emphasis added).

The Supreme Court said the "scope of their investigation was also unreasonable in light of what counsel actually discovered in the DSS records." *Id.* at 525. The records revealed several facts probative to Wiggins's mitigation case: Wiggins's mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed emotional difficulties while in different placements; he had frequent, lengthy absences

from school; and, on at least one occasion, his mother left him and his siblings alone for days without food. The Supreme Court said, "[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." *Id.* These facts, the Supreme Court said, could have easily resulted in additional avenues of investigation that produced more probative mitigation evidence.

The Supreme Court also said, "[C]ounsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless[.]" *Id.* at 525.

The Supreme Court also said this – which is of critical importance to Mr. Wang's case:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the *quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further*. Even assuming [Wiggins's attorneys had] limited the scope of their investigation for strategic reasons, *Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy*. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Id. at 527 (emphasis added).

In the end, the Supreme Court said trial counsel's performance was deficient because it ceased its mitigation investigation when it only had rudimentary knowledge of Wiggins's social history and the limited records they had contained much mitigation evidence that should have prompted counsel to investigate further.

(2). *Rompilla*

In *Rompilla*, a Pennsylvania capital case, trial counsel interviewed Rompilla and five family members and retained three guilt-phase mental health experts. None of these sources, though "proved particularly helpful" in developing probative mitigation evidence. *Rompilla v. Beard*, 545 U.S. 374, 381 (2005).

Rompilla's post-conviction attorneys, though, identified several avenues trial counsel could have pursued to develop mitigation evidence and a comprehensive social history report, *e.g.*, school records, Rompilla's juvenile and adult incarceration records, and records regarding Rompilla's alcohol dependency. *Id.* at 382. While the Supreme Court said trial counsel was ineffective for not pursuing these avenues, it directed most of its ire and analysis at trial counsel's failure to obtain and review the criminal case file regarding Rompilla's prior rape conviction. *Id.* at 383.

Trial counsel's failure, the Supreme Court said, was particularly egregious because the Commonwealth had notified the defense of its intent to use Rompilla's prior rape conviction to establish a death-qualifying aggravating circumstance under state law. *Id.* In holding trial counsel's performance deficient, the Supreme Court said:

> Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay, and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. *Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing* whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and Rompilla's sentencing strategy stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.

Id. at 385-386 (emphasis added).

The Supreme Court said "[t]he notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense." *Id.* at 387. "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Id.*

In finding the state court's adjudication of Rompilla's *Strickland* claim objectively unreasonable, the Supreme Court said:

> We think this conclusion of the state court fails to answer the considerations we have set out, to the point of being an objectively unreasonable conclusion. It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking. No reasonable lawyer would forgo examination

> of the file thinking he could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging in the prior victim's testimony. Nor would a reasonable lawyer compare possible searches for school reports, juvenile records, and evidence of drinking habits to the opportunity to take a look at a file disclosing what the prosecutor knows and even plans to read from in his case. Questioning a few more family members and searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there. But looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce.

Id. at 389.

In the end, the Supreme Court said trial counsel must "make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Id.* at 377.

(3). *Showers v. Beard*

In *Showers v. Beard*, 635 F.3d 625 (3d Cir. 2011), Judy Ann Showers was convicted of first-degree murder for allegedly poisoning her husband with liquid morphine (Roxanol). *Id.* at 626-627. The Commonwealth said Showers surreptitiously administered the lethal dose. It relied on circumstantial evidence and Dr. Isidore Mihalakis's testimony that Roxanol is capable of being masked. The defense argued Judy Ann's husband committed suicide but did not present a defense expert to rebut Mihalakis's masking testimony. *Id.* at 627. However, before trial, trial counsel had retained Dr. Harry Doyle, a psychiatrist, to investigate the husband's state of mind. Dr.

Doyle determined that the central question was whether the morphine was taken voluntarily or surreptitiously. Dr. Doyle, though, did not have the necessary scientific background to testify regarding the Roxanol's properties. Consequently, Dr. Doyle advised trial counsel to secure a qualified expert to address the impossibility of disguising Roxanol and provided him with contact information for three potential experts. Trial counsel did not contact any of these experts. *Id.* at 627.

During post-conviction, PCRA counsel retained Dr. Cyril Wecht, then Coroner of Allegheny County, and a nationally recognized and acclaimed forensic pathologist. At a PCRA hearing, Dr. Wecht testified that the lethal dose of liquid morphine could not have been administered surreptitiously or forcefully and that Judy Ann's husband likely committed suicide. Dr. Wecht said he would have offered the same opinion if he had been called as a witness at Judy Ann's 1994 trial. *Id.* at 627. Dr. Doyle also testified and mentioned how he had given trial counsel the names of three potential experts to consult regarding whether Roxanol can be masked. *Id.*

Trial counsel also testified and said he believed that Helen Wolfe, Judy Ann's friend, would be the most reliable witness regarding whether Roxanol can be disguised. Trial counsel said that he did not cross-examine Dr. Mihalakis about the absence of a masking substance because he "recall[ed]" that there was some other type of fluid found in the husband's stomach. Trial counsel explained that he did not ask Dr. Mihalakis additional questions regarding the lack of evidence of force because it "can be very

dangerous" to ask questions for which "you don't know all of the answers." *Id.* at 627-628.

In finding trial counsel ineffective for failing to expand the scope of his investigation, and consulting with an expert like Dr. Wecht before trial, the Third Circuit Court of Appeals ("COA") said:

> The properties of Roxanol and the autopsy results were known well before the trial. If Roxanol could not be masked by another substance, the only plausible explanation for the manner of death would have been willing, self-administration. *The Commonwealth's evidence in the case against Showers, other than expert testimony regarding the properties of liquid morphine, was wholly circumstantial, making scientific evidence all the more important.*

Id. at 631 (emphasis added).

The COA, more importantly, said once Dr. Doyle told trial counsel he could not answer the all important medical issue in the case, it was "incumbent upon" trial counsel to "produce" an expert who could answer this question and testify:

> After Dr. Doyle told [trial counsel] that he was not qualified to testify to the crucial properties of Roxanol, "it was incumbent upon [trial counsel] to produce" an expert who could so testify. The record reflects "little meaningful effort" on [trial counsel's] part to do so.

Id. at 631.

The COA mentioned how trial counsel "elicited testimony from Dr. Mihalakis… that he had only tasted two drops of Roxanol for the purpose of the litigation and never tried the substance in a masking agent," but said "this testimony was not nearly as strong

as that which could have been provided by an expert, such as Dr. Wecht." *Id.* at 631. Trial counsel, incredibly, "relied on the testimony of [Helen] Wolfe, who was hardly an expert on Roxanol," and trial counsel further undermined Wolfe's already limited credibility when he told the jury during closing arguments that "Wolfe had only tried the drug once in a masking agent." *Id.* at 632.

The COA also criticized trial counsel's reasoning for failing to elicit significant favorable testimony from Dr. Mihalakis on cross-examination. Trial counsel, as mentioned, said he did not ask many questions because, to him, it was "dangerous" to ask questions he did not know the answer to. The COA agreed, but only partially:

> This court agrees that it may be risky for an attorney to ask questions for which he believes the answer may be harmful. However, it is no excuse for failing to elicit significant evidence when the risk of an adverse response has been created by counsel's failure to conduct a thorough investigation or understand key, undisputed facts in the record.

Id. at 632.

The COA, furthermore, recognized that trial counsel had "prepare[d]" and "present[ed]" some "favorable" evidence on Judy Ann's behalf, but his "serious omissions" outweighed the limited favorable facts. Trial counsel "failed to investigate readily available key evidence in support of the defense's chosen theory, *i.e.*, that [Judy Ann's] husband committed suicide, or make a reasonable decision that investigation was unnecessary." *Id.* at 632. The COA emphasized that "even the most minimally competent attorney… would have consulted at least one of the experts suggested to

him by Dr. Doyle" because "[t]estimony by any of the available experts would have injected significant doubt regarding [Judy Ann's] guilt. Reliance on Wolfe was not objectively reasonable." *Id.* at 632.

Notably, and with great relevance to Mr. Wang's case, the COA said, "This court and others have overturned a state court on habeas review based on deficient performance even where experts had been consulted but defense counsel failed to seek a second opinion when the facts so warranted." *Id.* at 632-633 (citing *Hummel v. Rosemeyer*, 564 F.3d 290, 302 (3d Cir. 2009) (defense counsel's failure to obtain additional psychiatric evaluation of defendant's mental capacity to stand trial deficient because previous evaluations were equivocal and client's behavior would have put competent counsel on notice); *see also Richey v. Bradshaw*, 498 F.3d 344, 362 (6th Cir. 2007) (counsel's failure to consult with another arson expert).

The COA, importantly, said defense attorneys need not "always enlist expert testimony but it depends on the specific circumstances of the case." It approvingly cited the 1989 ABA Guidelines that "call[ed]" for the "retention of expert witnesses when necessary or appropriate for preparation of the defense, adequate understanding of the prosecution's case and rebuttal of any portion of the prosecution's case at the guilt/innocence phase." *Id.* at 633.

(4) ***Siehl v. Grace***

A Pennsylvania jury convicted Kevin Siehl of first-degree murder in connection with the July 1991 murder of his estranged wife Christine. The Commonwealth claimed

Christine was murdered in her bathroom at 1:30 a.m. on July 13, 1991. The bathroom contained indications of a struggle, including blood on the walls and floor, broken mirror pieces, and scattered cat litter. There was no sign of forced entry. Law enforcement identified three suspects: (1) Kevin Siehl, who was married to Christine, but living separately from her; (2) Frank Wills, with whom Christine had been romantically involved while married to Siehl; and (3) Robert Prebehalla, who told people of his hatred of Christine. *Siehl v. Grace*, 561 F.3d 189, 190-191 (3d Cir. 2009).

