

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

2008 MAR 29 P 2:01

UNITED STATES,

v.

DYLAN M. WARD,
JOSEPH R. PRICE,
and
VICTOR J. ZABORSKY,

Defendants.

Criminal No. 08-CF1-26997

Judge Lynn Leibovitz

Trial Date: May 10, 2010

DEFENDANTS' JOINT MOTION IN LIMINE TO EXCLUDE ARGUMENT AND TESTIMONY THAT THE CRIME SCENE WAS CLEANED AND TO LIMIT ARGUMENT AND TESTIMONY REGARDING LACK OF BLOOD EVIDENCE

Defendants Dylan M. Ward, Joseph R. Price and Victor J. Zaborsky, by and through undersigned counsel, respectfully submit this Motion In Limine To Exclude Argument And Testimony That The Crime Scene Was Cleaned And To Limit Argument And Testimony Regarding Lack Of Blood Evidence.

I. FACTUAL BACKGROUND

A. MPD'S CLAIMS REGARDING TRACE BLOOD EVIDENCE AT 1509 SWANN STREET.

The Metropolitan Police Department ("MPD") began processing 1509 Swann Street in the early morning hours of August 3, 2006, and continued to do so for more than three weeks. During this time, MPD openly acknowledged that the crime scene did not comport with MPD's expectations of what a "violent stabbing crime scene" should look like, as MPD Captain C.V.



Morris, former head of MPD's violent crime unit, told the *Washington Post* on August 15, 2006: "A lot of evidence we should have seen at the house, we didn't see."¹

Specifically, MPD expected to find much more blood on the scene than they observed, and, according to the government's designated experts, "blood spatter, blood spillage, [and] blood trails" would have been expected in the vicinity where Mr. Wone was stabbed.² When investigators did not see the quantity and form of blood evidence they expected, MPD concluded that the crime scene must have been cleaned. According to government expert Robert Spalding, a chemical agent known as Luminol is regularly used to detect for the possible presence of blood, particularly in cases where police believe that blood stains may have been cleaned.³ Luminol is a highly sensitive chemical agent that can detect microscopic amounts of blood invisible to the naked eye.⁴ When Luminol comes into contact with even a microscopic amount of blood, it reacts or "luminesces," indicating the possible presence of blood.⁵ MPD, however, did not use Luminol to detect the presence of blood at 1509 Swann Street. Instead, MPD used a chemical agent known as "Ashley's Reagent." As discussed in further detail *infra*, Ashley's Reagent reacts to proteins that are found in a variety of common household surfaces and is *not* designed to detect the presence of blood. When applied at 1509 Swann Street, Ashley's Reagent reacted throughout the home, including on the walls, floors and door area in the room in which

¹ *Washington Post* B6 (Aug. 16, 2006).

² Letter from Kirschner to defense counsel, 14 (Mar. 8, 2010).

³ "Luminol" is specifically designed to detect the presence of blood, including blood that has been cleaned or is not visible to the naked eye: "[p]erhaps the greatest advantage of luminol is its sensitivity. Proescher and Moody found that luminol would detect hematin from hemoglobin in dilutions up to 1 in 10,000,000 It is more than capable of detecting blood not present in sufficient amounts to be seen with the naked eye." Robert Spalding, *Principles of Bloodstain Pattern Analysis*, 359 (James, et al., eds., 2005).

⁴ *Id.*

⁵ *Id.*

Mr. Wone was found, as well as in the hallway outside the room, and on the walls, floors, stairs, sinks, bathrooms, and the doors on the first, second and third floors of the home.

Subsequently, MPD Detective William A. Xanten executed a number of affidavits in support of search warrants for 1509 Swann Street, Mr. Price's law office, and Messrs. Zaborsky and Price's car, describing the detection of the trace blood evidence in the home as the basis for probable cause to search these additional areas. In his various affidavits, Detective Xanten described the results of the use of Ashley's Reagent at the home as follows:

Aug. 4, 2006 Affidavit for Search of Mr. Price's Office:

While processing the crime scene inside of 1509 Swann Street, N.W., technicians were able to determine . . . that the area where the victim's body was located had been cleaned. The use of chemicals and an artificial light source showed trace blood evidence located around where the victim's body was found. This trace blood evidence was located on the walls, floors, sofa bed and door frame of the bedroom where the decedent was killed.⁶

Aug. 4, 2006 Affidavit for Search of Automobile:

The use of chemicals and artificial lighting devices showed areas where trace blood evidence was located but apparently had been cleaned. This blood was in the form of a trail leading from the bedroom area where the decedent was located into a hallway outside of this bedroom.⁷

Aug. 7, 2006 Affidavit for Search of 1509 Swann Street:

[T]he investigation has shown that . . . trace blood evidence exists near where Wone's body was located. Through the use of chemicals and artificial light, trace blood evidence was located in several areas of the house, to include the inside door going to the basement apartment from the kitchen area of the house.⁸

The *Affidavit in Support of an Arrest Warrant for Dylan Ward* filed by the government ("Affidavit") also indicates, among other things, that "a number of specially trained police dogs

⁶ Affidavit of William A. Xanten (Aug. 4, 2006), produced at P25-26.

⁷ Affidavit of William A. Xanten (Aug. 4, 2006), produced at P30.

⁸ Affidavit of William A. Xanten (Aug. 7, 2006), produced at P39. Identical language was included in another affidavit executed by Detective Xanten in support of a search warrant for the basement apartment of 1509 Swann Street, N.W., produced at P46.

were brought to the Swann Street residence.”⁹ One of those dogs was a “‘cadaver dog’ trained to detect human blood and human remains.” *Id.* With respect to the cadaver dog, the government asserts that the following events occurred:

[a] ‘cadaver dog’ trained to detect human blood and human remains was taken through the house. The dog alerted – indicating the presence of human blood or human remains – in two locations. The first location was the lint trap of a dryer located just outside the bathroom by Ward’s bedroom on the second floor. The second location was a drain situated within the secured courtyard area in the back of the residence, at the bottom of a set of stairs leading down to the rear entrance into the basement apartment of the residence¹⁰

MPD took three samples of water from the rear drain and seized the washer and dryer from 1509 Swann Street.

