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JAMES F. KANATZAR
Jackson County Prosecuting Attorney

August 31, 2009

VIA U. S. MAIL

Mr. Cliff Middleton
4439 Meadow View Drive
Shawnee, Kansas 66226

Dear Mr. Middleton:

On November 5, 2008, I met with you and Mr. Alvin Brooks to discuss your father's case. You requested that my Office agree to vacate your father's conviction and dismiss same. In our meeting I relayed that my Office would make a review of this case in order to determine if any extraordinary relief was necessary.

Since our meeting, we have reviewed the police reports, trial court files, motion court files, trial transcripts, post conviction hearing transcripts and appellate opinions addressing this case. Listed below is a summary of my conclusions:

I. The State's Evidence at Trial

At the time Kathy Middleton was shot, there were only two individuals in the Middleton residence: Kenneth Middleton and Kathy Middleton. Mr. Middleton summoned the authorities after his wife was shot. He reported that he was cleaning a gun and that his wife took the gun from him and began to walk away and while it was in her possession it was dropped. The gun, according to Kenneth Middleton, discharged upon being dropped and Kathy Middleton was struck in the face with a bullet.

An emergency responder reported that Mr. Middleton told a slightly different account of how the incident occurred. The other account included a recitation that Mr. Middleton handed the gun to Kathy Middleton and then Kenneth Middleton passed out and upon coming to his senses, he discovered that Kathy Middleton had been shot.

The State's ballistic/forensic expert testified that the gun could not be discharged by dropping it. Built-in safeties would have prevented the discharge of the gun absent the pulling of the trigger. Expert testimony also disclosed that the gunshot stippling on the face of Kathy Middleton was consistent with the weapon being discharged approximately one foot from her face and that she would not have had the gunshot stippling pattern

which appeared on her face had the gun discharged at floor level and hit her in the face some five feet away.

After the police arrived, Mr. Middleton was seen entering the bathroom and putting water on his hands. He later was seen taking dirt and rubbing his hands in the dirt. From this evidence the argument was made that Mr. Middleton was concerned about gunshot residue on his hands and was trying to eliminate evidence. Kenneth Middleton was taken by ambulance to a hospital to be checked out and while in route, his caretakers thought he was feigning unconsciousness when he was being asked to explain what happened.

II. The Appellate Court Decision

The Court of Appeals affirmed the conviction of Mr. Middleton in State of Missouri v. Middleton, 854 S.W.2d 504 (Mo.App. 1993).

III. The First Missouri Supreme Court Rule 29.15 Hearing

Kenneth Mitchell filed a Motion to Vacate his sentence pursuant to Missouri Supreme Court Rule 29.15 on September 9, 1991. The Petition was amended on November 25, 1991. A hearing was held on March 13, 1992. At the time of the hearing, Gerald Handley represented Mr. Middleton.

On March 2, 1992, Mr. Handley filed a pleading requesting an order allowing experts retained by Mr. Middleton to examine the gun. The motion was granted on the same day. No gun expert testified at the hearing.

Mr. Handley made a record striking the paragraphs of his own pleading which dealt with Mr. Duncan's failure to retain a ballistic expert. Robert Duncan was alive in March of 1992 and testified at the hearing. No questions were asked of Mr. Duncan about the ballistics issues. On April 9, 1992, Judge Messina, who was the judge hearing the post-conviction Motion to Vacate, ruled against Mr. Middleton and found that "Movant received effective assistance of counsel at all stages of his trial from Mr. Duncan, an experienced trial lawyer."

IV. The Second Missouri Supreme Court Rule 29.15 Hearing

A Motion to Reopen the Rule 29.15 proceedings was filed on July 16, 2003. A hearing was held which covered three days of testimony; December 18, 2003, June 24th and June 25th, 2004 once again before Judge Messina.

While the record speaks for itself, the overall thrust of the second hearing had to do with allegations that the Assistant Prosecutor assigned to the trial, Pat Peters, had a conflict of interest because the civil proceedings arising out of the death of Kathy Middleton were being handled by a law firm in which his father, retired Judge William Peters, was "of counsel" to the firm. Also, the allegations in the second hearing focused on the failure of Robert Duncan to obtain expert testimony to address the ballistic and forensic evidence concerning the accidental discharge of the weapon and the gunshot stippling on Kathy Middleton's face. Additionally, the allegations had to do with the failure of Robert Duncan to discover and attempt to capitalize on a record from the crime

lab that had whiteout on it suggesting that there was possible missing or altered evidence concerning a gunshot residue test performed on the left hand of Kathy Middleton.

