
REDACTED

SUPREME COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF TOLLAND

S.C. 19251
S.C. 19251 X01

MICHAEL SKAKEL

v.

COMMISSIONER OF CORRECTION

REPLY BRIEF OF THE COMMISSIONER OF CORRECTION-APPELLANT
WITH ATTACHED APPENDIX

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COUNTERSTATEMENT OF THE ISSUES

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ARGUMENT

I. THE HABEAS COURT ERRED IN OVERRIDING THE REASONABLE STRATEGIC DECISION OF COUNSEL AS TO HOW MANY AND WHICH THIRD PARTY CLAIMS TO RAISE AND FURTHER ERRED IN FINDING PREJUDICE WHERE THE PETITIONER FAILED TO PRESENT ANY EVIDENCE IN SUPPORT THEREOF

The evidence from the habeas proceeding makes clear that trial defense counsel gave serious consideration to raising a third party defense centered on Tommy Skakel. In fact, Jason Throne stated that it was a matter of “ongoing discussion.” HT 4/23:38-39. Nevertheless, after careful consideration, the defense team decided that 1) they did not have sufficient *admissible evidence* to present such a defense; 2) presenting such a defense would “water down” the defense focusing on Ken Littleton, as to whom they had admissible evidence establishing an arguable connection to the crime; and 3) presenting evidence related to Tommy Skakel, particularly his alleged statements regarding a later rendezvous with Martha and a consensual sexual encounter, would weaken their alibi while bolstering the state’s evidence of motive and corroborating two important state witnesses.¹ See e.g. HT 4/16: 172, 173-74, HT 4/17: 32, 132-33, 140-42; 144, 148-52; HT 4/23: 15, 39, 99-103; HT 4/26:104.

Petitioner argues that counsel's strategic decision to eschew a third party culprit defense based on Tommy Skakel, and instead present such a defense aimed at Ken

¹ The petitioner argues that “trial counsel never indicated that it was not in his client’s best interest to pursue a third party claim against Tommy Skakel,” but “[r]ather, he consistently stated that he did not believe he had a sufficient basis for making such a claim.” PB: 36 n. 68 *citing* HT 4/16: 170-72. The petitioner mischaracterizes Attorney Sherman’s testimony in the cited pages of the transcript, testimony which is, in fact, directly contrary to what the petitioner claims. Attorney Sherman expressly testified that he did not believe it was sound strategy for him to pursue more than one third party suspect; HT 4/16: 172-73; and that his “prime reason” for not pursuing a third party defense that focused on Tommy Skakel, as opposed to Kenneth Littleton, was that he did not believe that any such defense “would have worked”; *id.*:172; or “would be successful.” *id.*:173. Thus, contrary to the petitioner’s claim, this portion of the record *fully* supports the respondent’s assertions that trial counsel believed it was not in his client’s best interest to pursue a third party claim based on Tommy, either in addition to or in lieu of Littleton. See *also* HT 4/17: 150-52.

Littleton, was not reasonable.² In support of this contention, petitioner argues that if counsel had followed certain investigatory leads found in the state's discovery material, he *might* have uncovered admissible evidence implicating Tommy Skakel. PB:34-36, 41. In addition, petitioner argues that, despite Jason Throne's testimony that he had no recollection of Tommy discussing a sexual liaison with Martha during his brief meeting with Tommy, Sherman could have admitted Tommy's alleged admission to this encounter through Throne. According to the petitioner, this alleged statement would have been admissible despite its hearsay nature, as a statement against penal interest. PB:35, 42, 44. Further, he contends that counsel could not have anticipated the state's evidence that petitioner's awareness of Martha's sexual encounter with Tommy provided the spark that led him to brutally kill her. According to the petitioner, because counsel could not have anticipated this evidence, counsel could not have included the risks of bolstering the state's case in their decision not to focus on Tommy. PB:36-37. With regard to the prejudice analysis, petitioner's argument boils down to an assertion that information in the state's discovery materials *might* have led to admissible evidence, and that this possibility is enough to prove prejudice. PB:42-50.

As explained *infra*, petitioner failed to carry his burden on either prong of *Strickland*. Petitioner's claims under both the performance and the prejudice prong suffer from the

² As an initial matter, it is important to note that the habeas court did not find the defense team deficient in failing to conduct an adequate investigation into the possibility of raising a third party defense centered on Tommy Skakel. Rather, as the court's memorandum of decision makes clear, it believed all the components of such a claim were known to defense counsel. It simply disagreed with counsel's strategic choice. See *e.g.*, MOD:34-35; App. Pt.1:A-972-3 (noting that although *Strickland* requires deference to counsel's strategic choices, "[Sherman] unreasonably chose a third party against whom there was scant evidence and ignored a third party against whom there was a plethora of evidence.") Therefore, this Court should ignore petitioner's attempt to recast the issue decided by the habeas court as one focusing on the adequacy of counsel's investigation. See *e.g.* PB: 38 (The Habeas Court's Conclusions As To Trial Counsel's *Failure To Investigate* And Present Third Party Culpability Defense Against Tommy Skakel Are Supported By The Record)(emphasis added); see also PB:27.

same fatal deficiency: petitioner failed to present the evidence he claims counsel should have used to fashion a third party claim against Tommy Skakel in 2002. He also failed to prove any of the investigatory gateways he contends were available to counsel would have led to available and admissible evidence in 2002. See e.g. *Johnson v. COC*, 285 Conn. 556, 584 (2008)(Petitioner cannot carry burden under *Strickland* merely by alleging that if counsel had conducted additional investigation he *might* have discovered exonerating evidence); *Thomas v. COC*, 141 Conn. App. 465, 472, *cert. denied*, 308 Conn. 939 (2013)(Petitioner's failure to call witness at habeas trial makes it impossible to discern whether witness would have testified in accord with his statement to the police).³ Therefore, he presented no legitimate basis for the habeas court to cast aside trial counsel's reasonable professional judgment and he abjectly failed to prove prejudice.

Moreover, even if this Court were willing to assume sufficient admissible evidence was available to counsel in 2002 to construct a third party claim against petitioner's brother, this premise would not be sufficient to satisfy petitioner's burden under *Strickland*. As *Strickland* itself recognizes, there are "countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Thus, in order

³ Petitioner nevertheless asserts that the habeas court did rely on evidence from the habeas trial in its determination of deficient performance and prejudice. PB: 40. He supports this assertion, not by identifying this supposed evidence and providing citations to the transcript, but rather by citing to the habeas court's memorandum of decision. See PB:40, *citing* MOD 36-38, App. Pt 1: A-974. As argued in the Commissioner's initial brief, the information relied on by the habeas court in finding deficient performance and prejudice did not derive from witnesses introduced at the habeas hearing. Rather, the court relied almost exclusively (the only exception being the testimony of Jason Throne, discussed *infra*) on documents included in the state's disclosure that were given to criminal trial counsel prior to trial. See RB: 38, n. 14; 43-45, 50-60.

Moreover, the petitioner consistently avoids explaining how the hearsay information contained in these documents would transform itself into *evidence admissible in court*. In the hearing below, petitioner never even attempted to produce the witnesses which would have been necessary to get this alleged "evidence" before the jury. Nor has he demonstrated that the information on which the habeas court relied would have been admissible under our rules of evidence despite its hearsay nature.

to prevail, petitioner was required to prove, not just that *some* criminal defense attorneys might have chosen to focus on Tommy rather than Littleton, but that *all* reasonably competent attorneys would have done so. Put another way, petitioner needed to prove that *no* reasonably competent attorney would have concurred in Sherman's assessment that focusing on Littleton was preferable due to the lack of actual evidence of, and the risks associated with, a defense centered on Tommy. As demonstrated below, and in the Commissioner's initial brief, petitioner failed to carry this burden.

1. Petitioner failed to prove admissible evidence of Tommy's alleged volatility was available to counsel in 2002

Petitioner attempts to persuade this Court that he carried his burden of proving the availability of evidence in support of his now preferred defense by contending that members of Skakel's family would have been able to testify to Tommy's supposed temper. PB: 29, n. 50. He also argues that because Mildred "Cissy" Ix testified in 2002 it is apparent she would have been available to explain the comments attributed to her in a police report about Tommy allegedly defacing a picture. See PB: 30, n.51. Further, he contends defense counsel could have subpoenaed Tommy Skakel's therapist and psychiatric records and somehow overcome Tommy Skakel's privilege with regard to this potential evidence. PB:33-34, n. 63.

Petitioner's arguments regarding what criminal trial counsel could have and should have done leads inexorably to the question: why didn't habeas counsel do all these things? Petitioner bore the burden of proof below; his counsel therefore was responsible for putting on evidence to prove the viability and the availability of the defense he contends criminal trial counsel should have raised. Petitioner cannot carry his burden by merely pointing a finger at previous counsel and criticizing their decisions. Because petitioner failed to present these alleged witnesses and their alleged testimony during the habeas trial, this court cannot know what their testimony would be if questioned on these matters. More, the habeas court unquestionably erred in relying on conjecture, rather than proof, as to the nature of the testimony of each supposed witness. See *Thomas*, 141 Conn. App. at 472.

In addition, even if this Court were willing to assume petitioner's suggested witnesses would testify in unflinching conformity with the information contained in police and other reports (hardly a warranted assumption), petitioner has not explained on what basis these unrelated and remote instances of volatility on the part of Tommy Skakel would be admissible or how they connect him to the murder.

2. Petitioner failed to prove admissible evidence of Tommy's alleged statements to Sutton Associates was available to counsel in 2002

In a further attempt to convince this Court that he carried his burden of proving the viability of a third party defense against Tommy, petitioner argues that his defense team could have obtained the testimony of the Sutton investigators in 2002, and thereby obtained evidence of Tommy's supposed statements to them, despite the fact that Tommy Skakel had successfully blocked the state's access to this evidence by asserting his attorney/client and work product privileges. Petitioner reasons that because the Sutton Report was leaked to the press prior to trial, "counsel's failure to act to retrieve the documents from the prosecutor or preclude their use at trial demonstrated their abandonment of the privilege after the documents became public." PB: 43: n.73.

There are several problems with this assertion. Foremost of these is the fact that the petitioner and his brother Tommy asserted various privileges prior to trial with regard to testimony of the Sutton investigators.⁴ After their successful pre-trial invocation of the

⁴ This court can take judicial notice of one such instance that occurred during the Grand Jury. See *McCarthy v. Warden*, 213 Conn. 289, 293 (1989), *cert. denied*, 496 U.S. 939 (1990). On March 29, 1999, Sutton investigator Willis Krebs appeared before the Grand Juror (*Thim*, J.) and, when asked whether Michael Skakel ever gave him information regarding the "events of October the 30th, 1975, and October 31, 1975, concerning the disappearance and/or death of Martha Moxley" he replied: "Upon the instructions of counsel for Michael and Thomas Skakel, I am compelled to refuse to answer the question because it would require me to reveal attorney client privileged communications and/or attorney work product and/or would violate Michael and Thomas Skakel's rights to effective assistance of counsel under the State and Federal constitutions." Grand Jury Tr. 3/29/1999 at 4. (Included in RReply App. at RRA: A-4-A-5) *He answered the same question with regard to Thomas Skakel with the same invocation. Id.* at 5. Krebs was not required to

attorney client and work product privileges, the state never attempted to present the testimony of any of the Sutton investigators during the criminal trial. Nor did the state attempt to introduce the Sutton report or any excerpt therefrom. Therefore, there was no further occasion on which an assertion was required. Given that Tommy Skakel unambiguously asserted his privilege at the appropriate time; see *supra* at n.4; it is hard to see how this record can be read to support an implied waiver.

Petitioner also argues that statements Tommy made in the presence of Jason Throne operated as a waiver of the privilege, not only as to those particular statements, but also as to the statements he allegedly made on a different occasion to the investigators for Sutton Associates. PB: 43-44. Petitioner states: "because [Tommy] voluntarily revealed the same information [to Throne] he had previously reported to Sutton Associates, Tommy effectively waived the privilege as to Sutton, as well, on the subject matter of what he did on the evening of October 30, 1975 with Martha Moxley." PB: 43-44 (footnote omitted); see also, PB: 44 n.75. What petitioner is essentially arguing is that once a person has made admissions to a third party, he waives his attorney-client privilege as to confidential communications on the same subject that he has had with his attorney or his attorney's agents. Not surprisingly, petitioner cites nothing that would support such an audacious proposition, which if accepted by this court carries the potential to eviscerate the attorney client privilege.⁵ In fact, this Court has rejected the notion that a waiver regarding particular

answer either question.