According to detectives, Siehl became the prime suspect because a fingerprint on the showerhead and a bloodstain from the bathroom wall allegedly matched Siehl's fingerprint and blood type. Importantly, the Commonwealth's fingerprint expert claimed the showerhead print had to have been placed on the showerhead within 24 to 36 hours of its discovery. This time-stamping opinion worked all too well for the Commonwealth because it fell within the exact time period the Commonwealth claimed Siehl had murdered Christine. *Id.*

Once appointed, Siehl's public defenders persuaded the trial court to appoint a forensic expert to assist them in Siehl's defense. The forensic expert reviewed the forensic reports and photographs and provided trial counsel with a two-page report titled, "PRELIMINARY ANALYSIS," the purpose of which was to explain how the murder was committed and to explain certain items of physical evidence. After reviewing a photograph of the showerhead fingerprint and Siehl's fingerprint card, the

expert opined that the showerhead print matched Siehl's. The expert, though, raised questions about the print in his report:

> This print does match the rolled inked impression on the finger print card bearing the name of Kevin Charles Siehl. See lift photograph and finger print card. It can be stated however, that the print is an exceptionally clear print and not smudged, as one would expect to find in a homicide scenario such as this one. The other thing about this print that is unusual, is that microscopic examination of the shower head, where the print was developed, shows no trace evidence of blood which one would expect to find due to the nature of the crime. It also can be stated that no time frame can be placed on this print as to when it was made. The alleged suspect, Kevin Siehl, had access to this apartment prior to the commission of the crime, therefore, the print could have been made well before the homicide occurred.

Id. at 191.

The expert did not explain the basis of his conclusion regarding the showerhead print belonging to Siehl. Also, although the expert commented on the shower wall bloodstains, he never tested the blood evidence and made no findings regarding the bloodstain the Commonwealth claimed was consistent with Siehl's blood type. *Id.* While the expert had concerns regarding the fingerprint, trial counsel abandoned its forensic investigation after receiving the expert's report. Trial counsel, for instance, did not retain a serologist to examine the blood evidence, particularly the bloodstain the Commonwealth claimed was consistent with Siehl's blood type. Likewise, trial counsel did not retain a fingerprint expert to assess the fingerprint expert's time-stamping

opinion that the showerhead print had to have been deposited on the showerhead within 24 to 36 hours of its discovery.

Before trial, defense counsel and the Commonwealth jointly stipulated that the showerhead fingerprint belonged to Siehl. Shortly thereafter, the Commonwealth's fingerprint expert testified and said the showerhead print belonged to Siehl. More importantly, he said the print's positioning led him to conclude it was not left by someone showering, but by the murderer who was standing outside the tub and directing water onto Christine's body with the hopes of washing away important forensic evidence. The expert used the showerhead to demonstrate this theory for the jury. He also said the print had not yet started to deteriorate, meaning it must have been left within 24 to 36 hours of when Christine's body was discovered. *Id.* at 192. The Commonwealth's serologist also testified that one of the twelve bloodstains recovered from the bathroom was consistent with Siehl's blood type, and that none of the blood was consistent with those of Wills or Prebehalla. *Id.*

Trial counsel presented an alibi defense but presented no evidence or experts to counter the Commonwealth's fingerprint and blood experts and evidence. As the COA recognized,

> The forensic evidence core of the Commonwealth's case was such that the failure to challenge it would likely lead the jury to conclude not just that Siehl had on some occasion been in the bathroom, but also that (1) he had been in [Christine's] bathroom within 24 hours of the discovery of the fingerprint; (2) he had stood outside and beside the tub and directed the showerhead toward the place where

> [Christine's] body was found lying in the tub; (3) during his violent struggle with [Christine] in the bathroom, his blood and hers spattered together on the bathroom doorframe; and (4) none of the 20 items in the bathroom that tested positive for blood was consistent with the blood of the two other suspects.

Id. at 196.

In state court, Siehl claimed trial counsel was ineffective for stipulating that the showerhead fingerprint was his before having it examined by an independent fingerprint expert. He also claimed trial counsel was ineffective for not retaining a serologist to review the key blood evidence. The Pennsylvania Superior Court said the fingerprint stipulation was reasonable and Siehl could not prove prejudice because his fingerprints "would be all over" Christine's bathroom because he had frequently showered there. *Id.* at 194.

Siehl raised the same ineffectiveness claims in federal court. The district court ruled that trial counsel was not ineffective. The COA disagreed. It first said the Superior Court's reasoning was objectively unreasonable because it "wholly ignored" the fingerprint expert's timing-stamping testimony and the fact this testimony represented the "core of the Commonwealth's case[.]" *Id.* at 196. The time-stamping testimony, the COA said, placed Siehl inside Christine's bathroom at the time of her murder. Accordingly, it was imperative trial counsel adequately investigate the time-stamping opinion before trial and to present evidence and testimony to the contrary.

The COA said trial counsel's failure to retain a fingerprint expert to challenge the time-stamping testimony was ineffective because the forensic expert's preliminary report "had altered" trial counsel "to the fact that [the fingerprint expert's] 24 hour print aging testimony was probably unsound." *Id.* at 196. In the end, the COA held:

> In short, given the Commonwealth's expected testimony regarding the age and position of the print, and the position and character of the blood samples found in the apartment, any decision to stipulate that the print was Siehl's without an intention to counter that expected testimony was ineffective because it effectively admitted that he was the murderer. Thus, assessing the ineffective assistance claim in light of all the circumstances, we conclude that the Superior Court's application of *Strickland* in this case was not objectively reasonable… [.]

Id. at 196.

(5) *Dugas v. Caplan*

In *Dugas v. Coplan*, 428 F.3d 317 (1st Cir. 2005), Peter Dugas was charged with arson in connection with a fire to his father's grocery store. The State's case against Dugas "consisted of several expert witnesses" who each opined the fire had been purposely set. *Id.* at 323. The "strongest" evidence against Dugs was the "expert testimony on arson." *Id.* Outside the arson testimony, the "balance of the evidence" against Dugas "was relatively weak." *Id.*

When trial counsel initially reviewed the reports from the State's arson experts, he concluded the "not arson" defense had potential merit but believed it would be a "challenge" to undermine the State's arson experts. *Id.* Before making this conclusion,

trial counsel (1) "casually" spoke to a few other defense attorneys, (2) read "some" arson materials, (3) "visually assessed" the fire scene, and (4) spoke briefly with the State's arson experts. *Id.* at 323, 328. Trial counsel never consulted, retained, or presented an independent arson expert to examine the physical evidence, assess whether the scene characteristics were consistent with the State's arson findings, and testify at trial.

At trial, trial counsel told the jury he intended to present a "not arson" defense as well as a "someone else started the fire" defense. *Id.* Regarding the "not arson" defense, trial counsel did not present an arson expert. Instead, trial counsel "confined his challenge of the state's arson evidence to cross-examination of the state's expert witnesses." *Id.* at 324. However, "the focus" of trial counsel's cross-examination "was unclear, and many of the experts' scientific conclusions went unchallenged." *Id.* at 324. Trial counsel, for instance, "did not ask the kinds of questions that a trained fire investigator or forensic scientist would consider important. Instead, his questions amounted to an unfocused set of miscellaneous criticisms and evinced his lack of scientific knowledge." *Id.* Also, "[d]espite his earlier statement to the jury that he believed that the state's arson experts were wrong, [trial counsel] presented no alternative theory of the fire." *Id.*

During post-conviction proceedings, Dugas retained an arson expert who identified several problems with the State's arson investigation. In particular, the defense expert challenged the State's expert who had claimed he identified an accelerant

in the scene material. Based on this evidence, Dugas raised a *Strickland* claim, alleging trial counsel had been ineffective for failing to have the scene evidence and the State's alleged arson evidence examined by an independent arson expert. The state courts denied relief. In federal court, the district court said trial counsel's representation was deficient but not prejudicial. On appeal, the First Circuit Court of Appeals reversed the prejudice ruling and granted Dugas a new trial.

In terms of the deficiency prong, the First Circuit said trial counsel performed deficiently for at least five reasons.

First, challenging the state's arson case was critical to Dugas's defense. Much of Dugas's defense, therefore, depended on trial counsel's "ability to convince the jurors that the State's experts might be wrong in concluding that the fire was arson." *Id.* at 329. "Given this representation, it is unfathomable that he did not undertake a more thorough investigation into such a crucial aspect of the defense." *Id.*

Second, the arson evidence was the "cornerstone" of the State's case and the State "had little evidence beyond it." *Id.*

Third, trial counsel admitted "he lacked any knowledge of arson investigation and had never tried an arson case" and "understood that he needed expert assistance to understand and challenge the state's case." *Id.* at 329-330. Despite this awareness, trial counsel "accept[ed] the characterization of the fire scene by the state's experts rather than conduct an independent investigation." *Id.* at 330.

Fourth, trial counsel "knew and admitted that a layperson would be likely to view the scene as an arson" and "understood that expert testimony or a well-informed cross-examination on the scientific conclusions of the state's experts would be necessary to shake the jurors' views that they were dealing with an arson scene." *Id.* at 330.

Fifth, trial counsel "conceded" he "had at least some reason to believe that there were problems with the state's arson case," as he "noted inconsistencies in the testimony of the state's arson experts and recall[ed] talking to colleagues about the need to hire a well-qualified expert to challenge the state's arson case." *Id.*

Thus, as *Wiggins* had clearly-established, based on the rudimentary facts developed by trial counsel's initial cursory investigation, a reasonable attorney in his position would have relied on these rudimentary facts to conduct further investigation by retaining and consulting a qualified arson expert. *Id.* Consequently, trial counsel's "failure to follow through with his investigation of the arson issues resulted in a feeble defense that was contrary to his promise to the jury at the outset of the trial[.]" *Id.* In the end, these facts collectively "demonstrate[d] the inescapable need for expert consultation in this case. Yet for reasons he was unable to explain, [trial counsel] did not consult an arson expert as part of his investigation." *Id.* at 331.