V. Robert Duncan's Actions Regarding The Alleged Pat Peter's Conflict

One of the documents in the file is a pleading filed in a civil case that Kenneth Middleton brought against Mildred Anderson. The pleading is captioned "Motion To Reconsider Disqualifying Defendant's Attorney Donald R. Moore And His Entire Law Firm." The pleading was filed on July 24, 2000. Attached to that pleading are a number of exhibits, including four affidavits which were signed by Bob Duncan.

One affidavit was signed on January 11, 1995, another was signed on January 26, 1995, another was signed on August 7, 1995 and finally an affidavit was signed on September 27, 1996. In the September 27, 1996 affidavit which Mr. Duncan signed, he stated that had he known that retired Judge William Peters was in the firm handling the civil matters, he would have sought to disqualify Pat Peters.

Judge Messina, at the conclusion of the second hearing held in 2004, did not find any impropriety on behalf of Peters and did not determine that that relationship was a reason for undoing Mr. Middleton's conviction. There is nothing in the trial transcript that suggests otherwise.

Pat Peters presented the evidence and vigorously sought a conviction of Mr. Middleton, but there is nothing in my review of the trial testimony that would suggest that his vigor or zeal in presenting the case was somehow attributable to his father being of counsel in a firm that was handling a civil case arising out of the incident.

VII. The Failure of Robert Duncan To Utilize Ballistic or Forensic Witnesses

At the second 29.15 hearing, Kenneth Middleton testified as did other witnesses, including retained experts. Testimony was presented that Mr. Duncan did not consult with experts. On page 98 of the transcript of the second hearing, Mr. Middleton testified that he asked Mr. Duncan to consult with experts. On the same page, Mr. Middleton says he was able to attend interviews with experts had they been arranged. Jonathan Laurans argued to Judge Messina that Robert Duncan did not consult an expert. (See transcript at pg. 226). This testimony and argument were given at a time when Bob Duncan had passed away.

The testimony and argument at this hearing was given after Mr. Middleton filed the pleading in the civil case in July of 2000. As pointed out above, one of the exhibits to a motion in the civil case was an affidavit signed by Bob Duncan on January 11, 1995. In that affidavit, Robert Duncan stated among other things as follows: "I did not have any physical evidence in this case examined by a forensic expert other than to speak to a gun expert about the gun, but did not have him examine the gun". (emphasis added).

The affidavit of Robert Duncan which was in Mr. Middleton's possession and filed as an exhibit to a July 24, 2000 pleading discloses that Mr. Duncan did consult with a gun expert. In the first Rule 29.15 hearing, Robert Duncan testified on March 13, 1992 and was questioned by Gerald Handley who was representing Mr. Middleton at the time. No questions were asked of Mr. Duncan about the ballistics issues, about the forensics

issues, or about the consultation with the expert which Mr. Duncan subsequently stated had taken place in an affidavit which he signed in 1995.

It is certainly inferable from the fact that Mr. Duncan wasn't questioned about ballistics preparation that neither Mr. Handley nor Mr. Middleton felt that questioning Mr. Duncan about his consultation with a gun expert would have been helpful. This inference is further supported by the fact that prior to the first hearing, Handley dismissed the allegations about Duncan not obtaining experts.

During the second Rule 29.15 hearing, an extensive evidentiary presentation was made. Two forensic experts were retained. Despite having two forensic experts retained, neither expert credibly rebutted the trial testimony that the gun would not discharge but for the trigger being pulled. One expert presented an anecdotal report of having dropped a similar weapon in a locker room and the gun discharged. The expert's gun had been deliberately altered to make it a "hair trigger" weapon. Essentially, that anecdote was the sum total of the rebuttal to the ballistics expert testimony in the case.