⁵ Neither of the two cases petitioner cites in connection with this argument support the assertion that a party may compel the disclosure of confidential communications between an attorney and client once the client has spoken to others on the same subject. Both *Hopkins v. Balachandra*, 146 Conn. App. 44, 58 (2013) and *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 292 Conn. 1, 55-61, *cert denied*, 558 U.S. 991 (2009) stand for the unremarkable proposition that a party waives his privilege as to particular documents when he voluntarily discloses them to a third party. See *Rosado*, 292 Conn. at 60-61 (having voluntarily disclosed certain documents to the plaintiffs during discovery, defendant could not now invoke the privilege to prevent their disclosure to others); *Hopkins*, 146 Conn. App. at 59 (Once plaintiff submitted copy of his superbill to employer, he relinquished justified expectation that document would not be publicly disclosed). Neither

communications implies a waiver of the confidentiality of other conversations, even if conducted with the same person. *State v. Pierson*, 201 Conn. 211, 223 (1986)(testimony by victim, victim's mother, and psychiatrist about sexual assault did not establish waiver with respect to "wholly separate communications related to treatment of the [victim] or his mother"), on appeal after remand, 208 Conn. 683 (1988) cert. denied, 489 U.S. 1016 (1989); see also *State v. Kemah*, 289 Conn. 411, 426 (2008)("[W]e have construed waivers narrowly and have declined to imply a complete waiver of privilege from a waiver as to particular matters or as to disclosure to certain persons.").

Nevertheless, if petitioner wanted to pursue these or other arguments in favor of waiver, he should have called the Sutton investigators to the stand at the habeas trial and litigated the issue. Whether, and to what extent, a privilege has been waived is a fact specific inquiry. See *Harp v. King*, 266 Conn. 747, 770 (2003)(Noting that the determination of whether privilege has been waived will usually require detailed inquiry into all relevant facts). Having failed to present evidence regarding waiver below, and further failed to obtain appropriate factual findings from the habeas court, petitioner failed to prove that Tommy Skakel somehow implicitly waived his privileged communications with Sutton Associates, thereby providing trial counsel a pathway for overcoming Tommy's invocation.

As argued in the opening brief, even assuming petitioner had proven that Sherman could have obtained the testimony of the Sutton investigators at trial, he nevertheless failed to establish that Tommy's supposed statements to them would have fallen within a hearsay exception or, if admissible, would have provided the direct connection between Tommy and the murder needed to establish a third party culprit defense. RB: 43-45; 50-53. The statements relied on by petitioner below, and considered by the habeas court, concerned Tommy's supposed admission of a sexual encounter with Martha that evening. As

case can reasonably be read as extinguishing the privilege for *all* communications on a subject once a particular communication is disclosed. In fact, in *Hopkins* the court was quick to point out that waiver of one aspect of a privilege does not constitute waiver of the entire privileged relationship. See *id.*

respondent argued in the initial brief, petitioner failed to prove that these statements—which described a voluntary sexual encounter in which Martha was an active participant—were either against Tommy's penal interests or sufficient to connect him to the murder. RB:53. Petitioner responds to these arguments by relying on a section of the Sutton Report never brought to the habeas court's attention and on which the habeas court did not rely. See PB:45-46; cf. MOD, Appt. Pt 1 A971-987. The section of the report on which petitioner now relies contains a description of Tommy's flirtation with Martha in the driveway as including two forcible rejections of him by Martha. PB:19, 40, 45-46.

Even if this Court excuses petitioner's failure to present his claim that this particular language provides the requisite connection at the appropriate time --during the habeas trial when the respondent would have had an opportunity to respond and the habeas court an opportunity to rule on it—his assertion nevertheless fails.

Sutton's statement regarding the "forcible" rejection must be considered in context, and seen for what it is and what it is not. In the Sutton Report, during a section reviewing the two interviews Sutton apparently conducted with Tommy, the Sutton investigators wrote the following:

Another significant alteration in his story between these two Sutton Associates interviews relates to *his initial flirting and fooling around with Martha at the side of the house, before 9:30*. On October 7, 1994, he described that portion of their encounter as having some "friction", since she forcibly rejected him twice. On February 6, 1995, however, he only recounted asking Martha if she wanted to "make love" at that time, and that she had stated no.

(Emphasis added.) PE 282: 12

First thing of note is this excerpt appears to be a narrative of what the interviewer recalls of his interviews with Tommy. It is not a transcript or tape of Tommy's supposed statements. Therefore, without the benefit of examining either Tommy or the interviewer, it is impossible to know if the characterization of Martha's rejection as "forcible" is intentionally hyperbolic, unintentionally so, or accurate. Nor is it possible to know if the

characterization originated with the interviewer or Tommy. Second, this excerpt focuses on the flirtation between Tommy and Martha before 9:30, which was witnessed by Helen Ix. In her criminal trial testimony, Helen Ix Fitzpatrick described the interaction between the two as "playful", "innocent" and "flirtatious." CT 5/19:70. She certainly did not describe an angry or violent scene or anything that could be fairly characterized as a "forcible rejection." Third, this interaction obviously did not occur at the time of Martha's death, and hence cannot be viewed as a triggering event leading Tommy to "snap" as petitioner contends. PB: 31-32. Thus, the narrative on which petitioner relies fails to establish the precise nature of Tommy's statements to Sutton, and further fails to establish that any such statements, if they could be clearly discerned, would be admissible as against his penal interest, or that, even if they were, would be sufficient to establish a direct link between Tommy and the murder. See PB:44-45, n76, n77. In fact, petitioner's reliance on this excerpt makes it all the more apparent that without an opportunity to examine either Tommy or the investigator, the nature of the evidence that would result if either or both were available for questioning about these interviews is entirely speculative. See *e.g. Sinchak v. COC*, 126 Conn. App. 670, 677-78 (petitioner failed to prove prejudice where he failed to present witness he claimed counsel should have interviewed), *cert. denied*, 301 Conn. 901 (2011); *Williams v. COC*, 90 Conn. App. 431, 437 (2005)(petitioner who failed to call witness at habeas trial whom he alleged trial counsel should have presented failed to prove prejudice)

Indeed, even the Sutton investigators, who presumably had the benefit of speaking directly with Tommy, concluded this section of their report by stating:

Many divergent and damning conclusions can be drawn when speculating about the significance of these points, but any conclusion, good or bad, will remain *only* speculation without further cooperation and clarification from Tommy Skakel.

PE 282: 13 (emphasis in original).⁶

⁶ In addition, although the petitioner and the habeas court apparently believe Sherman should have drawn the jury's attention to sections of Martha's diary that they

3. Petitioner failed to prove evidence of Tommy's alleged statement of an alleged sexual encounter with Moxley was available and admissible through Throne in 2002

As to the testimony of Jason Throne, petitioner has not countered, because he cannot, what the Commissioner pointed out in his initial brief: Throne had no recollection of Tommy Skakel discussing the alleged sexual liaison with Martha. Therefore, petitioner failed to prove that Sherman could have obtained and presented evidence of this supposed statement through Throne.

Although petitioner argues that Sherman's testimony was that Tommy basically discussed what was in the Sutton Report during their brief meeting, Sherman stated that Tommy did not go into the details of the sexual encounter with Martha. HT 4/18:152. Therefore, as argued earlier; RB: 52; petitioner failed to establish any pathway for the presentation of those details to the jury. Without those details, which the habeas court believed, (albeit erroneously) corresponded to Dr. Henry Lee's testimony, the utility of Tommy's statement to any third party defense would be greatly reduced, even under the habeas court's erroneous view. See RB:52:n.21.⁷

interpret as revealing Tommy's increased sexual aggression; PB:30-31; MOD: 42-43, App. Pt 1 A980-81; there are two problems with this assertion. First, it is a stretch, and one the jury is unlikely to have been willing to make, to categorize these entries as referring to instances of sexual aggression rather than teenage flirtation. Second, focusing on these entries (which had been introduced by the state at trial) would have highlighted petitioner's jealous response to the flirtation, which is also referenced in the diary. See EPP/Main Menu/Documents/Diary/Sept.19 (Describing petitioner's reaction to Tommy and Martha's flirtatious behavior.)

⁷ Further, as noted in the Commissioner's initial brief, the portion of Tommy's conversation recalled by Throne was Tommy's warning to his brother's attorneys that the assumptions made about the last time he saw Martha that night were wrong. According to Throne, Tommy told them that the time line was off and that he met Martha later, sometime after the period everyone had assumed they parted ways for the night. HT 4/23: 13-14. This statement, therefore, suggests Martha might have been alive outside the period covered by petitioner's alibi, and beyond the estimate of the time of the encounter included in the Sutton Report. Thus, contrary to the petitioner's suggestion, it is far from obvious that the defense could only have gained from a third party culpability defense centered on Tommy rather than Littleton. On the contrary, as argued extensively in the initial brief and

4. Petitioner failed to prove evidence of Tommy's alleged statements regarding his homework was admissible and available in 2002 or that any such evidence would have helped establish a third party claim

Petitioner claims, as did the habeas court, that counsel could somehow use a statement attributed to Tommy in a police report to show that Tommy lied about his activities that night and thereby bolster a third party claim. PB: 32 n.59. Nevertheless, petitioner does not contest what the Commissioner pointed out in his initial brief; RB:54-55 and n.22; that, in addition to failing to produce Tommy or anyone to whom this statement was allegedly made, petitioner failed to prove it was false. According to the December 13, 1975 police report, Tommy claimed that at one point during the evening of the murder he was working on an extra credit History assignment on Abraham Lincoln and log cabins. See App. Pt 2:A-1478. Another report, however, indicates the police attempted to verify this by speaking with an English teacher at his school. Not only could the English teacher not definitively say Tommy's alleged assertion was false, because students were free to write in their journals on subjects of their choosing and he did not have Tommy Skakel's journal, but there is no reason to believe an English teacher would necessarily be aware of an extra credit assignment in History. App. Pt 2: A-1479. Thus, even if this Court were willing to accept police reports in lieu of admissible evidence on this point, these reports cannot reasonably be used to establish a false statement by Tommy.

Petitioner failed, therefore, to carry his burden of proving evidence of either Tommy's alleged volatility, his allegedly false statements, or his statement regarding a later rendezvous with Martha was available to counsel at the time of trial. In that these are the sole components of his preferred defense, petitioner failed to carry his burden of proof under either prong of *Strickland*. See e.g. *Johnson v. COC*, 285 Conn. at 584; *Thomas v.*

herein, the evidence petitioner contends points to Tommy would have damaged petitioner's alibi, strengthened the state's evidence of motive, and corroborated evidence indicating petitioner's awareness of Tommy's liaison with Moxley was the catalyst for his rage that resulted in her death.

COC, 141 Conn. App. at 472.