C. Application of *Wiggins* and *Rompilla* to Mr. Wang's case

1. The scope of trial counsel's forensic investigation was unreasonably narrow, especially considering Dr. Hoyer told trial counsel – well before trial – he could not rule out homicide based on the entrance wound's characteristics

The issue is not whether trial counsel should have retained a forensic expert like Brent Turvey. The issue whether the investigation supporting trial counsel's decision not to consult and retain this type of forensic expert "was itself reasonable." *Wiggins v. Smith*, 539 U.S. at 523. If trial counsel's decision not to consult and retain a forensic expert, like Brent Turvey, was based on a "thorough" and "reasonable" investigation into the facts and physical evidence, trial counsel's decision is "virtually unchallengeable." *Strickland v. Washington*, 466 U.S. at 690. *Wiggins* and *Rompilla*, though, clearly establish trial counsel may not cease investigating if his initial investigation was cursory, having only developed rudimentary facts regarding a critical issue at trial. This is especially true when the rudimentary facts would lead a reasonable attorney to further investigate.

Yes, trial counsel retained one forensic expert, Dr. Paul Hoyer. Dr. Hoyer's retention, however, did not prevent trial counsel from examining the *entire* scene and *all* the physical evidence to determine if the physical evidence and scene characteristics supported Mr. Wang's suicide narrative and/or undercut the Commonwealth's homicide narrative. Moreover, trial counsel's decision not to look outside the entrance wound and Dr. Hoyer's narrow area of expertise was objectively unreasonable because

trial counsel knew before trial that Dr. Hoyer could not and was not going to opine that the entrance wound was a contact wound.[111] Trial counsel also knew, or should have known, Dr. Hoyer would testify that the entrance wound's characteristics also supported the Commonwealth's homicide narrative. Likewise, trial counsel knew the jury would have difficulty conceptualizing Mr. Wang's suicide narrative based solely on Dr. Hoyer's trial testimony.[112]

Furthermore, even if Dr. Hoyer's pre-trial opinion was that the entrance wound was, in fact, a contact wound, trial counsel still had a duty to expand the scope of his forensic investigation because a contact wound made suicide *and* homicide both *equally* plausible.[113] Trial counsel, therefore, did not raise all available defenses because the *scope* of his forensic investigation was unreasonable based on the rudimentary information he had gathered from Dr. Hoyer during their pre-trial consultations.

The *scope* of trial counsel's pre-trial investigation depends on what trial counsel uncovers during his preliminary investigation. For instance, uncovering certain information will lead a reasonable attorney to stop investigating a particular defense. *Rompilla v. Beard*, 545 U.S. at 383. The opposite, however, is also true: uncovering certain information can impart on trial counsel a duty to expand the scope of his investigation. *Wiggins v. Smith*, 539 U.S. at 525; *Rompilla v. Beard*, 545 U.S. at 284-285.

[111] Rpp. 262-269
[112] Rp. 266.
[113] Rpp. 262-269.

"In assessing the reasonableness of an attorney's investigation," therefore, "a court must consider… whether the known evidence would lead a reasonable attorney to investigate further…. [because] *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision[.]" *Wiggins v. Smith*, 539 U.S. at 527.

Consequently, once trial counsel realized Dr. Hoyer's foreseeable trial testimony made suicide *and* homicide *equally plausible*, and that the jury would have difficulty conceptualizing and believing Mr. Wang's suicide narrative based only on Dr. Hoyer's testimony, he had a duty to expand the *scope* of his forensic investigation by examining the *entire* scene and *all* the physical evidence to determine if the physical evidence and scene characteristics supported Mr. Wang's suicide narrative. Trial counsel, though, abandoned his forensic investigation after having acquired only rudimentary knowledge of the physical evidence because he only examined one item of physical evidence, *i.e.*, the entrance wound, and only consulted with one forensic expert, *i.e.*, Dr. Hoyer. *Wiggins v. Smith*, 539 U.S. at 524.

Realizing Dr. Hoyer's testimony would not be what he expected or wanted it to be, trial counsel refused to expand the scope of his forensic investigation and instead placed the entirety of Mr. Wang's defense on Mr. Wang himself. Trial counsel told Mr. Wang multiple times before trial it was his trial testimony – and not the physical evidence – that represented his best and strongest chance for an acquittal.[114]

[114] Rpp. ___ (Ex. 21, 22)

This decision was objectively unreasonable. By not examining the *entire* scene and *all* the physical evidence, trial counsel *had no idea* if the remaining physical evidence, rather than Mr. Wang's testimony, represented Mr. Wang's best and strongest chance for an acquittal. Moreover, examining the *entire* scene and *all* the physical evidence would have been *consistent with* trial counsel's initial reason for retaining Dr. Hoyer, *i.e.*, to develop and present forensic evidence supporting Mr. Wang's suicide narrative and undercutting the Commonwealth's homicide narrative.

In this respect, trial counsel's failure is analogous to counsel's failure in *Showers*. Without consulting with a Roxanol expert to determine whether liquid morphine could be masked, defense counsel presented a lay witness to discuss the potential of masking, assuming (unreasonably) the lay witness's testimony would be as impactful as an expert's testimony. The COA said defense counsel's decision to present the lay witness was objectively unreasonable because the counsel's investigation preceding this decision was unreasonable and nonexistent because defense counsel never contacted the three experts Dr. Doyle had mentioned to him before trial.

Here, after Dr. Hoyer told trial counsel that suicide and homicide were both equally plausible, trial counsel immediately decided Mr. Wang's testimony represented Mr. Wang's best and strongest chance for an acquittal. Trial counsel did not even consider whether the other physical evidence and scene characteristics provided a more persuasive, objective, and realistic opportunity for an acquittal. This was objectively unreasonable because, as Brent Turvey methodically and exhaustively detailed and

explained, the physical evidence and scene characteristics support Mr. Wang's suicide narrative far more than the Commonwealth's homicide narrative.

2. Trial counsel's cross-examination was terrible

Harrington is applicable here. *Harrington* is a *Strickland* case where the defendant alleged trial counsel's ineffectiveness for failing to retain and present a bevy of forensic experts to undermine the State's theory of first-degree murder. In addressing the *Strickland* claim, the Supreme Court said, "[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy" and when trial counsel "conducted a skillful cross-examination." *Harrington v. Richter*, 562 U.S. at 111. In finding trial counsel's advocacy reasonable and effective, even without presenting a single forensic expert, the Supreme Court said "defense counsel elicited concessions from the State's experts and was able to draw attention to weaknesses in their conclusions stemming from the fact that their analyses were conducted long after investigators had left the crime scene." *Id.*

The Supreme Court's point was straightforward: trial counsel need not introduce forensic experts on his client's behalf if he is able to effectively cross-examine the State's experts and elicit helpful concessions regarding the forensic evidence. Thus, the question becomes whether trial counsel effectively cross-examined the Commonwealth's expert witness. The answer is no – and not even close. *Accord Dugas v. Coplan*, 428 F.3d at 331 ("Where defense counsel's extensive cross-examination of the government's expert strongly suggests that they consulted an expert, or where the state's

evidence may be so weak that it can be demolished on cross-examination, defense counsel's investigation and pursuit of a defense may be deemed sufficient.").

a. Stott's cross-examination

On direct-examination, Stott said Sharon had to have been seated on the left edge of the bed near its midline and facing the closet to the right of the bed and that Mr. Wang had to have been standing directly behind her between the bed and left wall when he fired the fatal shot. On cross-examination, Stott reiterated these opinions with little to no challenge from trial counsel. For instance, on direct-examination, Stott said the lack of blood spatter on the headboard, the corner left walls, and the mattress made it unlikely that Sharon was near or against the headboard when shot. On cross-examination, Stott repeatedly gave the same opinion because trial counsel had no idea how to challenge or undermine his opinion with the totality of the physical evidence.

Counsel: Did you consider, rather than having the body fairly well forward down the bed from the headboard, that perhaps that person is partially away from the headboard but has shot while the head is turned at some angle? *Does that question make sense?*

Stott: It is possible for a person to turn their head certainly instead of looking directly in this direction, looking like this. Could it happen? Yes, *but my problem with that is the lack of any blood spatter on that side of the room, whether it is on the headboard area, the wall behind the headboard.* (Indicating).

Counsel: No. I am just saying where you saw the blood – maybe we can do this without the photo. Rather than being flat against the headboard, that is a physical impossibility, right?

All I am saying is somewhere in between being against the headboard and being more toward the foot of the bed, somewhere in there but toward the side of the bed where the – did you see the nightstand and you saw the blood; correct?

Stott: Yes.

Counsel: But rather than being in the middle of the bed, more toward that side and then sort of bent over a little bit with the head turned, that would do it. That you would agree with the thoughts you had expressed earlier; is that correct? (Indicating)

Stott: *Are you asking me if the body is now midway, halfway down the bed?*

Counsel: Partway down the bed but the head is bent over and turned?

Stott: If they are halfway down the bed, they wouldn't be anywhere near the headboard. *It appears to me the person was at the edge of the bed with their back toward the wall where she was found laying against and would have fell backward. That is what it appeared to me.*

Counsel: But the head could have been directly in line with the headboard but the head turned. Would you agree with that, that the head is turned?

Stott: Again, the lack of blood spatter is what I find unusual.

Counsel: I am saying turned halfway down the bed but with the head turned, so that the body comes off the bed where the blood is, right?