B. SUBSEQUENT FBI LABORATORY TESTING ESTABLISHED IN OCTOBER 2006 THAT THERE WAS NO “TRACE BLOOD EVIDENCE.”

Based on the reactions observed from the use of Ashley’s Reagent, MPD used swabs to collect more than 160 samples from the floors, walls, sinks, showers, stairs, doors and baseboards throughout 1509 Swann Street. On August 18, 2006, all of these samples were sent to the FBI Laboratory for forensic testing. **The FBI Laboratory determined that there was no blood on any of the samples.**¹¹ MPD then removed the surfaces and items from which the samples were taken by sawing out numerous sections of hardwood flooring throughout the house, tearing a staircase tread and riser out of the first floor staircase, and removing doors, sink drain traps, sections of dry wall and wall board, a section of a ceiling, and pieces of fabric from the sofa bed on which Mr. Wone was found, as reflected in the photographs, attached at Exhibits A and B, taken before and after 1509 Swann Street was processed. On August 28, 2006, all

⁹ Affidavit at 11

¹⁰ *Id.*

¹¹ See FBI Laboratory Report of Examination, 1-8 (Oct. 16, 2006), produced at P157-64.

these items were sent to the FBI so they could be directly tested for the presence of blood.¹² **The FBI Laboratory determined that there was no blood on any of the materials.**¹³

In stark contrast to MPD's early claims that it found "trace blood" all over 1509 Swann Street, of the more than 175 samples and items collected from Defendants' home, including the floors, walls, stairs, sinks, bathtubs, and showers, only three of the samples were even *presumptively* positive for the possible presence of the blood.¹⁴ Further testing revealed no blood on these items either.¹⁵ All of these test results were known to the government no later than October 16, 2006, when the FBI Laboratory provided the government with the final report of examination.

Significantly, MPD also seized and sent to the FBI Laboratory every sink trap (referred to in the FBI and MPD reports as "u-joint traps") in 1509 Swann Street. The sink traps were tested for the presence of both blood¹⁶ and cleaning agents. *Neither* was found.¹⁷ These results were all provided to the government no later than September 2007.

The FBI Laboratory also tested the lint trap from the dryer upon which the cadaver dog had allegedly alerted. No blood was found.¹⁸ A minute amount of DNA material was located in the lint trap (not a surprising find given that skin cells would be expected to be found in a lint trap). The FBI Laboratory tested that DNA material and determined that Messrs. Price, Ward and Zaborsky "cannot be excluded as potential contributors" to it, while Mr. Wone "is excluded

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ See FBI Lab Report of Examination, 4 (July 2, 2007) produced at P178-183.

¹⁷ See FBI Lab Report of Examination, 2 (Sept. 14, 2007), produced at P186-87 (stating "[n]o residues consistent with cleaning agents were identified in the specimens Q195-Q197 U-joint traps.").

¹⁸ See FBI Lab Report of Examination, 3 (Aug. 8, 2009), produced at P2536-40.

as a potential contributor to the mixture of DNA.”¹⁹ The government did not send the lint trap to the FBI Laboratory for testing until February 4, 2009, more than three years after seizing the dryer²⁰ and more than three months *after* Detective Waid wrote his Affidavit in support of Defendants’ arrests. The government received the results of the testing in August 2009.

The FBI Laboratory also tested the three samples collected from the outside drain upon which the cadaver dog allegedly alerted. These samples were collected in August 2006 but were not sent to the FBI Laboratory for testing until February 4, 2009.²¹ All three samples were tested for the presence of blood and DNA.²² No blood was found in any of the three samples and no human remains were detected.²³

C. MPD USED THE WRONG FORENSIC CHEMICAL TO PROCESS 1509 SWANN STREET CAUSING FALSE POSITIVES FOR THE PRESENCE OF TRACE BLOOD EVIDENCE.

On February 9, 2009, in response to numerous defense requests for more information about the then unidentified chemicals that coated virtually the entire interior of 1509 Swann Street, the government provided the defense with the following information:

For your information, be advised that as part of processing the scene of the homicide on August 3, 2006, MPD mobile crime lab technicians applied a processing chemical called Ashley’s Reagent to certain areas of the crime scene. Ashley’s Reagent is essentially a protein stain that reacts with protein. Thereafter, FBI evidence response team members processed parts of the crime scene using other methods and techniques, including Luminol. Further, multiple samples and items were taken from the scene and submitted for further forensic testing. **It has been determined that the Ashley’s Reagent was used in a manner not intended by the manufacturer of that product.**²⁴

¹⁹ *Id.* at 4.

²⁰ *Id.* at 2.

²¹ *Id.* Like the lint trap, the samples were not tested for more than three years after they were collected and were not sent for testing until after Detective Waid’s Affidavit was issued and the Defendants had all been arrested.

²² *Id.*

²³ No DNA was found in two of the samples. *Id.* Some biological material was found in the third sample but no human DNA typing results were obtained from it. *Id.*

²⁴ Letter from Kirschner to defense counsel, 3 (Feb. 9, 2009) (emphasis added).

In response to this disclosure, the defense requested additional information about the misuse of Ashley's Reagent.²⁵ The government declined to provide further details, but indicated that the government had spoken with the manufacturer of Ashley's Reagent, Mr. Donald Ostermeyer, and provided the defense with Mr. Ostermeyer's contact information.