During Mr. Middleton's criminal trial, Ralph Baney from the Crime Laboratory testified that he tested the trigger pull on the Middleton gun and found it to be 3 ½ pounds. Baney specifically testified that the Middleton gun was not a "hair trigger." (See page 415).

VIII. What Robert Duncan Did Do Regarding The Expert Issues

During the course of the trial, Robert Duncan cross-examined experts with treatises. See for example pages 324, 326 and 431. Duncan used a book by Vincent DeMaio which book or some later edition was used by Robert Tressel, one of Middleton's retained experts in his analysis of the case.

In short, it appears from the affidavit of Robert Duncan given on January 11, 1995 and from the trial transcript itself, Mr. Duncan consulted with a gun expert and also read treatises and books concerning the weapon and forensic issues in order to cross-examine the State's witnesses at trial.

IX. The Stippling Evidence

At the second Rule 29.15 hearing, witness Robert Tressel testified. He attempted a reconstruction of the shooting scene. He testified about the trajectory of the bullet and how it would have passed through Kathy Middleton's head and hit the wall. It was his opinion that the trajectory of the bullet was inconsistent with the State's theory at trial. However, his testimony in the written transcript is not overly persuasive and no effort was made to explain the criminal trial testimony that the stippling on Kathy Middleton's face would have been deposited only under circumstances where the gun was fired approximately one foot from her face. In fact, Tressel appears to have assumed this distance to be true at page 188.

X. The Missing Test/Whited Out Report

There is apparently no record of a gun shot residue test being conducted on Kathy Middleton's left hand but a report about tests has whiteout on it. Witness Robert Tressel,

called by Mr. Middleton, opined that Kathy Middleton could have shot herself by pulling the trigger with the thumb of her left hand. This theory would have been inconsistent with the statements made to the police by Mr. Middleton about Kathy Middleton dropping the gun. It appears that the thrust of the claim concerning the document with the whiteout was Duncan's failure to use it to suggest something sinister had occurred with the test results.

XI. Trial Strategy Of Robert Duncan

Only Kathy Middleton and Ken Middleton were in the house when Kathy Middleton was shot. One of them had to be responsible for the discharge of the gun. Mr. Middleton's statement was that the gun was dropped. At trial, ballistics testimony demonstrated that an accidental discharge from dropping the gun could not occur. No credible evidence to the contrary has been disclosed to date. Duncan's affidavit states that he consulted a gun expert.

Assuming that the gun could not discharge from a drop, it is hard to see how Mr. Middleton would have withstood cross-examination about his story and easy to see the decision being made for him not to testify. The dropped gun theory was before the jury because the State put the statement into evidence. Thus, the defense, at least, had a chance to argue Mr. Middleton's account without him being subjected to cross-examination.

Attorney Christopher Carter, another expert for Mr. Middleton at the second Rule 29.15 hearing opined that Duncan should have put Mr. Middleton on the witness stand to testify. (Tr. 222-223). Yet although Middleton testified at the second hearing concerning complaints about Robert Duncan he did not reveal what he would have said on the substantive issues which would have been beneficial to his defense. Mr. Middleton's account was before the jury and he was not subject to cross-examination.

XII. Conclusion

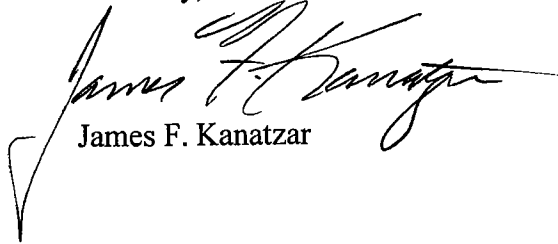
The most recent attack on Robert Duncan's representation took place in the second Rule 29.15 hearing. The primary thrust of that hearing was Pat Peters' claimed conflict of interest and the failure of Robert Duncan to consult or utilize forensic experts. Judge Messina did not find any validity in the Pat Peters conflict. Mr. Middleton, through his attorney Gerald Handley, specifically dismissed the allegations concerning Robert Duncan's failure to retain experts at the time of the first Rule 29.15 hearing. Even in the second hearing I do not think the State's forensic testimony was rebutted.