Stott: Perhaps I am not making myself clear. When the bullet exits the head, that would be followed by an explosive spray of blood and tissue. *I didn't find anything like that in those photographs and I would assume that none of the crime scene investigators did or there would be evidence of it. All the blood that I see is where the victim allegedly fell and her head came to rest on the floor.*[115]

When trial counsel asked another confusing hypothetical regarding the possibility that Sharon had shot herself, Stott referred to the minimal blood spatter again:

> The lack of blood in any other area other than that makes the hypothetical that you proposed to me of her shooting herself in that area near the headboard or partway down the bed, *I find unusual that there is absolutely nothing there.*[116]

Trial counsel's unpreparedness regarding bloodstain pattern analysis and scene reconstruction is evident from trial counsel's follow-up question:

Counsel: Well, is it possible there was blood – I don't know if I am getting beyond [myself], but there was some spatter and then it pooled up when the head and the torso went down there?

Stott: Pooled blood and spatter, they call [it] high velocity spatter, are two different things.

[115] NT, Trial, 11/4/2008, pp. 170-173.
[116] NT, Trial, 11/4/2008, p. 174.

> The high velocity blood when the gun is fired and the bullet exits, that is leaving a very high velocity. That is sprayed out of the wound. When the victim lies there after being shot and the blood runs from the wound, that just pools.[117]

In short, trial counsel did not effectively cross-examine Stott.

First, Stott *never* deviated from his initial opinion that Mr. Wang had to have shot Sharon while standing to the left of the bed, near the left wall, while Sharon had to have been seat at the left edge of the bed, near the midline, facing the closet. Instead of undermining Stott's opinion, trial counsel *bolstered* it because his questions and hypotheticals were so poorly thought out and articulated. Indeed, a simple reading of trial counsel's questions makes it painfully obvious how unprepared he was to confront, challenge, and undermine Stott's testimony with the totality of the physical evidence.

Second, based on Dr. McDonald's preliminary hearing testimony, trial counsel knew Dr. McDonald had opined that Mr. Wang had to have fired the fatal shot while standing at least three feet from Sharon. Stott's opinion, though, contradicted Dr. McDonald's opinion. Trial counsel, however, never highlighted this substantial and reasonable doubt raising contradiction, never asked Stott how his opinion could be squared with Dr. McDonald's, and never asked Stott whose opinion was correct – his or Dr. McDonald's.

[117] NT, Trial, 11/4/2008, p. 175.

Third, to believe Stott's homicide narrative the jury would have had to believe that a rightward traveling FCC either (1) struck the soft mattress and had enough momentum after striking the soft mattress to bounce all the way back to the head of the bed or (2) struck the floor at the foot of the bed and had enough momentum to bounce all the back up over the foot of the bed and land at the head of the bed near the headboard. The plausibility of either occurring was extremely small, but trial counsel never addressed the implausibility on cross-examination.

Fourth, Stott repeatedly referenced the blood spatter on the left wall to support his opinion. Trial counsel, however, failed to expose significant flaws associated with the blood spatter. For instance, Stott said the blood spatter on the left wall had to be created by back spatter. Back spatter is blood directed back towards the source of energy or force that caused the spatter.[118] If Mr. Wang stood directly *behind* Sharon, as Stott opined, the back spatter would have had to have struck Mr. Wang's person, clothing, or trigger hand. Mr. Wang had no blood on his person or clothing. Moreover, the back spatter that would have struck Mr. Wang's clothing and person, creating a void pattern on the left wall, but there is no discernible void pattern on the left wall. Trial counsel, though, never elicited these easily obtained facts to undermine Stott's opinion.

[118] Based on his meandering questioning of Stott, it is a wonder if trial counsel knew and understood the dynamics and cause of back spatter.

Fifth, if Mr. Wang stood directly behind Sharon and fired while she was sitting on the bed, the gun's trajectory would have either been downward or straightforward, not upward as required by the strike mark's location above the closet. Trial counsel, though, never confronted Stott with this inconsistency.

a. Dr. McDonald's cross-examination

On direct-examination, Dr. McDonald opined that Mr. Wang had to have been three feet or more feet from Sharon when he fired. On cross-examination, trial counsel asked Dr. McDonald if he knew first responders had moved Sharon's body. Dr. McDonald said he did, but this fact did not change his distance and the manner of death determinations.[119] Trial counsel then asked several confusing questions regarding whether officers touched Sharon's hands, and if so, whether that changed his opinion:

> Counsel: Let me ask you this. So you were aware [Ms. Lin's body had been moved]. We did not hear in this courtroom exactly how it was done but we were told that the body at one point – I'm just telling you what we were told. We don't know what happened prior or after but at one point, the head and the torso of the body and I guess the arms follow were on the floor, feet were on the bed. This is what we were told.
>
> Then we were told that emergency medical [personnel] moved the body back onto the bed, so that now the head and the torso are – when they moved it apparently to the right, I guess they could have gone to the left or the right but the feet were on the bed

[119] NT, Trial, 11/5/2008, 2008, p. 32.

and remained on the bed and now the photos that were taken show the head and torso were opposite the headboard after that particular movement. Are you following me?

McDonald: I think so.

Counsel: There is no indication that the hands and arms were not touched. Are you aware of that?

McDonald: That the hands and arms were not touched by whom?

Counsel: Either police personnel, medical personnel, I don't know. Nobody who moved the body testified about the moving of the body.

McDonald: Okay. Understood.

Counsel: Which leaves open the question, well, were the hands touched and so forth and so on. If the hands were touched, rubbed, smeared in blood, does that alter your opinion at all?

McDonald: Regarding?

Counsel: The blood spatter and soot and anything else that was on the hands, and I will follow that up. Thee are two parts of the question. One, does that by itself alter your opinion?

McDonald: No, it does not. It does not alter my opinion. Just moving a body even in a rough fashion would not remove all those little droplets of blood because I had the opportunity where part of my job is once – in other cases where I have seen the blood spatter, to clean the hands off and it is not a particularly easy job, so even a rough

> movement of a body would not remove all of the little droplets of blood that I was looking for.[120]

On cross-examination, Dr. McDonald conceded that officer did not bag Sharon's hands, and because of this, they could have touched her hands when they moved her body.[121] When trial counsel asked if this touching could have wiped away the "stippling," Dr. McDonald explained the difference between "gunpowder stipple and soot."[122] Soot, he said, is "very light" and "[c]ertain degrees of it can be wiped off," while gunpowder stipple "is where the gunpowder fragments enter the skin and either are stuck in the skin or they produce an injury to the skin[.]" Gunpowder stipple, Dr. McDonald said, "would not be wiped away."[123]

When trial counsel highlighted several tiny specks of blood on the lower part of Sharon's right hand, Dr. McDonald agreed that the tiny specks were blood, but refused to characterize them as blood spatter.[124] Trial counsel then confusingly asked if the "little dots" could be stippling. Dr. McDonald said, "Again, I looked at the autopsy and I did not notice any gunpowder stipple on the hands."[125] When trial counsel asked about the hair shavings, Dr. McDonald said he found no gunpowder or soot surrounding the entrance wound or on the hair.[126]

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[120] NT, Trial, 11/5/2008, pp. 30-33.
[121] NT, Trial, 11/5/2008, p. 33.
[122] NT, Trial, 11/5/2008, p. 33.
[123] NT, Trial, 11/5/2008, p. 33.
[124] NT, Trial, 11/5/2008, p. 34.
[125] NT, Trial, 11/5/2008, p. 34
[126] NT, Trial, 11/5/2008, p. 36.

Trial counsel then told Dr. McDonald that Stott had testified that based on the absence of soot and stippling, "it was inconclusive as to how near or how far away that gun was from the head[.]"[127] Dr. McDonald said he could not "comment on another person's testimony."[128] After trial counsel interrupted, Dr. McDonald continued and said, "My job is to examine the wounds and to look for signs of gunpowder stipple is a type of wound that is produced on the skin and I didn't see that and that is consistent with a close-range wound and I did not see that."[129]

Recognizing his first question was inartful, trial counsel asked:

> Counsel: So is your answer [to] my inartful question, was if you factored that in, that is not changing or impacting your testimony?
>
> McDonald: Not at all.[130]

Trial counsel's questioning makes clear he did not effectively cross-examine Dr. McDonald, and that his ineffectiveness is directly linked to his failure to fully understand all the physical evidence and scene characteristics, which are things he could have easily understood had he retained a qualified forensic expert like Brent Turvey.

First, if Mr. Wang had shot Sharon from more than three feet away, it would have been virtually impossible for the FCC to come to rest at the head of the bed, which is a critical fact trial counsel never broached during cross-examination.

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[127] NT, Trial, 11/5/2008, p. 37.
[128] NT, Trial, 11/5/2008, pp. 37-38.
[129] NT, Trial, 11/5/2008, p. 38.
[130] NT, Trial, 11/5/2008, p. 38.

Second, the only plausible way Mr. Wang could have created the strike mark above the closet is if he positioned the gun at an upward trajectory. Based on Mr. Wang's height (5'7"), and the fact he had to have been standing three feet or more from Sharon under Dr. McDonald's theory, it is very unlikely Mr. Wang would have positioned the gun in an upward trajectory had he fired the fatal shot.

Third, based on Dr. McDonald's three feet theory, the bedroom's dimension, the strike mark's location, and the fact Sharon fell off the bed, Sharon had to have been seated at the foot of the bed near the left edge. This position, however, cannot be correct for at least two reasons. To begin with, if Mr. Wang shot Sharon at the left foot of the bed, it would have been impossible for Sharon to have knocked over the nightstand and for her feet to be in the position they were in when officers arrived. Trial counsel, though, never highlighted these obvious, critical, and impeaching facts during his cross-examination.