5. Even if petitioner had proven admissible evidence was available to counsel in 2002, and that it was sufficient to establish a third party defense, he nevertheless failed to prove counsel was constitutionally ineffective in choosing a different tack

Even if this Court were willing to presume certain evidence was available and admissible, and that it was sufficient to establish a third party culpability defense, and further presume it would conform in every iota with the information contained in the state's disclosure documents, petitioner still would have failed to overcome the reasonable professional judgment of counsel. As argued previously, counsel had sound reasons for focusing on Littleton, including a videotape of him making an arguable admission of guilt, and a hair found at the crime scene that was similar to his. Further, as Sherman testified, he had the assistance of a former investigator for the state, Jack Solomon, whose suspicions of Littleton never abated. HT 4/16:39-41. Solomon met with Sherman prior to trial and shared information with him. *Id.* Solomon also testified as a defense witness at the criminal trial, in an attempt to cast doubt on Baker's assertions that she had lied to Littleton about his supposed admission during an alcoholic blackout. CT 5/22: 108, 122-23; see also CT 5/13:165-67. Having decided to focus on Littleton, the defense team reasonably decided against "laying out the buffet table" of third party suspects.⁸

Interestingly, in addition to Littleton's arguable admission and the hair arguably tying him to the crime scene, defense counsel was also able to present evidence of Littleton's mental instability. Because, unlike Tommy Skakel, Littleton was an available witness at the criminal trial, Sherman was able to offer impeachment evidence on a range of subjects that revealed much of Littleton's troubled past to the jury. See *e.g.*, CT 5/13: 33-34, 47, 48-49, 52-54, 91-118, 125; see also CT 5/9: 152(Littleton admits on direct that he suffers from

⁸ Had the defense team taken either of the other possible tacks, either trying to present both defenses, or focusing on Tommy instead of Littleton, those decisions would undoubtedly now be challenged as ineffective.

bipolar disease); see also CT 5/14:40-42 (Sherman elicits from Mary Baker the fact that Solomon shared with her his suspicions that Littleton may have been involved in other murders). Thus, defense counsel had an avenue available for admitting evidence against Littleton that may have caused the jury to view him as someone capable of committing this crime; counsel had no such path available with regard to Tommy Skakel. Because counsel could not compel Tommy to testify, there was no opportunity to impeach him with evidence that might have revealed his alleged mental health issues to the jury. In this way as well, therefore, Littleton made a better third party suspect.

As to the risks associated with a third party defense against Tommy, petitioner argues that counsel would have been unaware of some of those risks prior to trial and hence unable to include them in their calculations regarding the best defense. PB: 36-37. This assertion has no basis in the evidence. As argued in the initial brief, Tommy's statements regarding a sexual encounter with Martha, which both the petitioner and the habeas court view as the cornerstone of a supposed third party claim against Tommy, carried particular problems for the defense. If admitted, these statements would have corroborated the state's evidence of motive, and bolstered the testimony of two key witnesses. Petitioner made admissions to both Geranne Ridge and Elizabeth Arnold indicating he was aware that his brother engaged in some sort of sexual conduct with Martha the night she was killed. He further admitted to Ridge that this awareness, combined with the "mind altering drugs" he ingested, is what triggered the rage that led to her death. While petitioner is unable to dispute that Tommy's supposed admission of just such an encounter would be damaging to the defense, he argues that counsel could not have been aware of the nature of Arnold and Ridge's testimony prior to trial and hence this risk could not have influenced counsel's strategic decision. PB:36-37.

This argument is both legally and factually wrong. Factually, this record contains nothing to support petitioner's assertion that counsel was surprised by both witnesses' testimony. At the habeas trial, petitioner never asked either Sherman or Throne when they

first became aware of this anticipated evidence. Further, the record that does exist suggests the state disclosed the anticipated testimony of both witnesses well before trial. See CT 8/15/01:7-8(State represents in hearing nearly nine months before the start of evidence that state disclosed the "great, great bulk of the state's case" at least two or three months earlier). Although Arnold did not include petitioner's admission in her Grand Jury testimony, it is referenced in a police report dated June 23, 2000, which would have been part of the massive amount of information turned over to counsel prior to trial.⁹ RRA-6.

Similarly, although Ridge did not testify before the Grand Jury, in her 2002 trial testimony she indicated that the taped conversation in which she discussed petitioner's confession occurred about a year prior to trial. CT 5/21:105-06. Hence, it would have been part of the state's pre-trial disclosure as well.¹⁰ In fact, when the state offered a transcript of the taped conversation during the criminal trial, the court immediately asked Attorney Sherman if the defense had seen it and he indicated they had. CT 5/21:20.¹¹

Legally, it makes little difference whether the evidence clearly shows that a specific

⁹ Petitioner attempts to undermine Arnold's credibility by pointing to Sherman's cross of her suggesting that a book about this case had influenced her testimony. See PB:37.; CT 5/17: 22. On redirect, however, she insisted that she had a definite recollection of petitioner telling her his brother "f'd his girlfriend" that night. CT 5/17:24. Further, this Court should ignore this and other attempts by petitioner to convince this Court the state's witnesses were not worthy of belief. Neither this Court nor the habeas court may legitimately assess the credibility of the criminal trial witnesses. Under *Strickland* it is clear that the jury's findings which are unaffected by any claimed deficiency in counsel's performance must be accepted as sound. *Strickland*, 466 U.S. at 695-96. Because none of petitioner's claims of professional incompetence relate to Arnold, or indeed to any of the state's witnesses other than Coleman, there is no basis on which to reevaluate her or any other witness' testimony.

¹⁰ In addition to the state's disclosure, Sherman may well have been aware of both witness' anticipated testimony through a pre-trial interview of them. Sherman testified that although some witnesses declined to speak with him, he interviewed many of the state's witnesses prior to trial. HT 4/17:67-70; HT 4/18: 59; HT 4/23:9, 36.

¹¹ Moreover, as Throne testified, the defense team engaged in ongoing discussions regarding the wisdom and feasibility of making Tommy a third party suspect. HT 4/23: 38-39. Therefore, even if the defense team had been surprised by the evidence offered through Arnold and Ridge, when they heard it as part of the state's case they would have been able to include it in their ongoing calculations of whether it was in their client's best interest to focus on Tommy as a suspect.

risk or consideration figured into counsel's strategic choice. Under *Cullen v. Pinholster*, 131 S.Ct. 1388, 1407 (2011), a reviewing court's obligation is clear: "[I]n evaluating the reasonableness of counsel's conduct, reviewing courts are required not simply to give the attorneys the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as they did." (Emphasis added.) Thus, if a reasonably competent attorney would have declined to offer Tommy's alleged statements in light of the dangers entailed in doing so, that is sufficient to defeat a claim of professional incompetence. Even if Sherman had not acknowledged the dangers to the defense posed by Tommy's alleged statements, this Court, required as it is to entertain all possible reasons in support of the competence of counsel, must consider those dangers in assessing whether all reasonably competent counsel would nevertheless have sought to present this evidence. *Harrington v. Richter*, 131 S.Ct. 770, 790 (2011).

Finally, as mentioned earlier, even if petitioner convinces this Court that some reasonably competent attorneys would have chosen to posit Tommy Skakel as the murderer, the petitioner's claim nevertheless fails. Under *Strickland*, petitioner is required to prove that, looking at the state of affairs that existed in 2002 and not with the benefit of hindsight, no reasonably competent counsel would have concurred in the defense team's preference for a defense focused on Littleton, and their assessment of the risks of presenting inconsistent defenses, the lack of admissible evidence directly connecting Tommy to the crime, the danger of bolstering the state's evidence of motive, undermining the alibi, and corroborating two key state's witnesses. Petitioner offered no evidence at the habeas trial, and no arguments on appeal, that are sufficient to satisfy this burden.

II. THE HABEAS COURT ERRED IN FINDING DEFICIENT PERFORMANCE AND PREJUDICE WITH RESPECT TO DENIS OSSORIO'S HABEAS TESTIMONY

In support of his contention that the habeas court correctly found deficient performance and prejudice from the absence of Ossorio as an additional alibi witness at trial, petitioner relies primarily on two assertions. First, he argues that Sherman should have known to interview Ossorio because petitioner gave his name to Sherman prior to

trial. PB:54, 59. Second, he contends that the weightier evidence favors a time of death during the period of petitioner's partial alibi and that, therefore, the jury necessarily rejected the alibi in finding petitioner guilty. PB:61, 64. From this premise, he argues that the habeas court correctly found prejudice due to the absence of an additional alibi witness whose testimony might have convinced the jury to credit the alibi. PB:64.

The record does not support either of these contentions. Importantly, the habeas court rejected petitioner's self-serving assertion that he provided Ossorio's name to counsel prior to trial. Petitioner's attempt to rely on this discredited testimony to establish deficient performance must therefore be rejected. Further, the habeas court erred in finding Sherman at fault for failing to uncover Ossorio when both petitioner and his family members denied any other persons could substantiate the alibi.

Petitioner's argument regarding prejudice is similarly without merit. Contrary to petitioner's repeated (but unsupported) assertions, there was no forensic evidence placing the time of death during the time of petitioner's partial alibi. As explained in detail below, the evidence that was available could not pinpoint the time of death: it was just as consistent with a time of death beyond the period of the partial alibi as it was of the earlier time period. In addition, other evidence in the case clearly pointed to petitioner's guilt during a later time period. This, coupled with the state's argument and the trial court's instructions to the jurors informing them that they did not have to determine or unanimously agree on the time of death, and that they could accept the alibi and still find petitioner guilty, defeats the petitioner's claim and the habeas court's finding of prejudice.

A. Petitioner Failed To Prove Deficient Performance; The Habeas Court Erred In Concluding Otherwise

On the issue of deficient performance, petitioner relies heavily on his contention that he provided the name of Ossorio to his defense team as someone who could support his alibi. PB:54, 59. As the Memorandum of Decision makes clear, however, the habeas court did not credit petitioner's self-serving testimony to this effect. The court made plain that it found deficient performance "notwithstanding the failure of petitioner to bring this person to

Attorney Sherman's attention." MOD:55-56. Petitioner does not argue that this determination is clearly erroneous, nor could he as the habeas court's finding is well-grounded in the evidence. See PB:56.¹²

Therefore, this court's analysis must take as a starting point the fact that neither the petitioner nor his family members disclosed an additional alibi witness to the defense team. In fact, by failing to mention Ossorio, or even "the beau", when trial counsel asked directly if there was anyone else who could support the alibi, the petitioner and his family members answered "no." As argued in the initial brief; RB:69; where, as here, the information provided by the client and his family renders it unnecessary to look for additional witnesses --- because those who were there essentially state that no one else saw them -- it would be patently unreasonable to find ineffectiveness. *Strickland*, 466 U.S. at 691. ("[W]here a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless . . . counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

Further, the fact that all known alibi witnesses denied the existence of another, undisclosed witness undoubtedly colored the way counsel interpreted Georgeann Dowdle's grand jury testimony. It must be remembered that Dowdle stated that she was in her mother's library with her "beau" but she did not "venture out" and did not see her Skakel cousins the evening of the murder. CT 5/23:64-65. Thus, she admitted that she could not verify Michael Skakel's presence and gave no reason to believe her "beau" could. See HT 4/18: 187 (Sherman testifies it was his understanding "the beau" never saw Skakel brothers). Her testimony, rather than alert counsel to a potential alibi witness, was consistent with what petitioner and his family members had told counsel—no other persons could veri-

¹² Both Attorney Sherman and Attorney Throne testified that neither their client nor any of the alibi witnesses told them there was anyone else who could substantiate the alibi. In fact, Sherman stated that even when directly asked, the petitioner and his cohorts denied there was any other person who could testify to his presence at Terrien's that night. HT 4/16: 233-34; see also HT 4/18: 187; 4/23: 11-13, 49-50.

fy his presence. Petitioner and his family members, thus, are responsible for the fact that no one viewed Dowdle's testimony as adding anything to the information already known.

Quite plainly, to say that under these circumstances, all reasonably competent attorneys would have seen Dowdle's offhand reference to her "beau" as leading to an alibi witness is to say that all reasonably competent attorneys must operate under the continual assumption that both clients and family members are, inexplicably, withholding useful information. More, they must do so, not merely when given reason to *doubt* what they had been told, but also when given information that appears *perfectly consistent* with the information provided to them. As the Court of Appeals for the Fourth Circuit aptly noted: "There is no rule that counsel must disbelieve prospective witnesses presented to him by his client, or that he must spend considerable time and effort in testing the veracity of such witnesses or attempting to disprove their statements." *Bassette v. Thompson*, 915 F.2d 932, 940 (4th Cir. 1990), *cert. denied* 499 U.S. 982 (1991).