The defense contacted and met with Mr. Ostermeyer. He informed the defense that Ashley's Reagent is used to enhance blood patterns and impressions, *e.g.*, it could be applied to a bloody finger print or shoe print to enhance the print so it could be later analyzed by a latent print examiner. Mr. Ostermeyer explained that unlike Luminol, Ashley's Reagent is *not* designed to detect the possible presence of blood because Ashley's Reagent reacts with proteins that are commonly found in a variety of substances, including hardwood floor finishes, paint polymers and fabric dyes/stains. Based on the information provided by the government on February 9, 2009, Mr. Ostermeyer surmised that when MPD applied Ashley's Reagent on the floors, walls and other surfaces of 1509 Swann Street, it reacted with the proteins in the finishes of those surfaces, and MPD erroneously interpreted those reactions as indicative of the presence of trace blood evidence. Mr. Ostermeyer has been designated as a defense expert.

II. ARGUMENT

The government seeks to introduce three experts (a former FBI field agent and two retired MPD mobile crime lab technicians) to opine that the crime scene was cleaned and that the quantity of blood on the scene is inconsistent with the wounds suffered by Mr. Wone and with a "violent stabbing crime scene."²⁶ The designated experts lack qualification to offer these opinions and have no factual basis for them. Accordingly, such opinions fail to qualify as

²⁵ See Memorandum of Points and Authorities in Support of the Defendants' Joint Motion to Compel Discovery, 14-16 (Mar. 26, 2009).

²⁶ See Letter from Kirschner to defense counsel, 11, 14-16 (Mar. 8, 2010).

admissible expert testimony under *Dyas v. United States*, 376 A.2d 827 (D.C.), *cert. denied*, 434 U.S. 973 (1977). Independently, this testimony is inadmissible because its probative value is outweighed by its danger of unfair prejudice.

A. THE GOVERNMENT'S FORMER LAW ENFORCEMENT EXPERTS' OPINIONS

The government has designated three former law enforcement professionals -- a retired FBI field agent and two retired MPD mobile crime lab technicians -- as experts who are expected to testify that the quantity of blood at the scene of Mr. Wone's death is inconsistent with the stab wounds suffered by Mr. Wone and that more blood should have been found on the scene and on various items recovered from the scene. The government has provided the following Rule 16(a)(1)(E) disclosures for its crime scene experts:

Ms. Maureen Walsh (former MPD mobile crime lab technician):

- "Ms. Walsh is expected to testify that based on her training and experience, the crime scene discovered by the authorities in this case was not consistent with that of a violent stabbing crime scene (*i.e.*, lack of blood, blood spatter, blood spillage, blood trails, . . . and the absence of any other blood evidence of a violent struggle or stabbing.)"²⁷
- "Ms. Walsh is expected to testify that in her experience, knives used in violent crimes typically have blood all over them, including on the knife blade and handle."²⁸

Mr. Dave Sergeant (former MPD mobile crime lab technician):

- "Mr. Sergeant is expected to testify that based on his training and experience, the crime scene discovered by the authorities in this case was not consistent with that of a violent stabbing crime scene (*i.e.*, lack of blood, blood spatter, blood spillage, blood trails, . . . and the absence of any other blood evidence of a violent struggle or stabbing.)"²⁹

²⁷ *Id.* at 14.

²⁸ *Id.*

²⁹ *Id.* at 16.

- Mr. Sergeant is expected to testify that in his experience, knives used in violent crimes typically have blood all over them, including on the knife blade and handle.”³⁰

Mr. Robert Spalding (former FBI field agent):

- “The amount of blood present appears to be inconsistent with that described by [Defendant]. Given the nature of the wounds it could be expected that considerable bleeding would have occurred. In fact, according to Dr. Goslinoski, wound #1 involved ‘. . . penetration into the heart at the aortic root. . . .’ It is known that such a wound can involve spurting of blood due to heart pressure.”³¹
- “[Defendant] appears to describe more blood at the scene than is shown in the photographs taken by the Metropolitan Police Department Mobile Crime Unit personnel. The following statements suggest this”³²
- “While the available information does not allow the application of quantitative terms, in describing the amount of blood present, blood staining the Item 16 towel is inconsistent with the item having been used to stem the bleeding from an individual stabbed three times as was the deceased.”

B. LEGAL PRINCIPLES GOVERNING THE ADMISSIBILITY OF EXPERT TESTIMONY IN THE DISTRICT OF COLUMBIA.

The admissibility of expert testimony in this jurisdiction is assessed using “two levels of analysis.” *Ibn-Tamas v. United States*, 407 A.2d 626, 632 (D.C. 1979). First, the testimony must satisfy an admissibility threshold, for which a “three-fold test is applied.” *Id. Accord, Benn v. United States*, 978 A.2d 1257, 1269 (D.C. 2009). Second, if the admissibility threshold is satisfied, the expert testimony can be presented at trial only if the probative value of the testimony outweighs its prejudicial impact. *Ibn-Tamas*, 407 A.2d at 632.

The Court of Appeals first articulated the “three-fold test” for the admissibility of expert testimony in *Dyas v. United States*, 376 A.2d 827 (D.C.), *cert. denied*, 434 U.S. 973 (1977).

³⁰ *Id.*

³¹ Report of Robert Spalding, 13 (Feb. 25, 2009), produced at P1167-81.

³² *Id.*

Under *Dyas*, for expert testimony to be admissible, the trial court must find, first, that the subject matter of the testimony is “so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman.” *Id.* at 832. Second, the trial court must conclude that the expert witness whose testimony is offered has “sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.” *Id.* Third, the trial court must *exclude* expert testimony if “the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.” *Id.*

One important component of evaluating the second *Dyas* criterion – *i.e.*, whether the expert opinion offered is likely to aid the trier of fact in its search for truth – is the well-established principle that, to be helpful to the jury, “[a]n expert’s ‘opinion must be based on fact or adequate data . . . [N]ot a mere guess or conjecture.’” *Haidak v. Corso*, 841 A.2d 316, 327 (D.C. 2004) (quoting *Sponaugle v. Pre-Term, Inc.*, 411 A.2d 366, 367 (D.C. 1980)). As the District of Columbia Court of Appeals recently explained in an opinion that reversed a medical malpractice verdict on the ground that the plaintiff’s expert “relied on too much speculation:”

The purpose of expert testimony is to avoid jury findings based on mere conjecture or speculation. Thus, the sufficiency of the foundation for expert opinions should be measured with this purpose in mind. An expert witness opinion must be based on fact or adequate data . . . While absolute certainty is not required, opinion evidence that is conjectural or speculative is not permitted. Expert testimony may be excluded when the expert is unable to show a reliable basis for his theory.