Fourth, Dr. McDonald's three feet theory differed from Stott's positional theory. Trial counsel, though, never addressed this fact, never had Dr. McDonald explain how his and Stott's opinions could co-exist, and never asked Dr. McDonald which opinion was correct – his or Stott's.

c. Summary of trial counsel's cross-examinations

Trial counsel's cross-examination of Dr. McDonald and Stott "amounted to an unfocused set of miscellaneous criticisms and evinced his lack of scientific knowledge." *Dugas v. Coplan*, 428 F.3d at 324. Moreover, the substance of trial counsel's questions

and the confusing way he asked them, shows he was unprepared to question, challenge, and undermine Dr. McDonald's and Stott's opinions based on the totality of the physical evidence and scene characteristics. Many of trial counsel's questions made no sense and Dr. McDonald's and Stott's responses make this clear. Both, at one point or another, asked trial counsel to clarify a question because it was so confusing and garbled.

Overall, then, trial counsel's decision not to expand the scope of his forensic investigation cannot be supported by his wholly ineffective and confusing cross-examinations of Dr. McDonald and Stott. To the contrary, trial counsel's ineffective cross-examinations explain why he needed to examine all the physical evidence and scene characteristics and consult with and retain a forensic expert like Brent Turvey. Mr. Turvey would have identified numerous avenues of cross-examination undermining Dr. McDonald's and Stott's opinions.

3. Trial counsel's closing arguments also demonstrate he should have expanded the scope of his forensic investigation

During closing argument, trial counsel questioned the physical evidence and scene investigation, suggesting that the physical evidence, if it had been properly collected and examined, would have likely produced evidence in support of Mr. Wang's suicide narrative.[131] The problem with trial counsel's argument is obvious: The jury knew trial counsel retained a forensic expert to review the autopsy report and photographs and offer an opinion regarding the entrance wound. Knowing this, the

[131] NT, Trial, 11/5/2008, pp. 191-192.

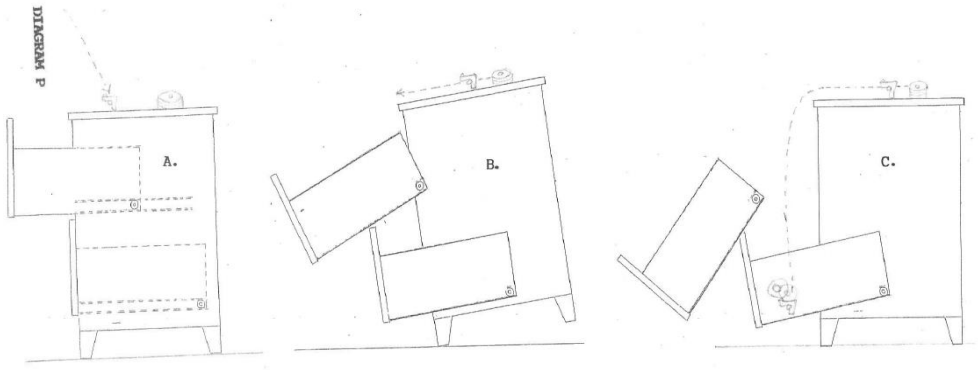
jury likely questioned trial counsel's decision not to retain another forensic expert to review the entire scene and all the physical evidence. Stated differently, if trial counsel truly believed the other physical evidence had the potential to support Mr. Wang's suicide narrative, he surely would have retained another forensic expert to examine this evidence and to explain how it supported Mr. Wang's suicide narrative. That trial counsel did not do this, however, likely raised suspicions with the jury to Mr. Wang's detriment.

4. The handgun's location is a red herring

In state court, the Commonwealth's go-to argument was the handgun's location. The handgun, as mentioned, was recovered from the second drawer under a CD. The Commonwealth claimed if Sharon had shot herself, the handgun could have *never* come to rest in the second drawer under a CD. Mr. Turvey, however, refuted this claim in his affidavit,[132] and based his opinion on (1) evidence dynamics, (2) the knocked over night stand, (3) the positioning of Sharon's body, and (4) the FCC's location. This diagram explains the evidence dynamics principle:

[132] Rpp. 133-136.

A. The top drawer have been halfway open. When the gun fell off her hand, it landed on top of the nightstand. There were a stack of CD on top of the nightstand as well.
B. When she fell on top of top drawer, she knocked both drawers out of the nightstand, causing it to tip forward, that in a chain reaction, causing the gun and CD's to slide off the nightstnd.
C. The top drawer had fallen on top of the halfway out bottom drawer, but it did not it, creating a gap for the gun and the CD's to be able to fall into the bottom drawer.



More importantly, had trial counsel performed effectively, he would have been able to prove, based on all the physical evidence, the Commonwealth's homicide narrative was "impossible." As Brent Turvey explained, if Dr. McDonald's three feet or more opinion is correct, Mr. Wang had to have fired the fatal shot standing three feet or more (diagonally) to the left of the foot of the bed. If he fired the fatal shot from this position, there is no way the FCC would have landed at the head of the bed. The FCC would have ejected to the right and landed several feet from the foot of the bed on the floor.

The same can be said regarding Stott's claim that Mr. Wang fired the fatal shot while standing in between the bed and left wall. Ditto regarding the prosecutor's claim that Mr. Wang fired the fatal shot while standing near the left foot of the bed. In each scenario, the FCC would have ejected to the right and landed *on the floor* feet from the foot of the bed.

Thus, here is the key question: of the two competing "impossibility" arguments, which of the two is less likely to have happened: (1) the handgun coming to rest in the second drawer under a CD after Sharon shot herself at the head of the bed; or (2) the FCC coming to rest at the head of the bed after Mr. Wang fired the fatal shot standing three feet or more from the left foot of the bed. Based on the laws of physics, evidence dynamics, and common sense the answer is simple: the latter is far more unlikely than the former.

The jury, unfortunately, was not able to compare these competing "impossibility" arguments because trial counsel failed to consider and examine (1) the FCC's location, (2) the strike mark's location, (3) the fact the night stand had been knocked over, (4) the lack of a void pattern on the left wall, (5) the positioning of Sharon's body after the shooting, and (6) the bedroom's dimensions. Had trial counsel considered and examined this evidence, he could have methodically and persuasively explained to the jury why the Commonwealth's homicide narratives were "impossible," whereas Mr. Wang's suicide narrative was possible and supported by the physical evidence and scene characteristics.

5. *Hinton v. Alabama* is inapplicable

In state court, the Commonwealth argued *Hinton v. Alabama*, 571 U.S. 263 (2014) precluded relief. The Commonwealth is wrong.

In *Hinton*, three robberies between February and July 1985 left two people dead. The State charged Anthony Ray Hinton with all three robberies and two murders after two firearms examiners said the six bullets fired during the three robberies could have only been discharged from the .38 caliber firearm recovered Hinton's house. "The State's case," therefore, "turned on whether its expert witnesses could convince the jury that the six recovered bullets had indeed been fired from the Hinton revolver." *Id.* at 265-266.

Recognizing that Hinton's defense called for an effective rebuttal of the State's firearms evidence, Hinton's trial counsel filed a funding motion to hire an independent firearms expert. In response, the trial judge granted $1,000 – $500 per murder. The trial judge believed $500 was the statutory maximum it could authorize. The trial judge was wrong. An earlier version of the statute had limited state reimbursement of expenses to one half of the $1,000 statutory cap on attorney's fees, which explains why the trial judge believed Hinton was entitled to up to $500 for each murder. Well before Hinton's trial, though, the statute had been amended to provide: "Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in such defense to be approved in advance by the trial court." *Id.* at 267.

Trial counsel failed to file a motion requesting additional funding because he was unaware the statute had changed and no longer imposed a specific limit and instead allowed reimbursement for "any expenses reasonably incurred." Unaware of the amended statute, trial counsel hired Andrew Payne, a firearms expert trial counsel –

himself – believed did not have the requisite expertise to effectively rebut the State's two firearms experts. *Id.* at 268.

At trial, Payne said the toolmarks in the barrel of the Hinton .38 caliber firearm had been corroded away so that it would be impossible to say with certainty whether a particular bullet had been discharged from his firearm. Payne also said the bullets from the three robberies did not match one another. The State's two experts, by contrast, maintained that all six bullets had indeed been fired from the Hinton .38 caliber revolver. *Id.* at 268.

In state post-conviction, Hinton alleged trial counsel was ineffective for not seeking additional funds under the amended statute. *Id.* at 270. To prove Payne's ineffective testimony prejudiced him, Hinton produced three firearms experts who examined the physical evidence and concluded that none of the six bullets from either murder could have been fired from Hinton's .38 caliber revolver. *Id.* at 270.

The Alabama state courts denied relief. The Supreme Court reversed. In deciding the case, the Supreme Court issued a narrow ruling – one based on an attorney's ignorance of the relevant statutory law. According to the Supreme Court, "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Id.* at 274.

After making this ruling, the Supreme Court said this regarding the hiring of defense experts and whether they are qualified:

> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law — the unreasonable failure to understand the resources that state law made available to him — that caused counsel to employ an expert that *he himself* deemed inadequate.

Id. at 274-275 (emphasis in original).

In the state courts, the Commonwealth seized on this paragraph to argue *Hinton* precludes relief. The Commonwealth is wrong. Mr. Wang's ineffectiveness claim has nothing to do with Dr. Hoyer's qualifications. Dr. Hoyer was a fine hire based on his training and experience at the Medical Examiner's Office. Trial counsel hired Dr. Hoyer to examine one piece of evidence, *i.e.*, the entrance wound. Dr. Hoyer did as requested: he examined the entrance wound and told trial counsel the entrance wound's characteristics equally support homicide and suicide.