Proof that not all reasonably competent attorneys would have seen Dowdle's "beau" as a potential alibi witness exists in this case. If the mere mention of a "beau" in Dowdle's grand jury testimony would, as petitioner claims, "have jumped off the page and smacked [Sherman] square between the eyes"; PB: 58; then one wonders why it did not have this effect on petitioner's present habeas counsel, Attorney Hubert Santos. As argued in the initial brief, if Dowdle's grand jury testimony would have had this effect on all reasonably competent attorneys, then one wonders why present counsel waited more than a decade to raise any issue concerning Denis Ossorio. RB: 67 n.29. If present counsel attached significance to Dowdle's reference to her beau, as petitioner now claims *any* competent attorney would do, he could have, and undoubtedly would have, brought an ineffectiveness claim in conjunction with his 2005 petition for a new trial; see *State v. Gonzalez*, 205 Conn. 673, 684 (1987) (claim of ineffective assistance may be brought in petition for new trial proceeding); or even earlier if his head was smarting from the smack between his eyes.

Present counsel's failure to take timely action on the information contained in the

grand jury transcripts is especially telling in that Santos has represented Skakel continuously from shortly after the verdict in 2002 until now.¹³ During that entire time, much of which his client spent incarcerated, Attorney Santos attacked the conviction in myriad ways, yet never litigated a claim based on Ossorio until the present action.¹⁴ In light of this, petitioner's assertion that all reasonably competent attorneys would have instantly realized the potential significance of the "beau" and acted accordingly must be rejected.¹⁵

Despite the failure of his present counsel to timely act on Dowdle's testimony, petitioner relies on *Rompilla v. Beard*, 545 U.S. 374, 377 (2005) to argue "an attorney must go beyond what his client advises him in order to comply with the requirements of effective representation[.]" PB at 25. Petitioner's reliance on *Rompilla*, however, is misplaced. In *Rompilla*, a death penalty case, the petitioner claimed his defense attorneys were ineffective in not uncovering mitigation evidence regarding his childhood and mental health issues. While agreeing that counsel were ineffective, the Supreme Court did not fault them for failing to uncover general mitigation evidence in the face of assertions by petitioner and

¹³ The portion of Dowdle's grand jury testimony in which she mentions her "beau" was admitted during her criminal trial testimony. CT 5/23:62-65. Thus, this information was contained in the criminal trial transcripts making it available to Attorney Santos at least at the time he began working on petitioner's direct appeal, if not sooner.

¹⁴ Petitioner attempts to introduce new facts into this record by stating that his investigator "easily located" Ossorio. PB at 58. Petitioner apparently hopes this Court will assume present counsel noticed the reference to the "beau" and went looking for him. Any such assumption is unwarranted. There is no evidence in this record illuminating how Ossorio became part of this case. There certainly is no evidence to suggest whether petitioner's counsel woke up to the purported significance of the "beau" and went looking for him or whether Mr. Ossorio offered his help to the petitioner or his family, or whether some other circumstance resulted in his presence at the habeas trial. Petitioner's attempt to convince this Court that there is evidence on this point must be rejected.

¹⁵ Not only did Attorney Santos apparently fail to attach any significance to Dowdle's beau, many other presumptively competent professionals failed as well. Attorneys for the state, which sought to present all alibi witnesses to the Grand Juror, never presented the "beau." Nor did the Grand Juror (*Thim, J.*) ever request testimony from the person mentioned by Georgeann Dowdle. Moreover, Sutton Associates, the private investigators hired by the Skakel family, make no mention of Ossorio in their report. Hence, it appears they never uncovered or interviewed him, despite their ready access to members of both the Skakel and Dowdle families.

his family members that his childhood was unremarkable. *Rompilla*, 545 U.S. at 383. Rather, the Court's holding centered exclusively on defense counsels' failure to examine the readily available court file on a prior conviction that counsel knew the prosecution would introduce. *Id.* at 383-84.

The Court's holding in *Rompilla* therefore, is narrowly focused on a defense attorney's duty to review information he or she knows the prosecution intends to introduce. As the Supreme Court itself noted, it was *not* requiring defense counsel to look for evidence they had reason to believe did not exist: "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.*" *Rompilla*, 545 U.S. at 389 (emphasis added); *see also Hannon v. Secretary, Department of Corrections*, 562 F.3d 1146, 1155 (11th Cir.), *cert. denied*, 558 U.S. 997 (2009) ("*Rompilla* requires 'reasonable efforts to obtain and review material counsel knows the prosecution will probably rely on as evidence'"); *Keith v. Mitchell*, 455 F.3d 662, 671 (6th Cir. 2006), *cert. denied*, 549 U.S. 1308 (2007) (*Rompilla* held only that counsel must investigate evidence it knows the state will use against defendant.) *Rompilla* thus lends no support to petitioner's claim.

Moreover, as argued *supra*, the petitioner and his cohorts are responsible for the fact no one viewed the "beau" as significant. Had the petitioner and those close to him not told defense counsel there was no one else who could substantiate the alibi, defense counsel might well have viewed Dowdle's reference to her "beau" differently. This case, therefore, fits comfortably within the prevailing view that counsel will not be found ineffective when the client misled, misdirected or withheld information from his attorney. *Johnson v. Upton*, 615 F.3d 1318, 1331-33 (11th Cir. 2010), *cert. denied*, 131 S.Ct. 3041 (2011)(counsel not deficient in failing to produce evidence of petitioner's fear of jail beatings as reason for his escape when petitioner never told his attorney about his supposed motivation); *Peterka v. McNeil*, 532 F.3d 1199, 1208-9 (11th Cir. 2008), *cert. denied*, 555 U.S. 1155 (2009) (counsel not ineffective in failing to offer as mitigation evidence fact that

petitioner declined opportunity to escape where petitioner did not tell counsel about it); *United States v. Farr*, 297 F.3d 651, 658 (7th Cir. 2002)(counsel not ineffective in failing to track down witnesses where his client “failed to supply his trial counsel with the witnesses names and addresses, much less advise him of the specific information those witnesses possessed that might serve to exculpate him.”); *Lambrix v. Singletary*, 72 F.3d 1500, 1505 (11th Cir. 1996), *aff’d*, 520 U.S. 518 (1997)(counsel not ineffective for failing to produce evidence of petitioner’s allegedly abusive childhood where there is no indication petitioner or his relatives gave counsel reason to think such evidence existed); *United States ex rel Kleba v. McGinni*, 796 F.2d 947, 957 (7th Cir. 1986)(counsel’s failure to find potential alibi witness not ineffective where client was primarily responsible for lawyer’s failure to locate witness; it was client’s responsibility to make lawyer aware of all potential alibi witnesses, their names and addresses); *United States v. Zylstra*, 713 F.2d 1332, 1338 (7th Cir.), *cert. denied*, 464 U.S. 965 (1983) (attorney not ineffective in failing to call witnesses where the defendant was unable to supply the last names or addresses of many of the proposed witnesses); *State v. Talton*, 197 Conn. 280, 297 (1985)(counsel will be found ineffective only when defendant has informed his attorney of existence of witness and that attorney, without a reasonable investigation and without adequate explanation, failed to call witness at trial.)

In this instance, the failure of the petitioner and his family members to mention Dowdle’s boyfriend is particularly peculiar in view of Ossorio’s testimony that he spoke with “the boys” and watched *Monty Python* with them. See HT 4/18: 74-76. Therefore, as argued in the initial brief, if Ossorio is to be believed, the other alibi witnesses could not have been unaware of his presence. Petitioner has offered no explanation for the collective failure of his alibi witnesses, as well as himself, to bring Ossorio to counsels’ attention. Such a failure is bizarre and inexplicable as “[o]ne would normally expect from a cooperative defendant or a defendant that was determined to prove his innocence that he would jump at every opportunity to . . . make available to the defense attorney the names, every

address he knew, the work telephone number, the home telephone number, every possible piece of information as to witnesses who might be favorable to the defense.” *United States v. Golub*, 694 F. 2d 207, 214 (10th Cir. 1982). In any event, petitioner’s failure to mention the presence of Dowdle’s boyfriend at Terrien’s, coupled with the fact that both he and his witnesses told counsel there was no one else who could substantiate the alibi, is directly responsible for his counsels’ failure to perceive Dowdle’s reference to her beau as adding anything new to the case. The habeas court erred in pinning that failure on counsel rather than on petitioner where it belonged.

B. Petitioner Failed To Prove Prejudice And The Habeas Court Erred In Finding Otherwise

In order for the alibi defense to have been successful, the defense team needed to persuade the jury of two things: (1) that the killing *had* to have occurred during the 9:30-11:00 p.m. time frame and (2) that the petitioner was at the Terrien residence during that time period. The petitioner’s claim of prejudice is that Ossorio’s testimony would have added a “better” witness to the witnesses already presented to the jury in an effort to establish the second point. Even accepting, for the sake of argument, petitioner’s claim with regard to the value of Ossorio’s testimony on this latter point, it is apparent that petitioner cannot prove prejudice unless the evidence supports his assertion that the murder had to have occurred during the time of the alibi. Because, as demonstrated herein and in the Commissioner’s initial brief, the evidence does *not* establish such a limited time frame within which the murder had to have occurred, and in fact is fully consistent with petitioner’s commission of the murder during a later time period, petitioner cannot prove a reasonable probability that Ossorio’s testimony would have resulted in an acquittal.

With respect to the time of the killing, the petitioner argues that, not only was there “[c]ompelling evidence . . . presented that Martha was murdered at approximately 10 P.M. , during which time [he] was present at the Terrien residence”; PB: 64; but that the state’s cross examination of his alibi witnesses, as well as portion of closing argument, signal the state’s belief that the weightier evidence pointed to a time of death between 9:30 and 10:00

p.m. PB:50-54. Both of these arguments are completely without merit.

First of all, as the following detailed review of the forensic evidence shows, the forensic evidence did not favor the time of petitioner's partial alibi over a much broader time period. Therefore, petitioner's assertion of the "weightier" evidence favoring the time of his alibi must be seen for what it is: reliance primarily on a barking dog. Moreover, several of petitioner's admissions, as well as his masturbating-in-a-tree story, point toward a later rendezvous with Moxley that resulted in her murder. And, of course, as argued earlier, the bottom line concerning the alibi was that the jury did not have to reject it in order to convict. In fact, the jury might well have decided not to make any determination of whether petitioner went to Terrien's and instead base its verdict on his numerous confessions and admissions, his connection to the murder weapon, his ever-changing account of his activities that night indicating a consciousness of guilt, and his motive.

As to petitioner's assertion that the state's cross examination and argument concerning the alibi witnesses evinces *its* belief that the murder occurred during the earlier time period, petitioner is simply wrong. Aside from the fact that the beliefs of state actors as to the time of death are irrelevant, as explained below, petitioner misconstrues the import of the evidence and argument offered by the state at trial. Further, the state's bottom line at trial could not have been clearer: as the state explicitly told the jury, and the criminal trial court confirmed, the jury did not have to determine the time of death other than to find it occurred between 9:30 p.m. and 5:30 a.m. CT 6/3: 92-95, 170, 178; see RB:62-64. Therefore, the jury did not have to reject the partial alibi in order to convict. Petitioner has not carried, and cannot carry, his burden of proving prejudice from the absence of one more witness on an issue the jury did not have to decide.

1. The forensic evidence does not favor the time of the partial alibi over a much broader time period

With regard to the so-called forensic evidence of the time of death, which petitioner refers to repeatedly without citation to the record, here is what the record shows: there is no forensic evidence favoring petitioner's desired time of death over a much broader time

frame that gave petitioner the opportunity to have killed Moxley after returning from Terrien's.

In his testimony, the state's chief medical examiner, Doctor H. Wayne Carver, explained three post-mortem processes that sometimes help provide an estimate of the time of death: lividity (also known as liver mortis), rigor mortis and, if the time of the deceased's last meal is known, the contents of the stomach or small intestine. CT 5/8:93.

As for lividity, Dr. Carver testified that following death, the blood stops flowing through the network of veins just below the surface of the skin. Once death occurs, there is no more blood pressure and so the stuff is all under the influence of gravity. And it will flow away from those parts of the body that are up and towards those parts of the body that are down. In most people, once they have stopped moving and stopped having a blood pressure, it is visible within a couple of hours on the parts of the body that are down. . . .