It appears as though Robert Duncan did consult a gun expert and certainly had read treatises on the scientific topics in preparation for the criminal trial. Given the State's ballistics evidence at trial, it appears that Mr. Duncan chose a strategy of using treatises and his client's account given to police rather than subjecting experts and his own client to cross-examination. The strategy did not result in an acquittal, but there is no compelling reason to believe that the testimony of a forensic expert or the testimony of Mr. Middleton would have changed the outcome.

I do not believe that the claimed deficiencies in Mr. Duncan's representation dictate a need to take steps to nullify the Court of Appeals' decision which held that

Judge Messina lacked jurisdiction to reconsider the Rule 29.15 motion. Nor do I believe that the evidence presented at the post conviction hearings by Mr. Middleton credibly suggest the likelihood of a different trial outcome.

Sincerely,

A handwritten signature in black ink, appearing to read "James F. Kanatzar". The signature is written in a cursive style with a large, sweeping initial "J".

James F. Kanatzar

cc: Alvin Brooks

Alvin Brooks gets child protection award

Crime victim advocate Alvin Brooks is the recipient of the Crystal Kipper and Ali Kemp Memorial Award, the U.S. attorney's office announced Friday. The award recognizes outstanding work in protecting children from exploitation.

"It's impossible to measure the immense impact this man has had, and continues to have, in Kansas City," said acting U.S. attorney Matt Whitworth. "The ... award is well-deserved

recognition for a lifetime of impressive accomplishments and community service."

Brooks was a Kansas City police officer and then led the Ad Hoc Group Against Crime.

Crystal Kipper was mur-

dered after her car broke down on a Northland highway in February 1997. Ali Kemp was murdered in June 2002 while working at a Leawood swimming pool.

| Mark Morris, The Star

TUESDAY NOVEMBER 18, 2008 **B3**

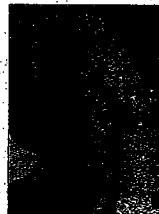
Brooks takes lead in anti-drug commission

By MICHAEL MANSUR
The Kansas City Star

Alvin Brooks was named chairman of the new Jackson County Drug Commission on Monday by Jackson County Executive Mike Sanders.

Brooks, long active as an anti-crime advocate and elected city official, will serve until Dec. 31, 2012.

The commission is the former county COMBAT commission, which oversees



Brooks

spending of revenues from the county's quarter-cent sales tax to combat drugs.

Brooks said Monday that he welcomed the appointment. He said he would work to ensure that the commission's operations are open and transparent and said he would

encourage community groups to become more involved in the commission's work.

Brooks was a member of a group that reviewed the old COMBAT program and suggested a new commission with even broader powers. Eight other new members, including former county prosecutor Albert Riederer, were appointed by Sanders last month.

To reach Michael Mansur, send e-mail to mmansur@kcstar.com.

SHORT TAKES

4/17/09

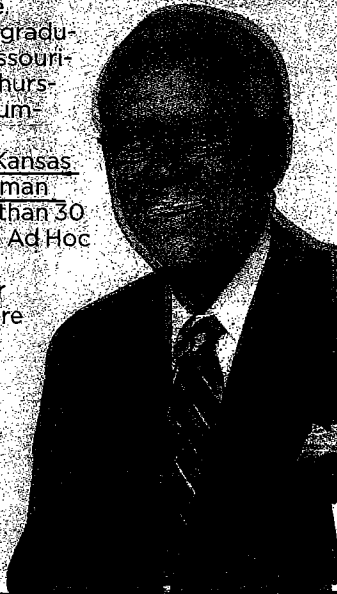
UMKC | Brooks is Alumnus of the Year

Alvin Brooks has been called Mr. Kansas City because of his long public service. He's also referred to as the city's champion of justice because of his decades-long crusade against violence and his campaign for human rights.

Now he has another title. Brooks, a 1959 and 1973 graduate of the University of Missouri-Kansas City, was named Thursday as the 2009 UMKC Alumnus of the Year.

Brooks has served as a Kansas City police officer, councilman and mayor pro tem. More than 30 years ago, he founded the Ad Hoc Group Against Crime.

Others honored for their community leadership were Margaret Evans, Reaner Shannon and Tracy Stevens. For more on UMKC alumni, go to www.umkc.edu/advancement/alumni_friends.asp. | Mara Rose Williams, mdwilliams@kcstar.com



SHORT TAKES

UMKC | School honors Alvin Brooks again

Alvin Brooks has another honor from the University of Missouri-Kansas City.