Mr. Wang's ineffectiveness claim is about the *unreasonable scope* of trial counsel's forensic investigation. More specifically, it is about trial counsel's failure to investigate *all* the physical evidence to determine whether it supported Mr. Wang's suicide narrative, *after* learning and concluding that premising Mr. Wang's suicide narrative on the entrance wound alone would not effectively rebut the Commonwealth's homicide

narrative. Mr. Wang's case, therefore, is a straight-forward application of *Strickland*: Whether trial counsel acted objectively unreasonable by not expanding the scope of his forensic investigation once Dr. Hoyer repeatedly told him the entrance wound's characteristics equally supported both narratives – homicide and suicide.

Here, because trial counsel did not examine, let alone consider, the physical evidence outside the entrance wound, trial counsel's decision to cease his forensic investigation and place the case on Mr. Wang's shoulder was objectively unreasonable. Trial counsel, in other words, "abandoned" his forensic investigation "after having acquired only rudimentary knowledge" of *all* the physical evidence. *Wiggins v. Smith*, 539 U.S. at 525. The facts he knew, moreover, should have prompted trial counsel to expand the scope of his forensic investigation. For instance, while Dr. Hoyer could not definitively say Sharon's death was a suicide, he still said suicide was possible. This fact should have prompted trial counsel to examine the other physical evidence to see if it could definitively establish – or strongly suggest – that Sharon's death was nothing more than a tragic suicide.

In the end, *Hinton* is about one thing: trial counsel's ignorance of the law and how his ignorance prejudiced Hinton. Mr. Wang's case, on the other hand, is about something entirely different: trial counsel's objectively unreasonable decision *not* to expand the scope of his forensic investigation by having a qualified forensic expert examine the physical evidence and scene characteristics. *Hinton*, therefore, does not preclude relief.

6. *Harrington v. Richter* does not preclude relief

In state court, the Commonwealth also argued *Harrington* precluded relief. The Commonwealth is wrong. *Harrington* dealt with trial counsel's failure to retain forensic experts to examine and analyze a blood pool and blood stains at a shooting scene that left one person dead and another wounded. Had trial counsel retained these forensic experts, Ritcher argued, the jury may have believed his trial testimony that his co-defendant, Branscombe, opened fire on Johnson (the wounded victim) and Klein (the deceased) after Johnson and Klein attacked Branscombe.

Ritcher's trial attorney did not consult with or present a forensic expert. Thus, Ritcher's trial attorney made a strategic decision to raise doubt by cross-examining the State's witnesses and presenting seven defense witnesses, including Ritcher. This approach, the Supreme Court said, was reasonable especially because Johnson, the State's key witness, had given conflicting accounts of the shooting before trial. Also critical was the fact Ritcher had initially denied involvement in the shooting, only to admit involvement and produce Johnson's missing firearm. Likewise, trial counsel had no pre-trial notification from the State that it intended to present forensic experts as part of its case-in-chief. With no notification, it was reasonable for trial counsel to premise his defense on raising doubt through cross-examination and the testimony from the multiple defense witnesses. Lastly, trial counsel "conducted a skillful cross-examination" of the State's forensic experts. These key facts, however, are absent from Mr. Wang's case.

First, trial counsel's initial objective was to develop forensic evidence to substantiate Mr. Wang's suicide narrative. Trial counsel did this, but Dr. Hoyer's opinion was equivocal because he said homicide and suicide were equally plausible based on the entrance wound's characteristics. After consulting with Dr. Hoyer, therefore, trial counsel was still at square one in terms of developing forensic evidence to support Mr. Wang's suicide narrative. The physical evidence was there to *strongly* support Mr. Wang's suicide narrative, namely (1) the FCC's location, (2) the strike mark's location, (3) the fact the night stand had been knocked over, (4) the lack of a void pattern on the left wall, (5) the positioning of Sharon's body after the shooting, and (6) the bedroom's dimensions.

Second, unlike Ritcher who gave conflicting statements before trial, Mr. Wang never gave inconsistent statements.[133]

Third, the primary witness at Mr. Wang's preliminary hearing was Dr. McDonald. Thus, unlike trial counsel in *Harrington*, who had no pre-trial notice of the State's forensic experts, trial counsel knew well before trial the Commonwealth's case hinged on Dr. McDonald's opinion.

Fourth, trial counsel in *Harrington* "skillfully" cross-examined the State's forensic experts and "elicited concessions" from them that "dr[e]w attention to weaknesses in

[133] Rpp. 252-261.

their conclusions." *Harrington v. Richter*, 562 U.S. at 111. Mr. Wang's trial counsel, as documented, did an awful job cross-examining Dr. McDonald and Stott.

D. The state courts unreasonably applied *Strickland*, *Wiggins*, and *Rompilla* when it adjudicated the *Strickland's* deficiency prong

When you remove the wheat from the chaff, this represents the PCRA court's reasoning: trial counsel retained and presented one forensic expert, Dr. Hoyer, who told the jury suicide was possible based on a single item of physical evidence, *i.e.*, the entrance wound. By suggesting to the jury suicide was possible, the PCRA court said trial counsel chose a "strategy" that "had a reasonable basis designed to effectuate [Mr. Wang's] interests, namely that Sharon Lin's death was a suicide."[134] This perfunctory analysis is an unreasonable application of *Strickland*, *Wiggins*, and *Rompilla*.

First, making one reasonable decision does not make all of trial counsel's subsequent decisions reasonable.

Second, simply because trial counsel had a "reasonably designed strategy" does not mean he "reasonably executed" this "strategy."

Third, the PCRA court never asked, assessed, and answered the most critical question under *Strickland*, *Wiggins*, and *Rompilla*.

Fourth, the PCRA court did not address a single aspect of Brent Turvey's 35-page affidavit.

[134] Rpp. ___ (pp. 9-10).

1. Making one reasonable decision does not make all of trial counsel's subsequent decisions reasonable

Yes, trial counsel acted reasonable when he retained Dr. Hoyer and had him testify that suicide was possible based on the entrance wound. This one reasonable decision, however, did not make all of trial counsel's subsequent decisions reasonable. In other words, that trial counsel retained Dr. Hoyer to examine the entrance wound cannot make reasonable his decision to abandon his forensic investigation after Dr. Hoyer told him the entrance wound's characteristics equally supported suicide and homicide.

This, however, is the PCRA court's exact reasoning, *i.e.*, because Dr. Hoyer's testimony supported Mr. Wang's suicide narrative, trial counsel's overall advocacy and his decision not to examine all the physical evidence and scene characteristics must be reasonable. This is an objectively unreasonable application of *Strickland*, *Wiggins*, and *Rompilla*. The Sixth Amendment does not give free passes to trial attorneys who make one reasonable decision during his or her client's trial – and the case law makes this clear.

Rompilla: Trial counsel in *Rompilla* spoke with multiple family members and hired three experts. These reasonable decisions, however, did not make trial counsel's subsequent decision of not obtaining and reviewing Rompilla's prior rape conviction case file reasonable.

Wiggins: Trial counsel in *Wiggins* obtained and reviewed the PSI and DDS reports. These reasonable decisions, though, did not make trial counsel's subsequent decisions of not retaining a mitigation expert and creating a social history report reasonable.

Showers: Trial counsel in *Showers* developed and presented some favorable evidence on Judy Ann's behalf, but the COA said trial counsel's "serious omissions" outweighed these limited favorable facts. Put differently, that trial counsel developed and presented some favorable facts did not make all of trial counsel's subsequent decisions reasonable, particularly trial counsel's decision not to retain and present a Roxanol expert.

Hummel: Trial counsel in *Hummel* had the defendant examined by an independent psychologist to assess the defendant's competency. This reasonable decision, however, did not make trial counsel's subsequent decisions of stipulating to the defendant's competency and not having him examined by a psychiatrist reasonable.

Siehl: Trial counsel in *Siehl* retained a forensic expert to review the physical evidence. This reasonable decision, though, did not make trial counsel's subsequent decisions not to retain a qualified fingerprint expert and serologist reasonable.

2. The Sixth Amendment is focused on the execution of a reasonable strategy, not whether trial counsel identified a reasonable trial strategy

Strickland, *Wiggins*, and *Rompilla* clearly establish the Sixth Amendment is focused on whether trial counsel *executed* a reasonable trial strategy. The PCRA court, however,

focused solely on trial counsel's strategy, *i.e.*, convincing the jury Sharon's death was a suicide. It never assessed whether trial counsel's *execution* of the suicide defense comported with the Sixth Amendment's clearly-established duty of conducting a reasonable investigation before making significant trial decisions, like deciding to abandon the forensic investigation after examining only one item of physical evidence, especially when that one item of physical evidence made homicide and suicide equally plausible.

Moreover, trial counsel should not be given a Gideon advocacy award for identifying the suicide trial strategy, as a first-year law student could have identified this trial strategy. There were two people in the bedroom. One died from a contact or close-contact wound to the head. Only one firearm was recovered from the scene. These facts only present with two possible defenses: (1) Sharon Lin killed herself; or (2) Mr. Wang justifiably shot and killed Sharon in self-defense. This was not a self-defense case, though. Thus, only one defense was plausible – the suicide defense.

Trial counsel's execution fell below professional standards. Trial counsel's initial execution of the suicide strategy was reasonable because he had Dr. Hoyer examine the entrance wound. However, once Dr. Hoyer informed trial counsel the entrance wound's characteristics equally supported homicide and suicide, trial counsel's execution went off the rails. Without examining and investigating the other physical evidence and the scene characteristics, trial counsel concluded that Mr. Wang's best and

strongest chance for an acquittal rested on his testimony alone, not the physical evidence and scene characteristics.