Giordano v. Sherwood, 968 A.2d 494, 498 (D.C. 2009) (internal quotation marks, citations, and brackets omitted). *Accord Washington v. Washington Hospital Center*, 579 A.2d 177, 181 (D.C. 1990); *St. Lewis v. Firestone*, 130 A.2d 317, 319 (D.C. 1957) (It is “well settled that the facts on

which expert opinion is predicated must permit reasonably accurate conclusions as distinguished from guesswork or conjecture.” (footnote omitted)).

C. EXPERT TESTIMONY CONCERNING WHAT THE BLOOD EVIDENCE *SHOULD* HAVE BEEN MUST BE EXCLUDED UNDER *DYAS*.

1. The Government’s Crime Scene Experts are Not Qualified to Testify to What the Quantity of Blood on the Scene Should Have Been.

As a threshold matter, the government’s crime scene experts lack “sufficient skill, knowledge, or experience” to testify regarding the degree of external bleeding that would be expected to occur as a result of the particular stab wounds suffered by Mr. Wone. *Dyas*, 376 A.2d at 832. It has long been understood by forensic pathologists that the precise location, trajectory and internal injury caused by a given stab wound dictates the degree of internal and external bleeding that will result from the wound, and, therefore, also determines the quantity of blood that should be expected to be found at the scene.³³

The three crime scene experts noticed by the government lack the medical background and training in human anatomy that is required to offer a reliable opinion concerning the amount of blood that would be expected to be found at the scene of Mr. Wone’s death. None of the government’s experts is a medical doctor or a forensic pathologist, and none possesses the knowledge and expertise to testify concerning the degree of *external* bleeding that would occur as a result of the *specific* stab wounds suffered by Mr. Wone. Indeed, the expert disclosures filed by the government do not suggest that any of the three possesses the necessary skill or knowledge to opine in any fashion on the medical consequences of stab wounds at all, including the amount of internal and external bleeding that would result from the particular stab wounds at issue in this case.

³³ Dr. Ronald K. Wright, *Principles of Bloodstain Pattern Analysis*, 13 (James, et al., eds., 2005).

The inadequacy of the government experts' knowledge in these areas is illustrated by the fact that the crime scene experts' designated expert testimony is directly contradicted the opinions of the medical experts in this case. Specifically, the Defendants' three expert forensic pathologists and an emergency room physician all concur that the quantity of blood at the scene of Mr. Wone's death *is* consistent with the degree of bleeding that would be expected from the particular stab wounds suffered by Mr. Wone. The opinions of all four doctors are consistent with basic medical and anatomical principles that have been long recognized fact that, as Spitz and Fisher explained more than three decades ago,: "[b]leeding [from stab wounds] is mainly into body cavities, since the outer parts of the wound track frequently close after withdrawal of the weapon. The amount of blood at the scene of injury may be minimal, unless extremities, the head or the neck are involved."³⁴ Defendants' four expert physicians all agree that these long-recognized principles are fully consistent with the quantity of blood discovered at the scene of Mr. Wone's death: Mr. Wone suffered stab wounds to the torso, not the extremities, and, as a result, the vast majority of the bleeding occurred internally, not externally.

It is also important to note that while Mr. Spalding, Ms. Walsh and Mr. Sergeant's professional training and experience might qualify them to offer expert testimony concerning methods of processing a crime scene (including, for example, presumptive tests conducted for the presence of blood), it does not render them qualified to opine regarding the distinctly medical question of the quantity and type of bleeding that results from a stab wound of a particular size, location, and trajectory. *See, e.g., Hernandez v. City of Albuquerque*, No. CIV 02-0333 JB/RHS, 2004 WL 5522847, at *6 (D.N.M. Jan. 23, 2004) (police officer with 26 years of experience

³⁴ *Spitz and Fisher's Medicolegal Investigation of Death*, 305 (Dr. Werner U. Spitz, ed., 3d ed. 1993) (1973). *See also* Wright, *supra*, at 27 ([A] stab wound of the chest where a major vessel or the heart is penetrated . . . will cause massive *internal* bleeding. . . . Abdominal stab wounds, even fatal ones, rarely have significant external bleeding.)

excluded from testifying as expert regarding rate of bleeding by plaintiff and as to alternative possibilities for the plaintiff's head injuries.). *Accord Toy v. District of Columbia*, 549 A.2d 1, 9 (D.C. 1988) ("While Mr. diGrazia's substantial experience in the criminal justice field qualified him to render opinion testimony on general police procedures, it did not also qualify him to render opinion testimony as to the proper administration of CPR."). Indeed, because they lack the necessary foundational knowledge and understanding of the exact nature of the stab wounds (i.e., which, arteries, sections of the heart, etc., were perforated) that they may have observed at crime scenes in other cases (e.g., what organ(s) may have been perforated in the stabbing), they cannot meaningfully or permissibly extrapolate from the quantity of blood observed in those cases to this one. Such testimony would lack a reliable methodology and would be pure conjecture. As such, any opinions the government proposes to offer from these non-medical witnesses concerning blood quantities caused by stab wounds is simply not probative of any contested issue in this case. Those opinions therefore fail the basic test of relevancy.