For several hours, if you turn the body over, it will flow away – it varies from person to person – and reestablish itself. After a certain period of time, somewhere over four, usually six or more hours, it gets stuck. So that if the body has one side down and the stuff forms, you turn it over, it will stay up, okay. It tells you something about how long the body has been dead. It is a very sensitive indication that the body has been moved after a period of time.

CT 5/8: 105-6.

Dr. Carver further testified that at the time of the autopsy, which occurred about 36 hours after the last time the victim was reported alive --9:30 on October 30 --, lividity was fixed. Dr. Carver further stated that the records indicated she had been found face down about noon on October 31st, and the body was first turned over about five or six hours after it was found. *Id.* at 107. When asked what the condition of fixed lividity 36 hours after she was known to be alive could tell about the time of death, Dr. Carver stated:

It tells us that she was in that face down position probably six or more hours before the time she was turned over. Now, the records of our office reflect her being turned over about six hours after she was found or five to six hours after she was found so it doesn't contribute a lot in terms of the period of time before she was found.

Id.

As to rigor mortis, Dr. Carver explained that the term refers to the "stiffness of death". *Id.*:107. He further explained that when a person dies, she initially becomes limp, but after a period of time, her muscles stiffen. *Id.* According to Carver, the stiffening usually takes several hours to become noticeable, but many variables can affect the time it takes for rigor to form. Dr. Carver also noted that after somewhere between 12 and 24 hours "the processes of the muscle tissue breaking down starts to catch up with the processes that produce the stiffness and so eventually the person becomes loose again." *Id.* at 108. When asked what he could deduce regarding time of death from the fact the victim was in rigor when found at 12 noon, Dr. Carver stated: "She died closer to 9:30 than she did to when she was found. She died several, many hours before she was found but in my experience, precision is very difficult with rigormortus(sic)." *Id.*

The final factor that Carver discussed as possibly providing insight into the victim's time of death was the contents of her digestive system. Dr. Carver noted that the victim's stomach contained approximately 100 cc of blackish fluid and the small intestine contained yellowish semi-liquid feces. CT 5/8: 109. Dr. Carver stated that the presence of a blackish fluid in the victim's stomach is consistent with swallowed blood. He explained that stomach acid "turns blood black". He further noted that the autopsy revealed some "aspiration or breathing in of blood into the lung passages" which indicated "some breathing action was going [on] after the skull fractures". This "would introduce blood into the respiratory passages which of course hook up with your swallowing passages." CT 5/8: 109-110. The blackish liquid, therefore, offered no clue as to time of death, but did indicate it was not immediate.¹⁶

As to the yellowish feces in the small intestine, Dr. Carver explained that food usually passes from the stomach into the small intestines within an hour or two of eating.

¹⁶ This is consistent with Dr. Henry Lee's testimony that Moxley was not dead or unconscious after the first blow. The blood spatters on her clothing indicate she was still moving, struggling and turning. CT 5/28: 142, 151.

Id.:111-12. Once food substances reach the small intestine, it can take anywhere from 24 to 48 hours for it to traverse the 25 feet of the small intestines and enter the large intestines. *Id.* Dr. Carver stated that the movement of food within the digestive system stops upon death, and the "breakdown of solid stuff to liquid stuff" "profoundly slows." *Id.*: 111.

Given that the victim's last known meal occurred between 6 and 6:30 p.m., and she was known to be alive at 9:30 that night, Dr. Carver stated that an examination of her digestive track did not provide any useful information as to how long she lived after she last ate. *Id.*:113.

In response to a question posed by Attorney Sherman on cross examination, Dr. Carver stated that the medical evidence was consistent with a time of death between 9:30 and 10:00 p.m. *Id.*: 127. But, on redirect, he stated that it was also consistent with her murder occurring later, such as at midnight or 1 a.m. *Id.*

Although Sherman presented the testimony of Dr. Joseph Jachimczyk in an attempt to convince the jury that Moxley was killed during the period of petitioner's partial alibi, Jachimczyk neither disputed the testimony of Dr. Carver nor offered contrary medical findings relevant to the time of death. See CT 5/28: 119-131. He did opine, however, based on the historical data, pictures, crime scene sketch and autopsy report he reviewed, that the time of death was about 10 p.m. *Id.*:131.

On cross examination, when asked how he arrived at his estimate, Dr. Jachimczyk stated that he considered the presence of rigor mortis, liver mortis (lividity) and "the lifestyle of the individual as described was supposedly that she had a 10:30 p.m. curfew which would account for the presence of where the body was found along a certain root" (sic). *Id.* at 134. He also considered the reports that there were "at least two dogs barking . . . around that time." *Id.* at 134; see also CT 5/28:145-46.

Further probing on cross revealed that Dr. Jachimczyk basically agreed with Dr. Carver with regard to the three possible forensic findings which can help determine the time of death. That is, he agreed that rigor mortis sets in within 4 to 8 hours of death; CT

5/28:134, 135; and generally disappears in about 24 hours after it has set. *Id.* at 135. Thus, under Dr. Jachimczk's own testimony, given that the body was in a state of rigor mortis when found at noon, she could have been killed as late as 8 a.m. on October 31. If she had been killed around midnight, rigor would have set in between 4 a.m. and 8 a.m., and would not have dissipated by the time the body was found at noon. Further, if she had been killed at 10 p.m., rigor could have set in between 2 a.m. and 6 a.m., and remained another six to ten hours until the time she was found. Thus, according to Dr. Jachimczyk's own testimony, the presence of rigor mortis at noon on October 31 is consistent with a wide time frame during which she might have been killed. That time frame is wide enough to encompass both the time of petitioner's partial alibi and a considerable time thereafter.

Dr. Jachimczyk stated that liver mortis (lividity) can start as soon as two to four hours after death, and will generally be fixed by eight to twelve hours. CT 5/28: 137. Thus, again, Dr. Jachimczyk's medical opinion would support a time of death much later than ten o'clock. If, for instance, the victim was killed at midnight, lividity would be present as early as by 2 a.m. and become fixed anywhere from 8 a.m. to noon. Thus, evidence of fixed lividity when the body was turned over five to six hours after it was found, does not favor an earlier time of death over a later one.

Finally, Dr. Jachimczyk agreed with Dr. Carver that the blackish fluid found in the victim's stomach was consistent with swallowed blood. CT 5/28: 139. Although Dr. Jachimczyk opined that the average time it takes food to travel from the stomach to the small intestines is four hours, rather than one or two as noted by Dr. Carver, this divergence favors a time of death later than the 9:30 to 10 p.m. time period endorsed by petitioner. If she last ate at 6:30, and her stomach was devoid of food substances at the time of death, these facts would suggest she was alive until at least 10:30 p.m. Of course, it is also consistent with a later time period, such as midnight or 1 a.m.

As to the yellowish feces in the small intestine, Dr. Jachimczyk agreed that the time food substances will stay in the small intestine varies and, thus, the presence of this

material does not give any definitive information as to time of death. *Id.* at 142.

Thus, a careful review of the criminal trial testimony from *both* pathologists makes clear that the available forensic evidence could not determine the time of the victim's death with any precision. Importantly, that evidence did not favor the time of petitioner's partial alibi over a later time period which would have permitted petitioner to go to Terrien's and kill Martha upon his return. Petitioner's assertion, therefore, that the "more compelling" evidence indicates the murder occurred around 10 p.m.-- which is the very linchpin of his theory of prejudice from the absence of Ossorio's testimony --is baseless.

It is apparent that the opinion of Dr. Jachimczyk regarding an earlier time of death was based, not on medical or forensic findings, but on the reports of dogs (primarily the Ix family dog, Zock, who lived across the street from the Moxley's) barking and Martha's curfew. Needless to say, neither of these things are definitive. And, in fact, both are easily reconciled with a later time of death. As Mrs. Moxley testified, Bell Haven in 1975 had "lots and lots" of teenagers living there, many of whom cut through her property to get to the streets behind her. Mrs. Moxley stated that it was "very common" for the neighborhood kids to cut through, and she believed she may have heard some young persons cutting through her property on the night of the murder, at about the same time others reported hearing a barking dog. CT 5/7:44. Given that the murder occurred on Mischief Night in a neighborhood full of teens, Zock and his canine friends probably had their pick of persons at whom to bark. It is folly to base a determination of the time of the murder on such inconclusive information.

As to the curfew, Mrs. Moxley testified that she did not assign a specific curfew to her children, explaining, "we didn't have a specific time when the kids had to be home because they were always so good, we never had to do that." CT 5/7: 73-74, *see also* CT 5/7: 91. She further stated that, if pressed, she would say she expected the children home at about 9:30 if it was a school night, and 10:30 if it was not. CT 5/7:94. The night Martha was killed was not a school night for Martha. CT 5/7: 96. Therefore, Mrs. Moxley did not

expect Martha home until about 10:30 that evening. CT 5/7: 38.

The evidence of "curfew", therefore, is also equivocal. If anything, it suggests Martha would not have felt bound to head home at 9:30-- the time at which the car left for Terrien's. In fact, it suggests she might have felt comfortable staying out longer.

Further, Mrs. Moxley testified that at about 9:30 or 10:00 that night, she decided to quit painting the mullions on her bedroom window, which had occupied her throughout the evening. After that, she took a shower. CT 5/7: 42-43. After taking a shower, it was about 11:00 p.m. and she went downstairs to watch the news. CT 5/7: 45. After the news, while watching a movie, she fell asleep, and did not wake up again until 1:30 or 2:00 a.m. CT 5/7: 45. Therefore, as Mrs. Moxley herself recognized, Martha may have come home while Mrs. Moxley was painting, or in the shower, or dozing, and left again undetected, thus meeting her murderer during this later time period. CT 5/7: 65.¹⁷

Dr. Jachimczyk's opinion of the time of death is based, not on medical or forensic findings, but on his erroneous assumption that Martha had a definite curfew, and reports he heard of barking dogs, evidence which is hardly conclusive and, in fact, entirely porous. Therefore, petitioner is simply wrong in asserting that the "weightier" and "more compelling" evidence supports a time of death within the period of his alibi.

2. Although the jury did not have to resolve the issue of whether petitioner went to the Terrien's, the trial evidence provided the jury with an ample basis on which to conclude the murder occurred after the time of petitioner's partial alibi

As argued in the earlier brief, much of the evidence produced at trial is consistent, perhaps even more consistent, with a later time of death. Primary among this evidence, of course, are petitioner's statements indicating he left the house late at night and masturbated on the Moxley property. His statement to Hoffman is particularly compelling.

¹⁷ Or, Martha may have never come home, staying out to rendezvous with Tommy and then encountering petitioner in the midst of his foray out into the neighborhood, first to "peep" and then to "get a kiss from Martha." App. Pt 2: A1190-94 (petitioner's statement to Hoffman).

See EPP/Main Menu/ Audio/Richard Hoffman; see also SE 108 App. Pt.2 1190. As the state argued in summation, by admitting that he left after returning from Terrien's, "horny", set his sights on finding the victim, visited both the area of the brutal assault and the tree under which her body was found, and masturbated, petitioner essentially "threw his alibi to the wind". CT 6/3: 92.

The testimony of petitioner's brother, John Skakel, lends further support to a later time for the murder. At the criminal trial, John testified that in 1975 his bedroom was on the first floor of the Skakel residence and shared a wall in common with the mudroom. CT 5/28: 61-64, 70-72. The mudroom, which led to the back door, is one place in which sporting equipment such as golf clubs was kept. *Id.* In fact, Detective Lunney saw Toney Penna golf clubs, that were part of the set from which the murder weapon came, in a barrel in the mudroom the day the victim's body was found. CT 5/9:10-17. John testified that at about 11:30 on the night of the murder he heard someone in the mudroom. CT 5/28:61-64, 70-72.

The fact that John Skakel heard someone in the mudroom at about 11:30 p.m., where the set of golf clubs matching the murder weapon were kept, and where the murder weapon was most likely obtained, suggests the murder occurred *after* the trip to Terriens. CT 5/28:61-64, 70-72. Importantly, the time at which John heard someone in the mudroom is consistent with the probable time of petitioner's admitted foray out, first to "peep" on a neighbor and then to go in search of Martha. App. Pt 2 A-1190-94 (SE 108, Petitioner's statement to Hoffman). In addition, in his statement to Hoffman, petitioner admits he is afraid of the dark, which would explain why he grabbed a golf club on his way out the door. App. Pt 2 A-1190.