Yes, Mr. Wang's testimony was consistent with his pre-trial statement, but this misses the point. Trial counsel's execution was ineffective because Mr. Wang's testimony did *not* represent Mr. Wang's best and strongest chance of securing an acquittal. The physical evidence and scene characteristics represented his best chance, but trial counsel did not know this because he never had them examined by a qualified forensic expert like Brent Turvey.

3. The PCRA court never asked, assessed, and answered the right questions under *Strickland*, *Wiggins*, and *Rompilla*

The PCRA court never asked, assessed, and answered the right questions under *Strickland*, *Wiggins*, and *Rompilla*. The failure to ask these questions means the PCRA court misapplied *Strickland* and its misapplication was objectively unreasonable.

Question #1: If trial counsel's defense strategy was to convince the jury Sharon Lin's death was a suicide, whether it was reasonable for trial counsel to abandon his forensic investigation after Dr. Hoyer said the entrance wound equally supported suicide and homicide.

Answer: Trial counsel's decision was objectively unreasonable. Had Dr. Hoyer unequivocally told trial counsel the entrance wound supported only one narrative, and that was the homicide narrative, trial counsel may have had a legitimate reason to cease his forensic investigation at that point. This, however, was not Dr. Hoyer's opinion to

trial counsel. While he could not eliminate homicide, Dr. Hoyer said Sharon's death could be a suicide, meaning Mr. Wang's suicide narrative was still very much alive and viable. Instead of abandoning his forensic investigation, consequently, Dr. Hoyer's opinion should have prompted trial counsel to examine all the physical evidence and scene characteristics to determine whether other items of physical evidence and/or certain scene characteristics supported Mr. Wang's suicide narrative.

In short, trial counsel abandoned his forensic investigation after only developing rudimentary forensic information regarding Sharon's death. The rudimentary information, moreover, should have prompted trial counsel to continue his forensic investigation.

Question #2: After abandoning his forensic investigation without examining the remaining physical evidence and scene characteristics, whether it was possible for trial counsel to effectively and accurately conclude that Mr. Wang's testimony, alone, represented the best and strongest opportunity for an acquittal.

Answer: The answer is no. To conclude Mr. Wang's testimony represented the strongest opportunity for an acquittal required trial counsel to examine the remaining physical evidence and scene characteristics. Trial counsel, therefore, merely assumed the physical evidence could not support Mr. Wang's suicide narrative, and then used this unreasonable assumption as the foundation for his objectively unreasonable decision to tell Mr. Wang that his innocence rested squarely on his shoulders and testimony.

Again, trial counsel's May 19, 2008 letter to Mr. Wang said this:

> In response to your recent letter, let me make this perfectly clear that Dr. Hoyer is not saying that Sharon's death was absolutely, positively a suicide. He agrees with the physical findings of the medical examiner but comes to a different conclusion as to cause of death. *It is your testimony that will persuade the jury that this was a suicide. Dr. Hoyer cannot supply… more information.*[135]

On August 9, 2008, trial counsel wrote Mr. Wang again and said, "As I have said from the start, your testimony, clear and concise, is the key to your case."[136]

Placing the entire case on Mr. Wang's shoulders without even considering or examining the other physical evidence and scene characteristics was, perhaps, the most objectively unreasonable decision and advice trial counsel made and gave.

4. The PCRA court never assessed or even commented on the findings and conclusions in Brent Turvey's 35-page affidavit

Brent Turvey wrote a 35-page, single-spaced report containing numerous findings and conclusions. The PCRA court's adjudication of this *Strickland* claim, however, consumed only two paragraphs and barely one entire page. The PCRA court's analysis focused on only two facts: trial counsel's decision to retain Dr. Hoyer and Dr. Hoyer's testimony that Sharon's death could be a suicide.

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[135] Rp. 268.
[136] Rp. 269.

The PCRA court's analysis is also unreasonably short because it never assessed or even commented on Brent Turvey's numerous findings and conclusions. The failure to consider Mr. Turvey's findings and conclusions traces back to the PCRA court's objectively unreasonable application of *Strickland*, *i.e.*, because trial counsel retained Dr. Hoyer, and Dr. Hoyer told the jury Sharon Lin's death could be a suicide, trial counsel's overall representation of Mr. Wang was adequate under the Sixth Amendment.

E. The state courts unreasonably applied *Strickland*, *Wiggins*, and *Rompilla* when it adjudicated the *Strickland's* prejudice prong

The PCRA court devoted one paragraph to the prejudice prong:

> Moreover, [Mr. Wang] has failed to demonstrate that the suggested alternative strategy identified by his hindsight approach (presenting an expert who would refute Dr. McDonald's opinion that the shot was fired from 2-3 feet away, and Robert Stott's opinion that [Mr. Wang] fired the shot while standing to the left of the bed), offered a reasonable probability of a different outcome at trial.[137]

The PCRA court misapplied *Strickland's* prejudice prong and its misapplication was objectively unreasonable.

1. The PCRA court made no findings invalidating or undermining Brent Turvey's expertise, his forensic assessment, or his affidavit, nor did it make findings invalidating or undermining his findings and conclusions

The PCRA court made no credibility findings regarding Brent Turvey's expertise or the way he performed his forensic evaluations and drafted his affidavit. The PCRA

[137] Rpp. ___ (pp. 9-10).

court, for instance, didn't find that Mr. Turvey lacked the requisite training and experience to perform a reconstructive analysis and to make the findings and conclusions he made. Also, the PCRA court made no credibility findings declaring any of Mr. Turvey's findings and conclusions incorrect, unreliable, or unsupported by the record evidence. The absence of such findings is critically important because the Court must view Mr. Turvey's findings and conclusions through a pristine prism and ask how a reasonable and properly instructed juror would've considered and weighed them against the Commonwealth's three homicide narratives.

2. Mr. Wang's PCRA "strategy" was identical to trial counsel's "strategy" with the only difference being Mr. Wang's PCRA attorney completely executed trial counsel's "strategy" by having a qualified forensic expert examine all the physical evidence and scene characteristics

Mr. Wang's PCRA "strategy" didn't represent an "alternative strategy." It represented the identical strategy trial counsel pursued before he threw in the towel well short of the finish line. Trial counsel's strategy was to develop physical evidence to "refute" Dr. McDonald's three-feet opinion. Trial counsel retained Dr. Hoyer for this very reason: to examine the entrance wound to determine whether it contained information "refuting" Dr. McDonald's opinion. Trial counsel, however, stopped his forensic investigation once Dr. Hoyer told him the entrance wound's characteristics equally supported homicide and suicide, meaning trial counsel only obtained a rudimentary understanding of the physical evidence and scene characteristics.

During his PCRA proceedings, Mr. Wang's primary argument was that trial counsel shouldn't have stopped his forensic investigation after receiving Dr. Hoyer's opinion because "refuting" Dr. McDonald was critical to proving Sharon Lin's tragic death was a suicide. Also, had trial counsel continued his forensic investigation, he would've had the necessary facts to easily deconstruct and invalidate Stott's positional testimonial as well.

Thus, Mr. Wang's PCRA "strategy" was identical to trial counsel's, except that PCRA counsel (Cooley), with Mr. Turvey's help, completed the forensic investigation trial counsel started and developed an abundance of facts supporting Mr. Wang's suicide narrative and invalidating the Commonwealth's homicide narrative.

3. It's reasonably probably the findings and conclusions in Brent Turvey's affidavit would've altered at least one juror's perception of the Commonwealth's case

The prejudice speaks for itself. The Commonwealth's based its entire case on the physical evidence because there were only two people in the bedroom at the time of the shooting, Sharon Lin and Mr. Wang, and Mr. Wang immediately proclaimed his innocence by telling eyewitnesses and the police Sharon had shot herself. Dr. McDonald's and Stott's testimony carried the day for the Commonwealth.

Trial counsel, though, not only did a woeful job cross-examining Dr. McDonald and Stott, he presented no forensic expert(s) to discuss how several scene characteristics and items of physical evidence undermined Dr. McDonald's testimony, Stott's testimony, and the positional narrative the prosecutor presented during her closing

arguments. Moreover, while trial counsel presented Dr. Hoyer, at the very end of Dr. Hoyer's testimony he agreed with the prosecutor that homicide and suicide were both equally plausible.

Jurors, therefore, likely began their deliberations with these perceptions of both cases: (1) the Commonwealth presented two qualified forensic experts who said Sharon Lin couldn't have shot herself and that her death had to be ruled a homicide; (2) trial counsel's cross-examination didn't invalidate Dr. McDonald's and Stott's homicide opinions; (3) Dr. Hoyer said suicide was possible, but he also said homicide was equally possible based on the entrance wound's characteristics; and (4) Mr. Wang presented no other expert(s) or evidence to discredit Dr. McDonald's and Stott's homicide opinions. Based on these perceptions, and the fact jurors give more weight and credence to qualified experts, the jury's first-degree murder verdict is unsurprising.

Brent Turvey's findings and conclusions, however, would've put Mr. Wang's and the Commonwealth's case in a whole new light. *First*, Mr. Turvey's affidavit systematically dismantles each of the Commonwealth's three positional narratives by thoroughly explaining how the physical evidence and scene characteristics don't support any of the Commonwealth's three homicide narratives. They do, however, support Mr. Wang's consistent narrative that Sharon Lin shot herself. *Second*, armed with Mr. Turvey's findings and conclusions, trial counsel would've significantly impeached Dr. McDonald and Stott on cross-examination, which would've further weakened the Commonwealth's case.