For this same reason, Mr. Spalding cannot offer opinion testimony as to how much blood should have been on the towel used by Defendant Price to apply pressure to Mr. Wone's wounds. Lacking the expertise to reasonably ascertain how much external bleeding would have occurred, and the rate of that bleeding, Mr. Spalding is in not qualified to opine as to whether the quantity of blood on the towel is or is not consistent with its having been used to apply pressure to Mr. Wone's wounds.

**2. The Crime Scene Experts Lack a Factual Basis to Testify
As to What the Blood Evidence *Should* Have Been.**

In addition to lacking the expertise required to opine regarding the quantity of blood to be expected at the scene, the government's three crime scene experts lack the necessary factual basis to offer the designated opinions.

As set forth above, the government's own extensive forensic testing establishes that the crime scene was not cleaned. Consequently, whatever expectations the government's crime scene experts may have concerning what the blood evidence at a "violent stabbing crime scene" *should be*, there is simply no factual basis for the experts to opine that the crime scene *in this case* was "cleaned." Indeed, any expert explanation for the "lack of blood, blood spatter, blood spillage, [and] blood trails"³⁵ must be based on fact and accepted science, "not a mere guess or conjecture." *Haidak*, 841 A.2d at 327.

The experts' experiences in processing other crime scenes provides no more factual basis for opinions that the crime scene in this case was cleaned than they provided for opinions as to how much Mr. Wone would or should have bled as a result of his wounds. It is axiomatic that a multitude of factors contribute to the quantity and form of blood evidence that will be found at a particular stabbing scene, including how much bleeding occurred, the extent to which—if any—the victim moved after being stabbed, and what actions the attacker took during and following the stabbing. Lacking actual knowledge of these facts, a crime scene or blood stain/pattern expert is in no better position than a given juror to say what the crime scene should have looked like. It would simply be a guess; the very sort of speculation our Court of Appeals has long prohibited by any expert in any field. *Id. See also Flaggs v. State*, 999 So. 2d 393, 403 (Miss. App. 2008) (noting that expert testimony of forensic pathologist "regarding blood spatter was far too speculative to have been reliable. In expressing his opinions on the blood spatter found at the crime scene, Dr. Hayne repeatedly used the phrase 'could be' and spoke in terms of 'possibilities.'").

³⁵ Letter from Kirschner to defense Counsel, 14-16 (Mar. 8, 2010).

It is precisely for this reason that experts in bloodstain pattern and crime scene analysis warn against the type of “filling in the blanks” the government would have its experts attempt in this case:

Common report errors occur when analysts overstate their opinions by “filling in the blanks” A scene reconstruction with bloodstain pattern analysis is similar to reading a book where various lines or paragraphs have been removed. The analyst must be careful not to fill in these blanks with information that is not scientifically supported. The types of opinions that one should avoid would include . . . [o]pinions based on a speculation of what they believe *should* have occurred: ‘the gunshot wound would have created a substantial amount of backspatter.’ ‘The shooter would have had backspatter on their person.’³⁶

Here, the government would magnify the error significantly by having its experts simply write the entire book, unconstrained by the actual facts of this case. This type of wholesale speculation, constrained by no more than the limits of the experts’ imaginations, is plainly improper and inadmissible in a court of law.

While the government’s crime scene experts may offer opinions regarding the import of the blood evidence actually found at the crime scene in this case, *e.g.*, whether blood spattered quickly or slowly, they may not opine as to what the crime scene should have looked like or prejudice the jury with their theories of what the lack of “blood trails” and “blood spillage” might possibly mean.

D. Expert Testimony That the Crime Scene was Cleaned and Concerning What the Blood Evidence *Should* Have Been Is Inadmissible Because The Probative Value of the Evidence is Outweighed By Its Prejudicial Effect.

Independent of its inadmissibility under *Dyas*, the experts’ testimony regarding what the blood evidence should have been at the scene is inadmissible under the “second level of analysis,” *Ibn-Tamas*, 407 A.2d at 632, because the probative value of testimony premised on

³⁶ *Principles of Bloodstain Pattern Analysis*, 442 (James, et al., eds., 2005) (emphasis added).

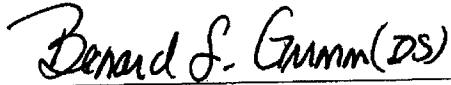
speculation as to why blood evidence is not present would be outweighed by its prejudicial impact.

As already discussed, the disclosed expert opinions concerning what the blood evidence should have been in this case would have no probative value because that testimony is based on speculation as to the *possible* explanation for the absence of evidence, rather than analysis of the actual evidence. Permitting expert testimony based on such an inadequate foundation would cause substantial prejudice to the defense by inviting the jury to rely on the views of former law enforcement officers as to what a stabbing crime scene should look like, and how much blood should be found at such a scene, when such testimony is directly contradicted by the *actual* forensic evidence recovered in this particular case. *See, e.g., Franco v. State*, 25 S.W.3d 26, 29 (Tex. App. 2000) (“[T]he testimony of a police officer potentially qualified to testify as an expert on blood splatter, would likely carry exceptional weight and an aura of reliability which could lead the jury to conclusions based upon more on [sic] speculation than scientific explanation.”). Consequently, because the probative value—if any—of the experts’ testimony, is substantially outweighed by its potential prejudicial effect, it is inadmissible.

CONCLUSION

For these reasons, the Defendants respectfully move to exclude all expert testimony and evidence that the crime scene was cleaned and all expert testimony as to what the blood evidence should have been.