The fact that petitioner admitted to taking "mind altering drugs" that night also supports a later time of death. This admission, which he made explicitly to Geranne Ridge; see App. Pt 2 at A1223-24; is consistent with his Elan-era statements claiming he was "blind drunk" and could not remember what happened or had some sort of "black out"; see e.g. CT5/16:136-38 (Dorothy Rogers Mickey); CT 5/16:78, 82, 123 (Chuck Seigen);

CT5/17:4-6, 16, 19 (Elizabeth Arnold); or, as he said to Alice Dunn, he might have killed her but if he did he was not in his "normal state". CT 5/17:75. It is also fully consistent with, and provides an explanation of sorts for, the extreme brutality of the crime: the "overkill" of repeated beatings, and the savage stabbing. It would also help explain the degrading act of masturbating on the body, and even perhaps the exaggeration of time to "two days later" rather than simply later that night. See CT 5/17: 137-38 (Petitioner told Coleman that after a girl spurned his advances he drove her skull in with a golf club, returning two days later to masturbate on her body). Further, it would explain why, with television sets aplenty in the Skakel house, John, Michael, Rushton, Jr. and Jimmy Terrien (Dowdle) decided to go to Terrien's house to watch *Monty Python* that night. As petitioner explained in his taped statement to Richard Hoffman, "we never got bothered" at Terrien's because Jimmy's stepfather was always in New York City and his mother "was always drunk in her wing of the house." App. Pt 2 at A1159. Sursum Corda was thus a place where "you could do anything. You were just left alone." *Id.* at A1160. The Terrien house was therefore a safer house in which to ingest drugs, as the Skakel house had a new, relatively unknown, and hence untested "babysitter" in Ken Littleton.

Further, petitioner was apparently not showing obvious signs of drug intoxication earlier in the evening, as none of the witnesses who saw him prior to Terrien's (Ken Littleton, Andrea Shakespeare Renna, Helen Ix) remarked on anything unusual in his demeanor or actions. Given all this, the jury might well have determined that the murder occurred after the petitioner returned from Terrien's, under the influence of "mind altering drugs." At that point, in his altered state, all it took was the spark of Martha's rejection, coupled with the knowledge she had a sexual liaison with his nemesis Tommy, for the petitioner to beat her to death so mercilessly.

Therefore, given that it could be argued the far weightier evidence favored a later time of death, petitioner cannot carry his burden of showing that an additional alibi witness would probably have resulted in an acquittal. This is especially so given the fact, as argued

throughout, that the jury did not have to be unanimous as to time of death, and hence may have accepted the alibi, rejected the alibi, come to various conclusions about the alibi, or made no determination regarding the alibi while still finding petitioner guilty beyond a reasonable doubt.

Despite all this, petitioner seems to argue that the state favored an earlier time period for the murder and hence, the jury must have also. PB at 51. This argument requires several points in refutation. First, as mentioned previously, petitioner's assumption as to the personal opinion of state actors is not only wrong, it is patently irrelevant to the determination of *Strickland* prejudice. Moreover, the criminal trial court instructed the jury it was the sole and final arbiter of facts; CT 6/3:143-44; and hence, even if it felt it could discern the state's preference as to time of death, it was free to reject it. In fact, in addition to the court's general instruction on this point, the jury was explicitly told (by both the state and the trial court) that it did not have to come to a determination as to the time of death, other than to find it occurred during the time alleged in the state's information. In addition, both the state and the criminal trial court expressly told the jury it could convict even if it credited the alibi. See CT 6/3: 8, 20, 92-97, 170, 178; CT 6/6: 18, 26. Hence, the partial alibi need not have figured into the jury's determination of guilt at all.

Further, the petitioner misconstrues the nature of the state's cross examination and argument regarding the general evasiveness of the petitioner's witnesses. See PB:51. The point of both was to illuminate for the jury the oddity of a group of people whose only clear recollection of the night their neighbor was brutally killed was the alibi.¹⁸ Jimmy (Terrien)

¹⁸ Of course, as to John Skakel, he testified he could not recall whether Michael went to Terrien's that night. CT 5/28: 58-59. In fact, he had no clear recollection of that night at all, other than the fact he heard someone in the mudroom about 11:30 p.m. See CT 5/28:25-26; 61-64, 70-72. Although his 1975 police statement was read into the record as his past recollection recorded; CT5/28: 32-37; John Skakel stated that he did not remember who went with him to the Belle Haven club for dinner that night, he did not remember any family members consuming alcohol at the club, he specifically did not recall his brother Michael drinking "Planters Punch" (as petitioner had told Hoffman), he did not recall who

Dowdle testified that Michael was with the group that went to his house to watch *Monty Python*, that they left at about 9:30 p.m., that *Monty Python* came on at 10:00 p.m., that the petitioner stayed for the whole show, and that the Skakels left to return to the Skakel residence about 11:00 p.m. CT 5/22:11-18. Nevertheless, his recollection of just about everything else regarding that evening was poor to nonexistent. For instance, he stated that he could not be sure who went to dinner with them at the Belle Haven Club, he could not recall who had alcohol at the Belle Haven club, but admitted he probably had more than one Heineken. He could not recall if he had more to drink back at the Skakel house. CT 5/22: 18-20. He specifically could not recall whether the petitioner was drinking. CT 5/22: 20. He could not recall whether Ken Littleton accompanied them to the club, he could not be certain whether the group drove or walked to the club, he could not recall whether John or Rushton Skakel had anything to drink that night, he could not recall when he first spoke to the police, but stated he did not believe he went to Windham on Saturday with the others. CT 5/22: 20-24. He also did not recall when he first saw Martha Moxley that night, he was not certain what car they took to his house, and could not recall where it was parked. CT 5/22: 30-31. He could not recall whether the petitioner was already in the car as they prepared to leave. *Id.*:31. He further could not recall whether anyone was smoking marijuana or "dropping acid" that night. *Id.*:38. He also stated that he did not remember his mother looking for him later that night when Mrs. Moxley called. CT 5/22: 38-39. And, while he could not recall whether any of the Skakels returned to his house later that evening, he denied going back down to the Skakel residence later. He further denied telling anyone that

exited the Skakel house with him as they were leaving for Terrien's, he did not recall whether Michael was already in the car as they came to claim it for the ride to Terrien's, he did not recall seeing Georgeann Dowdle, or Jimmy Terrien's mother, or any other member of the Terrien family that night, he did not recall whether the Skakel "nanny" Margaret Sweeney was in the Skakel house that night, he did not recall the drive home from Terrien's, he did not recall his brother Rushton having difficulty driving which required him to take over the wheel, he did not recall consuming any alcohol that night, or anyone else consuming alcohol at Terrien's, nor did he recall anyone taking any drugs at Terrien's, or taking any himself. CT 5/28: 39-48.

after the Skakels left he spent the night with a married woman. CT 5/22: 59, 37-38.

Rushton Skakel, Jr.'s testimony was similarly replete with claims of lost recollection. Nevertheless, he remembered the essential facts necessary to establish a partial alibi for his brother. See CT 5/22:61-81. Further, although he claimed to have no recollection of how much he had to drink that night, and claimed to have no recollection of what type of condition his brother Michael was in that night, he admitted that on the ride home John Skakel insisted on driving because John thought Rushton was drunk. He also recalled that John drove even worse than he had. CT 5/22: 65-67, 71-72. He further recalled that his brother Tommy was in bed asleep when he returned home at about 11:30 p.m.; *id.* at 81, but stated that he did not see Michael after they returned that night. *Id.*:78.

As the above summary of the state's examination of these witnesses reveals, much of the focus was on what the petitioner and the others may have drunk or otherwise ingested that night. The state was not so much intent on disproving the alibi, because, as noted, the state took the position that the jury could credit the alibi and still convict, as in highlighting for the jury the implausibility of the defense witnesses' selective amnesia. See CT 6/3:99; App. Pt2 A1415. The state argued that the witnesses had an "inexplicable . . . inability to recall almost anything beyond a red Lincoln going up to Terrien's house." CT. 6/3:10; App. Pt 2 A 1416. Consequently, there is no merit to the petitioner's claim that the prosecutor's attack on the alibi witnesses' convenient and selective recall constituted an implicit concession that the defenses' alibi theory, based on the insistence that the murder had to have occurred around 10 p.m., was correct.

Two final points: petitioner points to the state's witnesses and argues that "what is good for the goose is good for the gander", to counter the Commissioner's argument on Ossorio's inexplicable silence during the entire time this case was under investigation and even during the well-publicized 2002 trial. See PB at 61-62. In so doing, he misconstrues respondent's main point regarding that silence: if Ossorio did not realize he had information of any import as he claimed, then how did he retain such a clear recollection of who he

saw, what time he saw them, and what television show they watched on October 30, 1975. Further, the state's witnesses, to whom petitioner seeks to draw a comparison, were, for the most part, recalling confessions to a murder, or at least incriminating admissions regarding a murder. They were not dredging up the name of a television show they watched one night in October 38 years earlier. Moreover, many of the state's witnesses testified, in 1998 and again in 2002, to admissions they heard in the 80s and 90s; they were not reaching nearly as far back in time as was Ossorio.

Second, petitioner attempts to avoid the damage caused by the fact that Ossorio's testimony directly contradicts Rushton, Jr.'s criminal trial testimony of who watched *Monty Python* with them that night (Rushton listed only John, Jimmy and Michael), as well as the other inconsistencies between Ossorio's testimony and the criminal trial testimony of petitioner's witnesses; see RB at 73-74; by saying he might have declined to present these "shaky" alibi witnesses if Ossorio had testified. See PB at 63. Had that occurred, no doubt the decision not to present additional alibi witnesses would now be challenged as ineffective assistance. Further, petitioner overlooks the fact that had he done so, the state would have been free to call them on rebuttal, as it called Julie Skakel. Thus, the state would have been able to elicit the inconsistencies between their prior statements and grand jury testimony and Ossorio's testimony, particularly the fact that none of them indicated in their 1975 statements or prior testimony that Ossorio was with them that night.

Nevertheless, as argued throughout, the jury may well have believed petitioner went to Terrien's that night without hearing from Ossorio. Despite their evasiveness on other matters, Rushton, Jr. and Jimmy (Terrien) Dowdle were consistent and firm in the essentials of the partial alibi. Further, the only state's witness who actually disputed the alibi was Andrea Shakespeare Renna and, as she admitted, she could not explain her abiding conviction that the petitioner was still at the house after the car left for Terrien's. CT 5/9: 151, see also CT 5/24:76-107 (Sherman recalls Renna in defense case to impeach her with a prior statement). Just as reasonably, the jury may have declined to decide who took the

trip to Terrien's, finding whether petitioner did or did not go unimportant. The evidence clearly established his guilt; the jurors did not have to decide whether he committed the murder during the earlier or later time period as long as they unanimously found he intentionally killed Moxley. Therefore, petitioner has not carried his burden of proving a reasonable probability that the jury would have acquitted had it heard from one more alibi witness.

III. PETITIONER FAILED TO CARRY HIS BURDEN OF PROVING INEFFECTIVE ASSISTANCE OR PREJUDICE WITH REGARD TO THE 2007 NEW TRIAL TESTIMONY OF GRUBIN, SIMPSON, AND JAMES

Petitioner puts forth three arguments in support of the habeas court's finding of deficient performance and prejudice with regard to the new trial testimony of Grubin, Simpson, and James. First, he argues that the habeas court's finding of deficient performance was not clearly erroneous, as the Commissioner has argued, because it was based on evidence produced at the habeas hearing. PB: 75-78. Second, he contends that the habeas court did not err in disregarding the contrary findings made by Judge Karazin in evaluating the materiality of the testimony of James, Simpson and Grubin. PB: 78-84. Finally, he contends that the habeas court appropriately found prejudice based on the supposed weaknesses in the state's evidence and the alleged importance of the new trial testimony. PB: 84-91.