Consequently, had trial counsel developed and presented the findings and conclusions in Mr. Turvey's affidavit, jurors would've likely started their deliberations with these perceptions of both cases: (1) Dr. McDonald and Stott both said Sharon Lin's death was a homicide, but their positional opinions contradicted one another; (2) the Commonwealth never explained how all the physical evidence and scene characteristics proved Sharon Lin's death was a homicide; (3) Mr. Wang, on the other hand, explained how each item of physical evidence and all the scene characteristics supported Mr. Wang's suicide narrative and invalidated each of the Commonwealth's three homicide narratives; and (4) trial counsel repeatedly impeached Dr. McDonald and Stott on cross-examination by mentioning how different items of evidence and scene characteristics didn't support their homicide opinions.

Had trial counsel been able to foster these perceptions, it's reasonably probable the outcome of Mr. Wang's trial would've been different. Put differently, had trial counsel presented the findings and conclusions in Mr. Turvey's affidavit, either through Mr. Turvey himself or another qualified forensic expert, it's reasonably probable these findings and conclusions would've altered at least one juror's perspective of the Commonwealth's case to the point where this juror would've voted to acquit Mr. Wang because he or she would've believed the Commonwealth had failed to meet its burden of proving Mr. Wang's guilt beyond a reasonable doubt.

In the habeas context, every fairminded jurist who reviews these facts, particularly Dr. McDonald's testimony, Stott's testimony, trial counsel's cross-examination of Dr. McDonald and Stott, and Mr. Turvey's findings and conclusions, would conclude that trial counsel's deficient performance prejudiced Mr. Wang.

The Court, therefore, must grant Mr. Wang a writ of habeas corpus by ordering the Commonwealth to release him immediately and retry him, if it chooses, within a reasonable time period.

Claim #2: Trial counsel failed to present the testimony of Mr. Wang's three neighbors – Troy Davis, Timothy Flemings, and Rick Kern – each of whom would've corroborated salient aspects of Mr. Wang's statement and trial testimony, bolstering his defense that Sharon Lin committed suicide and creating reasonable doubt regarding the Commonwealth's homicide narrative. Trial counsel's ineffectiveness prejudiced Mr. Wang because there's a reasonable probability that had trial counsel presented Davis, Flemings, and Kern the outcome of his trial would've been different. U.S. Const. admts. 5, 6, 8, 14.

A. Introduction

The pre-trial discovery included statements from three of Mr. Wang's neighbors – Troy Davis, Timothy Flemings, and Rick Kern.[138] All three had said that immediately after they heard a gunshot they saw and heard Mr. Wang at the second floor window frantically screaming for help and asking for someone to call an ambulance because his wife had just shot herself. During his interrogation, Mr. Wang said Sharon had shot herself.[139] At trial, Mr. Wang said Sharon had shot herself. The fact Mr. Wang – with no time to fabricate a defense or other exculpatory explanation for what happened – simultaneously asked others to help his wife and call 911 tends to prove lack of criminal intent and lack of malice and is generally exculpatory.

Trial counsel, though, never subpoenaed or called Davis, Flemings, and Kern in support of Mr. Wang's suicide defense. This despite the fact trial counsel recognized pre-trial that the outcome of Mr. Wang's trial rested largely on whether the jury believed Mr. Wang's trail testimony and version of events. Based on the record, moreover, trial

[138] Rpp. 96-98, 248-251.
[139] Rpp. 252-261.

counsel's decision not to subpoena and present Davis, Flemings, and Kern was based on no investigation, meaning his decision not to call these witnesses can't be considered strategic and unchallengeable.

Davis's, Flemings's, and Kern's testimony would've been particularly helpful and impactful when addressing the Commonwealth's claim Mr. Wang hid the firearm in the bottom drawer of the night stand. Had Mr. Wang walked over to the nightstand and hid the firearm under a CD in the second drawer, he wouldn't have been able to be at the second-floor bedroom window only second after the shooting yelling to his neighbors for help.

Trial counsel's ineffectiveness prejudiced Mr. Wang. These three witnesses would've corroborated Mr. Wang's version of events and hammered home the fact Mr. Wang had no time to hide the gun in the nightstand's bottom drawer and no time to fabricate a defense. In the absence of Davis, Mr. Flemings, and Kern's trial testimony, the Court can have no confidence in Mr. Wang's conviction warranting a new trial.

B. Exhaustion and state court adjudication

Mr. Wang raised this exact federal claim in state court. The PCRA court rejected the claim by finding Davis's, Flemings's, and Kern's proposed testimony "cumulative" to other trial testimony:

> It is uncontroverted that, at the time of the incident, [Mr. Wang] stated that Sharon Lin had killed herself. At trial, Officer Magsam, the first officer on the scene testified that, when he arrived, [Mr. Wang] kept screaming, saying that, "she shot herself." Additionally, Officer Dennis Johnson

> testified that, when he arrived, [Mr. Wang] was yelling to someone on the phone, "she killed herself." Thus, this information was before the jury. Moreover, [Mr. Wang] has not shown that he was prejudiced by the absence of what would have been the cumulative testimony of Troy Davis, Timothy Flemming and Rick Kern. Counsel cannot be deeded ineffective for failing to call them as witnesses.[140]

AEDPA deference applies. Even under AEDPA deference, though, the PCRA court's cumulativeness finding and its legal conclusions regarding deficient performance and prejudice are objectively unreasonable.

First, the PCRA court's cumulativeness finding constitutes an unreasonable factual determination. Yes, Officers Magsam and Johnson both testified that upon seeing Mr. Wang at the scene he repeatedly said Sharon had shot herself. Officers Magsam and Johnson, however, arrived at the scene several minutes after the shooting, and this is critical, especially when you consider the Commonwealth's argument that Mr. Wang hid the gun under a CD in the nightstand's bottom drawer.

No witnesses, however, testified to seeing Mr. Wang at the second-floor window, *seconds after the gunshot*, screaming for help and yelling that his wife had just shot herself. Consequently, had Davis, Flemings, and Kern testified consistent with their statements, their testimony wouldn't and couldn't have been cumulative to any other witness's testimony. Thus, the PCRA court's cumulativeness finding is objectively unreasonable.

[140] Rpp. 31-32.

Second, the PCRA court's application of *Strickland's* deficiency prong was objectively unreasonable. *Strickland*, *Wiggins*, and *Rompilla* require a reviewing court to examine the investigation that preceded a challenged decision. The PCRA court, though, didn't examine trial counsel's investigation. Here, based on the record, trial counsel conducted no investigation before deciding not to subpoena and present Davis, Flemings, and Kern.

Third, based on their statements, presenting Davis, Flemings, and Kern presented no harm to Mr. Wang. Their proposed testimony, though, presented with a huge upside as mentioned above.

Fourth, the absence of their testimony, without question, prejudiced Mr. Wang. Again, without their testimony placing Mr. Wang at the second-floor window seconds after the shooting, the Commonwealth was free to argue, and the jury free to believe, that Mr. Wang had time to hide the gun in the nightstand's bottom drawer before he called 911.

The Court, therefore, must grant Mr. Wang a writ of habeas corpus by ordering the Commonwealth to release him immediately and retry him, if it chooses, within a reasonable time period.

Claim #6: The cumulative impact of trial counsel's objectively unreasonable decisions not to conduct a complete forensic investigation and not to subpoena and present Troy Davis, Timothy Flemings, and Rick Kern undermines confidence in the jury's first-degree murder conviction entitling Mr. Wang to a new trial. U.S. Const. amdts. 5, 6, 8, 14.

A. Introduction

While individual trial counsel errors can provide relief, so too can the cumulative impact of multiple trial counsel errors. *Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007); Marshall v. Hendricks, 307 F.3d 36, 94 (3d Cir. 2002); *Berryman v. Morton*, 100 F.3d 1089, 1101-1102 (3d Cir. 1996). If the complete forensic investigation claim (Claim #1) and the failure to present key witnesses claim (Claim #2) are separately insufficient to warrant relief under *Strickland*, collectively they warrant relief.

Trial counsel's failure to conduct a complete forensic investigation, by retaining a qualified expert like Brent Turvey, and to present Troy Davis, Timothy Flemings, and Rick Kern created a fundamentally incomplete and prejudicial narrative of the scene. Collectively, had trial counsel presented the findings and conclusions in Brent Turvey's affidavit and presented testimony from Davis, Flemings, and Kern that was consistent with their statement, it's reasonably probable the totality of the facts contained in Mr. Turvey's affidavit and Davis's, Flemings's, and Kern's testimony would've altered at least one juror's assessment of the Commonwealth's case to the point where the juror would've acquitted Mr. Wang because the juror would've believed the Commonwealth had failed to meets its burden of proving Mr. Wang's guilt beyond a reasonable doubt.

First, Mr. Turvey's findings and conclusions would've constituted credible evidence undermining each of the Commonwealth's three homicide narrative, while at the same time providing substantial support for Mr. Wang's suicide narrative.

Second, testimony from Davis, Flemings, and Kern would've done significant damage to the Commonwealth's claim that Mr. Wang hid the gun in the nightstand's bottom drawer.

B. Exhaustion and state court adjudication

Mr. Wang raised this exact claim in state court.

The PCRA court adjudicated this claim on the merits but denied it because it "determined" that Mr. Wang's ineffectiveness claims "lack[ed] arguable merit."[141]

The PCRA court's adjudication is objectively unreasonable.

The Court, therefore, must grant Mr. Wang a writ of habeas corpus by ordering the Commonwealth to release him immediately and retry him, if it chooses, within a reasonable time period.

[141] Rp. 37.

CONCLUSION

WHEREFORE, Mr. Wang respectfully requests the Court to grant him a writ of habeas corpus by declaring his first-degree murder conviction unconstitutional due to trial counsel's ineffectiveness.

Respectfully submitted this the 9th day of May, 2019.

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CERTIFICATE OF SERVICE

On May 9, 2019, e-filed this pleading with the District Court's ECF e-filing system and the Philadelphia County District Attorney's Office received a PDF copy of this pleading via email.