Respectfully Submitted,



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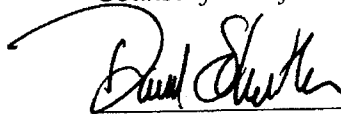
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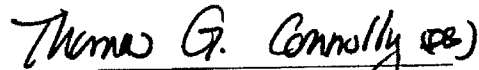
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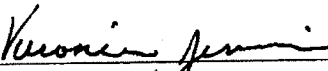
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Counsel for Defendant Victor J. Zaborsky

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' Joint Motion In Limine To Exclude Argument And Testimony That The Crime Scene Was Cleaned And To Limit Argument And Testimony Regarding Lack Of Blood Evidence, was served, via hand delivery, this 29th day of March, 2010 upon:

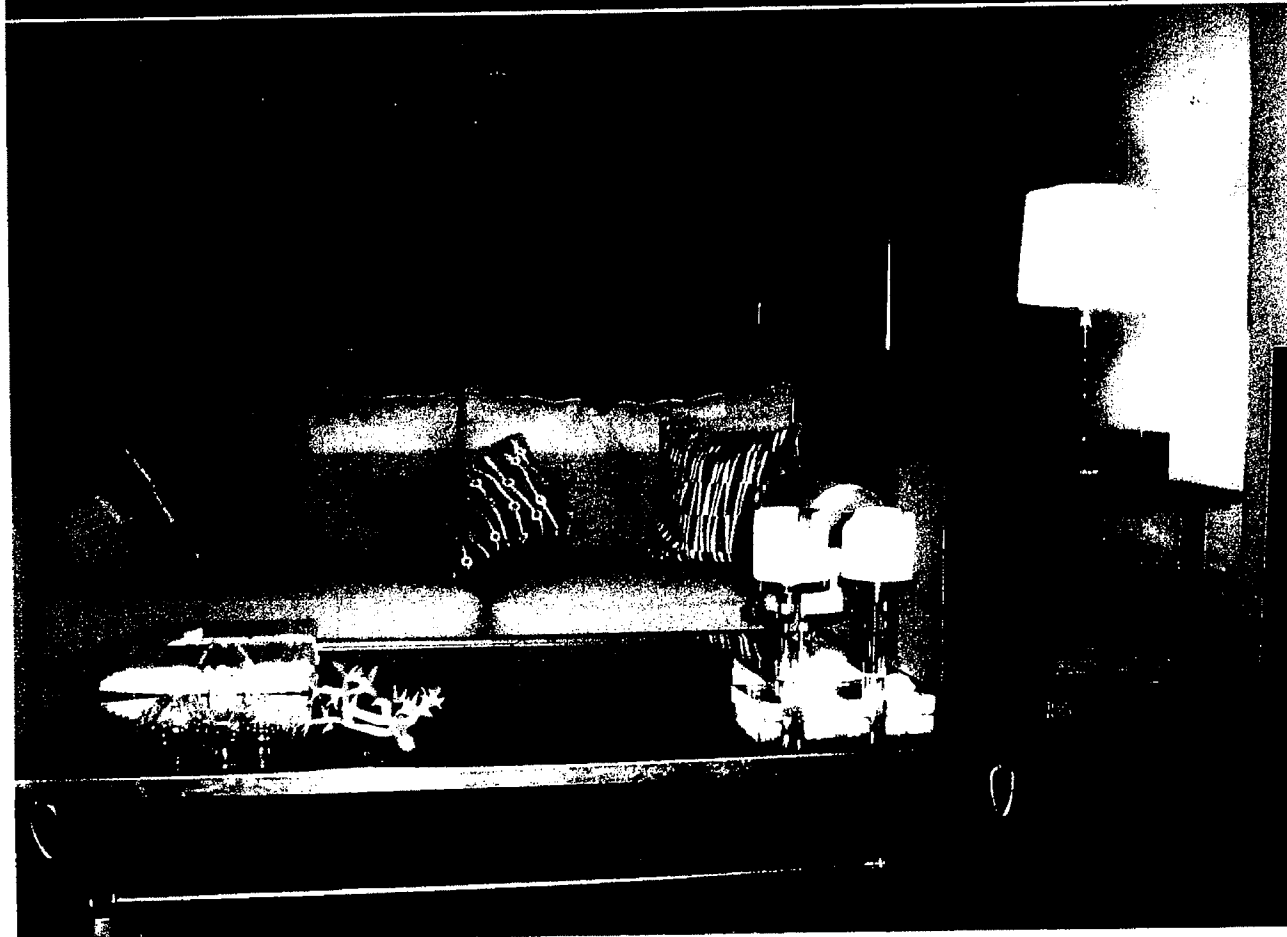
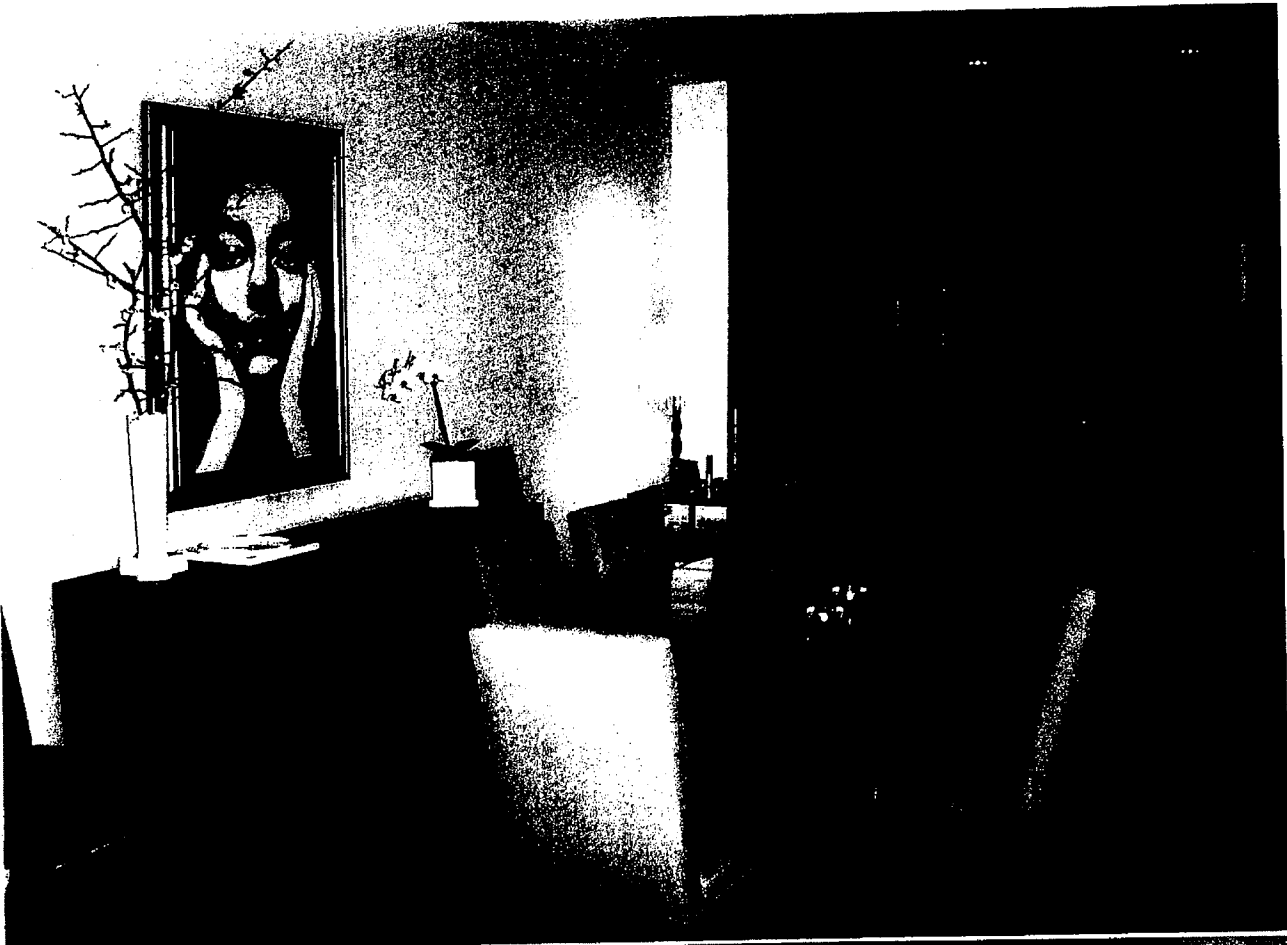
Glenn Kirschner, Esq.
T. Patrick Martin, Esq.
Rachel Carson-Lieber, Esq.
Assistant United States Attorney
Office of the United States Attorney
for the District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20001