None of these arguments withstand scrutiny. As to the first, while petitioner asserts there was evidence in the habeas hearing to support the finding of deficient performance, he fails to direct this Court to any such evidence. Instead, he argues that the habeas court appropriately based its finding on an assumption made by this Court in the appeal from the new trial proceeding, even though neither the underlying testimony in *this* proceeding, nor the factual findings made in the prior proceeding, supports that assumption. Second, petitioner ignores the policy considerations underlying the doctrine of collateral estoppel in arguing that he should not be estopped from relitigating the materiality of the testimony of these three men. Any reasonable reading of the core issue decided in the new trial

proceeding, and that presented below, reveals that they are the same. That being so, the purposes behind the doctrine are best served by discouraging the type of repeated litigation in which the petitioner has engaged. Finally, as to prejudice, petitioner relies on a slanted view of the evidence from the criminal trial—one that is entirely at odds with the jury's verdict -- as well as an exaggerated view of the importance of the new trial testimony at issue. Once the criminal trial evidence is viewed in a manner respectful of the jury's determination of guilt, and the new trial testimony is properly assessed, petitioner's claim crumbles.

A. The Habeas Court's Determination Of Deficient Performance Is Clearly Erroneous

As the Commissioner established in his initial brief, the habeas court's finding of deficient performance is based on its erroneous assumption that Sherman decided not to look for the three persons Coleman had named as *possibly* with him the night Skakel confessed. See MOD: 63 ("Sherman's decision not to pursue Simpson, James and Grubin reflected a significant and impactful lack of judgment").¹⁹ None of the evidence before the habeas court supports this determination. In fact, all the relevant evidence is to the contrary. Attorneys Sherman and Throne, as well as their primary investigator, Vito Colucci, testified that Sherman directed Colucci to find these persons. See HT 4/16:69-70; HT 4/17:108 (Sherman); HT 4/17:81 (Colucci); HT 4/23:15-16 (Throne).²⁰ Sherman also

¹⁹ Petitioner claims the habeas court's use of the word "pursue" indicates it did not base its finding on Sherman's supposed decision not to look for these men but rather on the extent of Sherman's efforts. Petitioner's interpretation is unreasonable. Not only did the habeas court characterize Sherman's supposed decision as an "impactful lack of judgment" it referred elsewhere to Sherman's "failure to investigate". MOD: 63, 71. Further, as discussed *infra*, the habeas court's reliance on an erroneous assumption made by this Court regarding the evidence before Judge Karazin makes clear that it found a failure to investigate, not a deficient investigation.

²⁰ As argued in the opening brief; RB: 90; although it appears the habeas court simply ignored this testimony rather than rejecting it, even if it had inexplicably chosen not to credit this undisputed testimony, it was not free to find the opposite fact established. *State v. Hart*, 221 Conn. 595, 605 (1992).

testified that he directed Colucci to attempt to obtain statements from these persons. HT 4/26: 105. This being so, the habeas court's determination that Sherman decided not to locate these three men is clearly erroneous and cannot stand.²¹

Petitioner argues, nevertheless, that the habeas court was entitled to rely on language in this Court's opinion in *Skakel v. State*, 295 Conn. 447, 513 (2010) in support of its determination. PB: 75-76. In particular, the habeas court relied on this Court's statement that "[n]o effort was made to locate Simpson and Grubin prior to or during trial." (Emphasis omitted). MOD:69; Appt. Pt 1 A-1007. That position is wrong for at least two reasons. First, it is clear beyond cavil that an appellate tribunal does not find facts. *Gould v. COC*, 301 Conn. 544, 566 (2011). This being so, this Court's reference to facts in its published opinion cannot legitimately be viewed as a "factual finding."²²

Second, this Court's statement in *Skakel v. State*, 295 Conn. at 513, that "[n]o effort was made to locate Simpson or Grubin prior to or during trial", does not accurately reflect the findings made by the trier of fact in the proceeding then under review. As pointed out in

²¹ Petitioner suggests a portion of Sherman's habeas testimony indicates he did not think it was important to find Simpson, Grubin and James. PB: 76. Actually, Sherman's statement that he thought it was important enough to "make the effort", but he never thought it was going to make a difference "*and as I sit here now, I still believe it.*" HT 4/16:69, indicates that even after learning the nature of the testimony related by James, Grubin and Simpson, Sherman did not believe it would have affected the result.

²² The two collateral estoppel cases cited by petitioner; PB: 75 n.100; do not stand for this proposition. The language in both *Barry v. Board of Education*, 132 Conn. App. 668 (2011) and *Jones v. COC*, 123 Conn. App. 307, *cert. denied*, 299 Conn. 904 (2010), refers to a lower court's required deference to the legal determinations of a superior tribunal. In *Barry*, the court stated merely that in deciding whether the claim before it had been previously litigated it would generally be bound the claim as characterized by the Second Circuit, which in turn had relied on factual findings of a lower court. By deferring to the court with the authority to find facts, the holding of *Barry* actually supports the Commissioner's argument herein.

As for *Jones*, although the Appellate Court stated that the habeas court was bound by the "factual conclusion arrived at in the petitioner's direct appeal"; 123 Conn. App. at 314 the conclusion to which it referred was actually the legal determination of sufficient evidence. Thus, *Jones* merely held that the legal determination of an appellate court binds a lower court. It did not, as petitioner suggests, authorize appellate courts to find facts.

the Commissioner's initial brief, Judge Karazin noted that Sherman had testified in the proceeding before him that he directed Colucci to find all three men; Judge Karazin also noted Colucci's testimony that he was directed to find only James. *Karazin* MOD: 5, 7; App. Pt. 2 A-1110, 1112. Judge Karazin did not resolve this dispute in the evidence.²³ Rather, he premised his holding on the fact that petitioner had not proven these men could not have been found in 2002 by the same methods used to find them in 2005. *Karazin*, MOD: 7; App. Pt 2 A-1112. This Court's statement in its 2010 opinion, therefore, is an inaccurate reflection of the relevant factual findings made in the new trial proceeding. As this Court has often noted, appellate tribunals are dependent on the facts found below; they are not equipped or authorized to settle evidentiary disputes:

Appellate courts never act as finders of fact. . . . When a witness presents conflicting testimony, a question of credibility arises that must be assessed by the trier of fact. . . . We cannot presume, in the absence of any indication by the habeas court, that it reasonably could have credited one version over another, or even that it construed [the witness'] comments as the petitioners do.

Gould v. COC, 301 Conn. at 566 (internal citations omitted).

Thus it is clear that the statement from this Court's prior opinion that petitioner contends supports the habeas court's determination is neither a finding of fact, nor even an accurate reflection of the facts found by the trier of fact in that prior proceeding. As noted in *Gould*, this Court was not in a position to resolve the conflict left unresolved by Judge Karazin. The habeas court erred in relying on this erroneous assumption instead of the undisputed evidence before it.

²³ Although Judge Karazin had no need to resolve this dispute, Colucci's new trial testimony that he was only directed to find one of the three men Coleman said may have been with him the night Skakel confessed is nonsensical and therefore suspect. Colucci offered no explanation, nor is one apparent on the record, as to why anyone would only search for one of the three, and if so, why James was the only one sought. Colucci's testimony in this proceeding that he had been directed to find all three is eminently more reasonable. Further it coincides with the habeas testimony of both Sherman and Throne and the prior testimony of Sherman. (Throne did not testify in the proceeding before Judge Karazin).

Further, in this proceeding, petitioner failed to present evidence regarding the extent of Colucci's efforts in attempting to locate these men, aside from Colucci's passing reference to his efforts to match thousands of "John Simpsons" with an approximate date of birth. Therefore the record provides no legitimate basis on which to find Colucci's investigatory efforts below the standard of reasonable competence.

Moreover, Colucci's testimony, although referring to only one of the three persons he was trying to locate, suggests he was dogged in his search. To the extent it illuminates his approach to his assignment in general, it suggest his efforts were not perfunctory and would qualify as within the range of reasonable competence. In addition, on cross examination, after reiterating that he was asked to find all three men, Colucci agreed that he "made an effort to do so." HT 4/19:99. Therefore, the evidence in this record, although not extensive, suggests the search performed by Colucci at Sherman's request was reasonably competent. At the very least, it provides no basis for rebutting the presumption of competence required by *Strickland*. *Strickland v. Washington*, 466 U.S. at 690.

Moreover, petitioner cannot rely on the simple fact that Colucci's efforts failed as proof that they were constitutionally deficient. *Strickland* does not require perfect representation; reasonable competence is all that is required. *Harrington v. Richter*, 131 S. Ct. at 791. Therefore, an unsuccessful outcome does not establish that the work performed was professionally unreasonable.²⁴

²⁴ Although petitioner does not argue that Judge Karazin's determination that this evidence could have been discovered in the exercise of due diligence is the equivalent of deficient performance under *Strickland*, he does assert that the Commissioner has taken irreconcilable positions with regard to the effect Judge Karazin's determinations should have in this proceeding. Specifically, he contends that the Commissioner's assertion that Judge Karazin's decision that this evidence was not newly-discovered does not demand a finding of incompetence is incompatible with his assertion that Judge Karazin's finding that this evidence would not have resulted in an acquittal on retrial should govern the prejudice inquiry herein. PB: 78 n.105. Once considered, however, these positions are easily harmonized. The Commissioner does not dispute Judge Karazin's determination that, because this evidence could have been discovered in 2002 by the same methods used to uncover it in 2005, petitioner failed to prove it was newly-discovered as required under

B. The habeas court erred in finding prejudice

1. The habeas court erred in contradicting Judge Karazin's assessment of the identical testimony

Petitioner argues that the habeas court did not err in discarding Judge Karazin's assessment of the materiality of the testimony offered by Grubin, James, and Simpson. In support of this assertion, he contends that the issue before Judge Karazin in the new trial proceeding was not identical to that before the habeas court. PB: 80. In addition, he posits

Asherman v. State, 202 Conn. 429, 434 (1987). The Commissioner contends, however, as argued in his initial brief, that this prior determination does not answer the question of whether counsel was reasonably competent. Simply because it has been proven that counsel *could have* discovered this evidence with due diligence does not mean that the failure to do so is professionally unreasonable. This latter determination requires a finding that *all reasonably competent attorneys would have found these witnesses* -- quite a different matter. For one thing, the petitioner in this proceeding, unlike in the prior one, must overcome the presumption of reasonable competence. A reasonably competent attorney may well try to uncover this evidence, and fail, as the evidence in this proceeding suggests happened. Moreover, *Strickland* requires this Court to consider factors not encompassed by the simple question of whether the evidence could have been discovered by due diligence, such as an attorney's reasonable determination that sufficient resources had been expended on the effort, or that time and money -- finite matters even in a well-financed defense such as this one -- would be better spent on other pursuits. Reasonably competent counsel is not required to track down every possibility, assert every conceivable defense, or do everything possible to locate potential witnesses whose ultimate value is unknown. *Crawford v. COC*, 285 Conn. 585, 599 (2008). As the evidence suggests here, a reasonably competent attorney, *whose client did not direct him to find these witnesses*, might reasonably assume these potential witnesses were unlikely to uncover helpful evidence, and decide that sufficient resources had been expended in their pursuit.

As to the prejudice analysis, however, the situation is different. There is no difference between the materiality component of the *Asherman* test and that required under *Strickland*. See RB:95. Further, although *Strickland* does not impose a preponderance standard as does *Asherman*, the difference between the preponderance of the evidence standard and *Strickland's* "reasonable probability" is slight and will matter in only the rarest of cases. *Harrington v. Richter*, 131 S.Ct. at 792. Therefore, as argued in the initial brief and *infra*, although the slight difference in the standard of proof required by the two tests makes it theoretically possible for petitioner to carry his burden of proof here although he failed to do so under the preponderance standard, he should have been required to do so using Judge Karazin's findings as a starting point. The habeas court erred in disregarding Judge Karazin's findings and relieving the petitioner of what should have been an all-but-impossible task -- proving prejudice while accepting Judge Karazin's determinations as a given.

that the habeas court correctly ignored Judge Karazin's determination because it was embedded in what petitioner characterizes as "dicta". PB: 79. Finally, he claims that principles of collateral estoppel should operate differently in the habeas context. PB: 83.