Last week, the former Kansas City mayor pro tem was named 2009 UMKC Alumnus of the Year.

This week, the university's Department of Criminal Justice and Criminology announced



Brooks

Brooks as the 2009 UMKC Alumnus of the Year. Brooks is a 1959 and 1973 graduate of UMKC. He has served as mayor pro tem and police officer. For more on UMKC alumni, go to www.umkc.edu/advancement/alumni_friends.asp. | Mara Rose Williams, mdwilliams@kcstar.com

Jim Kanatzar

JACKSON COUNTY'S PROSECUTOR

[Website Home](#)[About Jim](#)[CONTRIBUTE](#)[Community Testimonials](#)[Videos](#)

Testimonials from the community.

"Jim Kanatzar is one of the most respected leaders in law enforcement. His dedication and experience in serving and protecting the people of Missouri has been exemplary. Please join me in supporting Jim as Jackson County's Prosecutor."

- Missouri Attorney General Jay Nixon

"Progressive public offices are shaped and maintained by progressive leaders. The Jackson County Prosecutor's Office is such an office. It's leader, prosecutor Jim Kanatzar is a progressive and represents the new wave of young talented leaders in public office. Jim views his role as prosecutor not only to prosecute those who violate the law, but also as a victim/witness advocate whose sensitivity, compassion, commitment, and dedication, transcends race, color, ethnicity and socio-economic status. Jim practices the true essence of the criminal justice system—justice for all!"

- Alvin Brooks, Ad Hoc Group Against Crime and Former Kansas City Mayor Pro Tem

"Jim Kanatzar has the respect and admiration of both the law enforcement and legal communities. Jim brings experience, dedication and professionalism to the Jackson County Prosecutor's Office. I am proud to call him my friend and colleague."

- Teresa Hensley, Cass County Prosecuting Attorney

"Jim Kanatzar is an outstanding attorney and one of the finest individuals I have ever met. Jim has dedicated his entire career to serving the people of Jackson County. He is a great Dad and family man who is admired and respected for his integrity and principals."

- Dennis Waits, Chairman Jackson County Legislature

"Jim Kanatzar has my vote based on his performance on the job. When I look at Jim I see the value of an experienced prosecutor. Jim is both tough and fair when seeking justice for the people. We can all be proud to vote for Jim Kanatzar on August 5. (So, why not put up a yard sign too?)"

- "Dutch" Newman

JIM KANATZAR IS THE PROSECUTOR
FOR JACKSON COUNTY MISSOURI.

Paid for by Kanatzar for Prosecutor, Lee Moore Treasurer

Web development by CONKAVE

611 S.W.2d 236, *; 1980 Mo. App. LEXIS 3292, **

State of Missouri, Respondent, v. Julia Black, Appellant

No. 41714

Court of Appeals of Missouri, Eastern District, Division Four

611 S.W.2d 236; 1980 Mo. App. LEXIS 3292

November 25, 1980

SUBSEQUENT HISTORY: **[**1]** Motion for Rehearing Overruled, Transfer Denied January 16, 1981. Application Denied March 9, 1981.

PRIOR HISTORY: From the Circuit Court of St. Louis County

Criminal Appeal

Judge Richard T. Enright

DISPOSITION: Judgment Reversed and Defendant Ordered Discharged.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant sought review of the judgment of the Circuit Court of St. Louis County (Missouri), which convicted her of second degree murder in the shooting death of her husband and sentenced her to 10 years.

OVERVIEW: Defendant contended that she had accidentally shot her husband when handing him his shotgun. On review, the court reversed, rejecting the State's contention that second degree murder was presumed where the evidence showed a killing by the use of a deadly weapon upon a vital part of the body. The court held that second degree murder was established by showing a willful, premeditated killing of a human being with malice aforethought, and that, under Mo. Approved Instructions-Crim. 2d 2.28, the State had the burden of establishing beyond a reasonable doubt that defendant intended to kill or inflict serious bodily harm. Defendant consistently stated that the shooting was accidental, which was subject to at least two equally valid inferences: that she intentionally shot the gun and accidentally hit and killed her husband, or that she accidentally or unintentionally discharged the gun which killed her husband. Where two equally valid inferences could be drawn from the same evidence, guilt beyond a reasonable doubt was not established. Thus, the State did not carry its burden of establishing that defendant intentionally killed her husband.