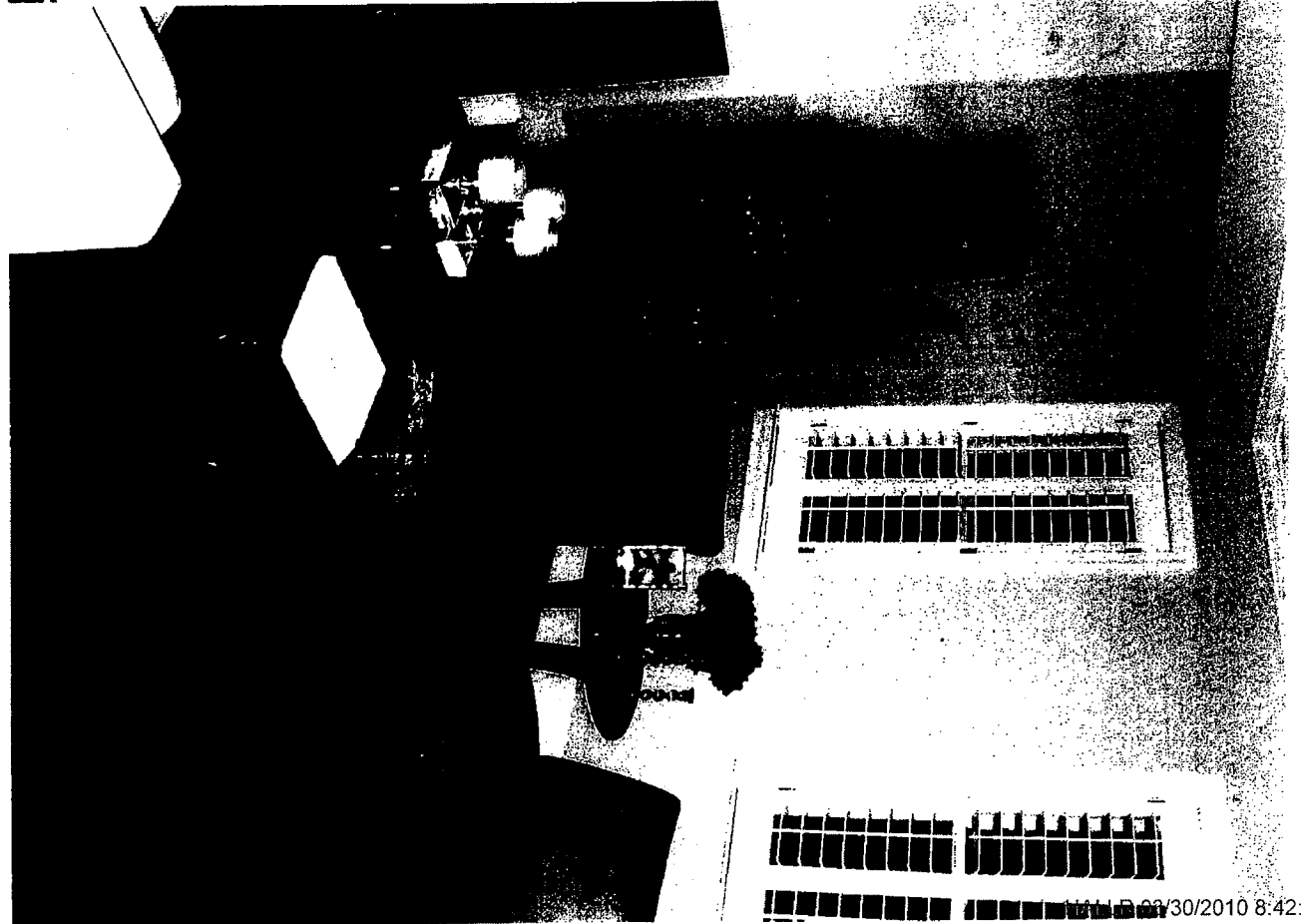
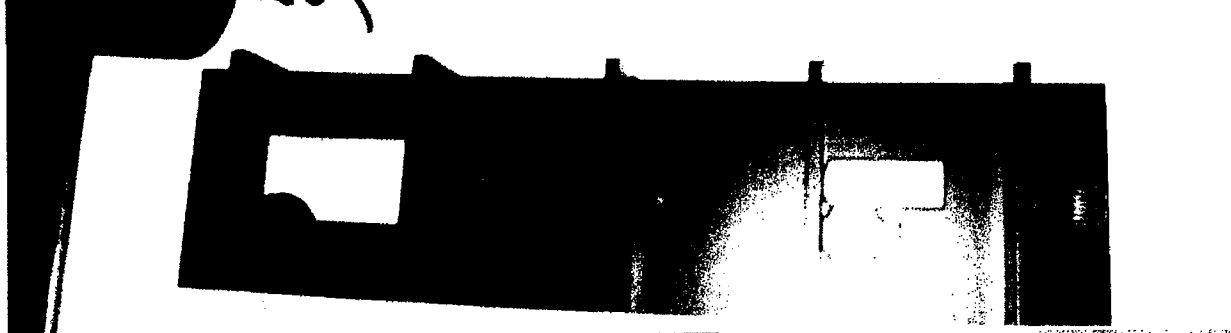