OUTCOME: The court reversed defendant's conviction and ordered her discharged.

CORE TERMS: shotgun, shirt, shot, hole, gun, decedent, pellet, accidentally, discharged, killing, killed, wadding, blast, intentionally, double-barrelled, wound, fliers, deadly weapon, reasonable doubt, dropping, firing, degree murder, corpus delecti, inferred, presumed, trigger, powder burns, single-barrelled, measurement, accidental

[**12] It is also clear that the presumption advocated by the state would run afoul of the law concerning *corpus delecti*. ^{HN3} In a homicide case the *corpus delecti* consists of two elements, first the death of a human being and second, the *criminal* agency of another in causing the death. These may be shown by circumstantial evidence, but are not established until it has been proved that the death was not self-inflicted nor due to natural causes or accident. *State v. Meidle*, 202 S.W.2d 79 (Mo. 1947). The burden to establish the *corpus delecti* is obviously upon the state. The *corpus delecti* cannot be presumed and must be proved by legal evidence sufficient to show that the crime charged has been committed by someone. *State v. Summers*, 362 S.W.2d 537 (Mo. 1962) [12].

The state also contends that defendant's statements that she "accidentally shot" or "accidentally killed" her husband is an admission that she shot her husband from which arises a presumption of intention. While a jury may disbelieve any part of a witness' testimony, we do not believe her consistent position that the shooting was accidental can be converted into an admission that it was intentional [**13] in the absence of some evidence of that intention.

In addition, the statement of defendant that she "accidentally shot" her husband is subject at best to at least two equally valid inferences. One is that she intentionally shot the gun and accidentally hit and killed her husband. Under the above cases relied upon by the state that might be sufficient to support the conviction. But, the other inference is that she accidentally (meaning unintentionally) shot or, more properly, discharged the gun which killed her husband. Such an inference would not support a conviction. ^{HN4} Where two equally valid inferences can be drawn from the same evidence, the evidence does not establish guilt beyond a reasonable doubt. *In re K.S.R.*, 585 S.W.2d 208, 210 [3] (Mo. App. 1979); *United States v. Kelton*, 446 F.2d 669, 671 (8th Cir. 1971).

Factually, the state offered evidence that Joe Black was killed by the double-barrelled shotgun. But, there was not one shred of evidence offered to establish that the shot pattern from the double-barrelled shotgun was inconsistent with defendant's claim of accident. No tests of firing patterns were apparently run on that gun, or if they were, were not offered [**14] in evidence. Nor, was any test made to determine if that weapon could be accidentally discharged by dropping. There was, in short, no proof that the [**241] double-barrelled shotgun was discharged intentionally.

Alternatively, the state produced evidence that based upon its tests the single-barrelled gun, which the state tests determined was not the fatal weapon, could not be discharged accidentally by dropping and that it must have been fired 18 feet or more from the decedent. This evidence was apparently offered on the theory that the state could establish its case solely by proof of the inaccuracy of defendant's explanation. We have serious reservations that the state can carry its burden in such a fashion. ^{HN5} The state has the burden of establishing each element of the offense beyond a reasonable doubt. This includes the element of intention and requires proof beyond a reasonable doubt that the killing was not accidental. See MAI-CR2d 2.28. It is not the defendant's burden to establish that the killing was accidental. It appears that here that is exactly the burden placed upon defendant, and the state attempted to carry its burden solely by refuting defendant's story. However, [**15] even if such an attempt by the state were permissible, the state's evidence does not refute defendant's explanation of the occurrence. It may be conceded that certain aspects of defendant's story were either mistaken or possibly fabricated. But, these erroneous aspects do not establish that she murdered her husband.

The state's test of dropping the gun and touching it on the side but not in the trigger area did not refute defendant's statement that she grabbed the gun as it was falling and that it discharged. The test did not duplicate the explanation of the occurrence given by the defendant. The pattern tests are similarly inconclusive. The hole in Joe Black's body was a