Veronica Jennings

EXHIBIT A:

Photos of 1509 Swann St.
taken before processing by
Metropolitan Police Dept.





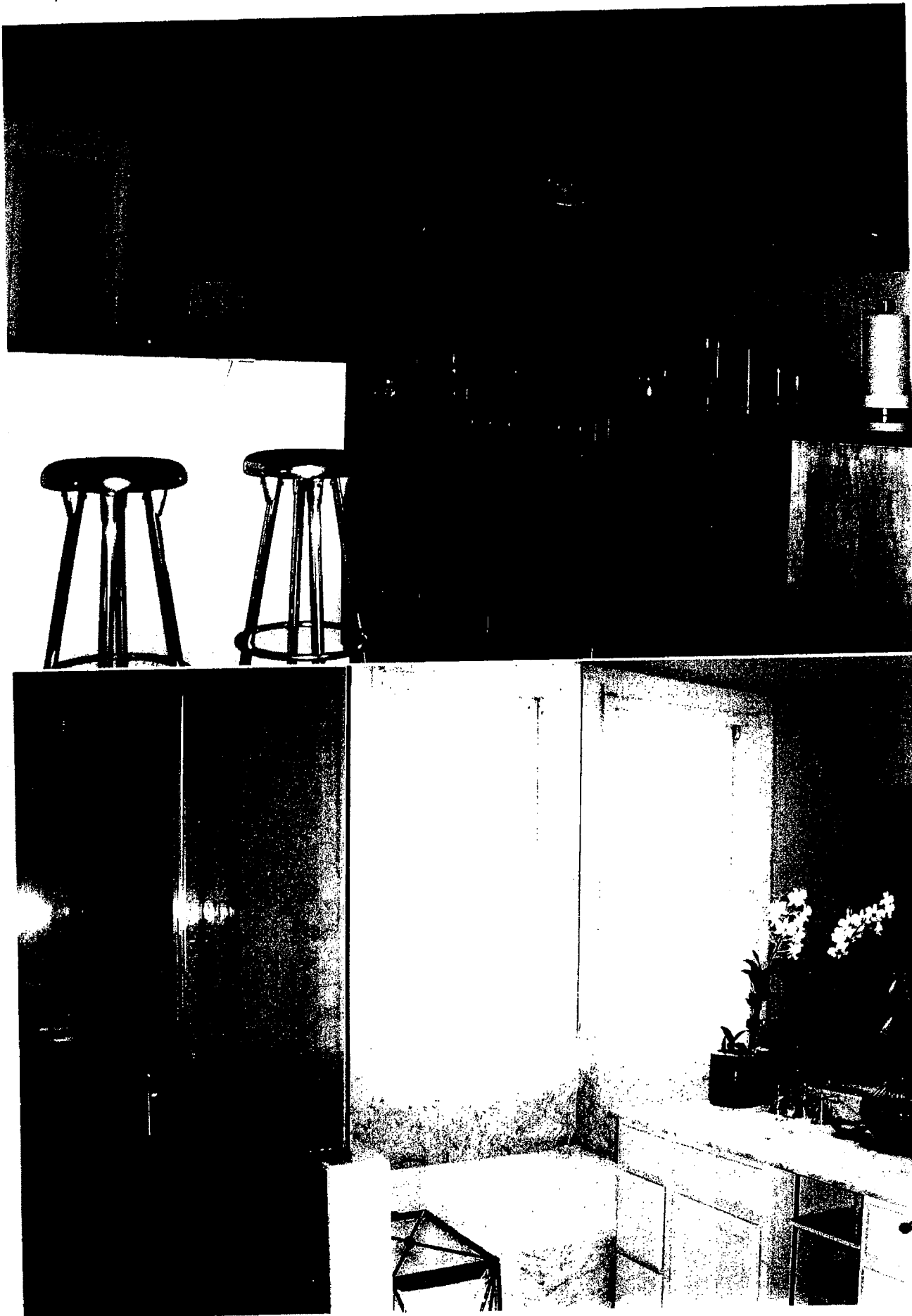


EXHIBIT B:

Photos of 1509 Swann St.
taken after processing by
Metropolitan Police Dept.