As to the alleged difference between the issue before Judge Karazin and that facing the habeas court, petitioner is wrong to suggest that because the two actions were premised on different legal claims—the first being a claim of newly-discovered evidence and this, the second, on ineffective assistance of counsel – the doctrine of collateral estoppel does not apply. In so arguing, petitioner confuses *res judicata* with its cousin, collateral estoppel. Although these doctrines are related, their difference is important here. If the legal claim were the same in these two proceedings, *res judicata* would bar presentation of the claim in its entirety. See e.g. *Brown v. COC*, 44 Conn. App. 746 (1997) (because petitioner had previously litigated a claim of ineffective assistance of counsel in a petition for new trial proceeding, *res judicata* prevented its reassertion in a subsequent habeas.)

Here, the Commissioner concedes that the legal claims raised in the prior action and this are different. Nevertheless, the two actions share certain core issues. One of which -- the materiality and impeachment value of the new trial testimony of Simpson, James and Grubin-- was decided by Judge Karazin in the prior proceeding. The Commissioner's point, simply put, is that because petitioner failed to convince Judge Karazin that this testimony was material and would have resulted in a different verdict in a new trial, he should have been estopped from trying to convince a second court to reach a contrary conclusion.

As this Court explained in *State v. Wilson*, 180 Conn. 481, 485 (1980), "[c]ollateral estoppel is that aspect of the doctrine of *res judicata* which serves to estop the relitigation by the parties and their privies of *any right, fact or legal matter* which is put in issue and has been once determined by a valid and final judgment of a court of competent jurisdiction." (Emphasis added.) Thus, collateral estoppel prohibits the relitigation of a matter previously determined, but it does not prevent the entire action from going forward if the action can be maintained despite the inability to challenge certain settled matters.

Applying this analysis here, petitioner should have been estopped from contesting the matters fully litigated and determined in the prior proceeding. Because petitioner's *Strickland* claim was not barred (having not been previously litigated) petitioner could proceed on his claim, but he should have been required to carry his burden using Judge Karazin's pertinent determinations as a starting point.

The Commissioner has taken just this approach to Judge Karazin's determinations on the issue of whether the evidence could have been discovered with due diligence. The Commissioner does not contest Judge Karazin's findings, but rather argues that whether this evidence could have been found with the exercise of due diligence does not answer the question of whether all reasonably competent attorneys would have found it. Nor does it establish whether the methods actually employed and the efforts actually exerted prior to trial in an attempt to uncover this evidence were constitutionally inadequate.²⁵ Keeping in

²⁵ As argued previously; see *supra* n. 25; the difference between evidence which could have been discovered through the exercise of due diligence, and the determination that counsel's investigatory efforts to find certain evidence were constitutionally inadequate is an important one, and one that has significance in this case. Under the newly discovered evidence test, evidence is *not* newly discovered if it could have been found prior to trial through the exercise of "due diligence". On the other hand, if it would have taken extraordinary efforts to uncover the evidence, beyond that required by due diligence, then the evidence will be deemed "newly discovered." In the new trial proceeding, petitioner attempted to prove that the methods used by Investigator Weeks in 2005 to find these witnesses were so extraordinary they exceeded the scope of due diligence. In so doing, petitioner had no reason to, and hence did not, develop evidence about the extent of Colucci's efforts to locate these witnesses prior to trial. In finding against petitioner on this point, Judge Karazin rejected petitioner's claim that Weeks' methods were beyond the bounds of due diligence. Judge Karazin's determination, however, says nothing about whether the search *Colucci* undertook was reasonably competent.

Moreover, just as there are many ways in which an attorney can render reasonably competent representation, and no two attorneys may do so in exactly the same way, it follows that there are many ways a competent criminal investigator can go about conducting a search for missing witnesses. The fact that two investigators may approach their tasks differently does not establish that either's approach is professionally incompetent. Thus, although Colucci apparently did not adopt the same methods for searching for these witnesses as did Weeks, without knowing precisely what he did in his quest to find them, there is no basis on which to evaluate whether his efforts fell within the

mind the presumption of competence and petitioner's burden of proof, and the fact, argued *supra*, that petitioner failed to present any evidence below indicating Colucci's efforts were deficient, it is clear that the petitioner failed to carry his burden under *Strickland*.

On the issue of prejudice however, both the standard applicable in a new trial proceeding and found in *Strickland* require a finding of materiality. See RB: 98-100. Further, as recognized in *Harrington v. Richter*, 131 S.Ct. at 792, while *Strickland's* required showing that it is "reasonably likely" the result would have been different is not identical to the preponderance of the evidence standard governing a new trial proceeding, "the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id.* Petitioner has offered no evidence or argument proving this case is just such a rare case. He has thus failed to overcome Judge Karazin's determinations that this evidence was not material and would not likely lead to an acquittal in a new trial.

As this Court has noted: "It would be a violation of the fundamental principles and purposes of collateral estoppel for this court to reexamine the identical factual situation to redetermine a matter of law that has already once been fully litigated by the same parties and finally decided." *State v. Wilson*, 180 Conn. at 487. That is what occurred below: the habeas court reexamined, not only the identical factual situation, *but precisely the same evidence*, and redetermined a matter fully litigated by the same parties and finally decided.²⁶

range of reasonable competence.

²⁶ Whether Judge Karazin's prior determinations; see RB:98-100; are considered matters of law, fact, or mixed questions of law and fact is not determinative of the applicability of estoppel principles. *State v. Wilson*, 180 Conn. at 485. What is important is that the matter was fully litigated and finally decided. Further, as argued in the Commissioner's initial brief, the fact that this Court did not find it necessary to review this aspect of Judge Karazin's decision does not undermine the preclusive effect of his determinations. RB:98. Neither a pending appeal nor an appeal affirming the judgment eradicates the preclusive effect of the trial court judgment. *Enfield Federal Savings & Loan Assn. v. Bissell*, 184 Conn. 569, 573 (1981); *LeBow v. Rubin*, 95 Conn. App. 454, 467, *cert. denied*,

Nevertheless, petitioner argues that Judge Karazin's determination of materiality and whether the new evidence would likely result in a different verdict was "dicta", and therefore not properly the subject of estoppel. PB: 79. Petitioner is wrong both in his characterization of the prior holding and in the effect an alternative holding has on the application of collateral estoppel. As argued previously; RB: 98-100; in order to prevail in the new trial proceeding, petitioner was tasked with proving both that the evidence was newly-discovered and that it would likely lead to an acquittal in a retrial. Integral to the determination of the second prong was whether the evidence was material and noncumulative. *Asherman v. State*, 202 Conn. at 434. All aspects of petitioner's burden were fully litigated in the prior proceeding. Further, Judge Karazin's Memorandum leaves no doubt that he gave all aspects of the *Asherman* test his careful consideration. See *Karazin MOD*, App. Pt 2 at 1106-1141. In such circumstances, to call Judge Karazin's determination on this core aspect of petitioner's burden "dicta" is simply wrong.

Moreover, it must be remembered that the reason why collateral estoppel applies only to matters that are deemed necessary to the judgement is to ensure that the matter was fully litigated and carefully considered. *Jean Alexander Cosmetics, Inc., v. L'Oreal USA, Inc.*, 458 F.3d 244, 250 (3d Cir. 2006), *cert. denied*, 549 U.S. 1305 (2007). As that is the case here, there is no reason not to accord both aspects of Judge Karazin's ruling preclusive effect.

More, to say that, because petitioner's failure to sustain either aspect of his burden in the new trial proceeding was fatal to his claim, the decision on one aspect of that burden is not "necessary" and should not be given preclusive effect means that collateral estoppel cannot be applied any time a litigant fails to sustain all of his multi-prong burdens. If one alternative is viewed as nonessential, the other is also. Thus, failure to sustain a multi-prong burden will mean that both (or all) aspects of the court's determination are open to

280 Conn. 933 (2006); *Salem Park, Inc. v. Town of Salem*, 149 Conn. 141, 144 (1961).

relitigation. Such a result makes no sense. Further, it violates the principle that collateral estoppel should be applied, not mechanistically, but with the aim of furthering its underlying policies. *In re Ross*, 272 Conn. 653, 662 (2005).

Finally, petitioner contends that collateral estoppel should not be applied to a habeas case, or at least should be applied in some unspecified but nevertheless different way. PB: 82-84. Nothing supports this assertion. Petitioner relies principally on *Negron v. Warden*, 180 Conn. 153 (1980), *Williams v. COC*, 100 Conn. App. 94, *cert. denied*, 282 Conn. 914 (2007) and *Kearney v. COC*, 113 Conn. App. 223 (2009), for this proposition. These cases, properly read, do not advance petitioner's argument. Moreover, while our case law has embraced limitations on *res judicata*, based on both our Practice Book provisions governing habeas corpus and a general caution in closing avenues to challenge a conviction, petitioner has not established that either limitation should operate here.

In *Negron v. Warden*, *supra*, this Court held that a second habeas corpus action was not barred because, while both the first and the second action concerned the effect of a *nolle prosequi* on a fugitive from justice warrant, the distinct legal claim being raised in the second action ascribed a different legal effect to the nolle. In the first, petitioner claimed that the nolle deprived New York of the authority to receive him into custody under the Uniform Criminal Extradition Act. In the second, he claimed Connecticut was barred from surrendering him to New York because of an alleged violation of Connecticut rules and practices. *Id.* at 163. This Court appropriately held that although the effect of the nolle under the extradition statute had been litigated, its effect in light of Connecticut rules had not. Thus, *res judicata* did not bar the second habeas action. *Negron*, however, does not defeat Commissioner's argument on collateral estoppel. Importantly, *Negron* did not consider whether the parties in the second action could relitigate the issue of whether a fugitive from justice warrant had issued, or whether it had been nolle-- issues presumably settled in the first action and hence not open to dispute in the second. If it had, then it would have been opining on a similar application of collateral estoppel to that advanced herein.

Similarly, the Appellate Court in *Williams v. COC*, *supra*, while framing the issue as one involving collateral estoppel, actually applied a *res judicata* analysis. In *Williams*, the court analyzed and compared the *legal standards* for a successful claim of newly-discovered evidence and of ineffective assistance. The court held:

In comparing these standards, we conclude that they are different Specifically, in a petition for a new trial made on the basis of newly discovered evidence, the petitioner bears the burden to prove, inter alia, due diligence by demonstrating that the proffered evidence is newly discovered such that it could not have been discovered by reasonable investigation. . . . Conversely, in an ineffective assistance of counsel claim made on the basis of counsel's inadequate investigation, the petitioner bears the burden to prove, inter alia, *lack* of due diligence by showing that his trial counsel's investigation was inadequate such that it fell below an objective standard of reasonableness. . . .

Williams, 100 Conn. App. at 103-04. (Footnote and internal citations omitted). Thus, it is clear that *Williams* was considering whether the prior adjudication involved the same legal claims. Had the court actually been deciding a collateral estoppel issue, it would have been asked to decide whether the parties could relitigate the prior determination that the allegedly new evidence – from a witness named Lisbon—could have been discovered despite the fact Lisbon had moved following a fire, by contacting the Red Cross, or by checking to see if he had filed a change of address with the post office. The previous court having heard testimony and apparently found that these methods would have been successful in finding Lisbon, the parties in the habeas action would have been estopped from contesting these determinations.

Finally, *Kearney v. COC*, *supra*, recognized that the application of *res judicata* in the habeas context is narrowed in two respects. First, under our case law, *res judicata* reaches only claims actually litigated in a prior proceeding. It does not bar claims that could have been litigated in connection with the previous cause of action. *Johnson v. COC*, 288 Conn. 53, 67 (2008), *overruled on other grounds*, *State v. Elson*, 311 Conn. 726 (2014). Second, under Practice Book §23-29 a judicial authority may dismiss a petition, if the petition presents the same ground as a prior petition *unless it states new facts or proffers new*

evidence not reasonably available at the time of the prior petition. Thus, under the Practice Book, the same claim or ground may be brought in a subsequent petition if it is premised on new facts or evidence not reasonably available at the time of the prior petition.

Importantly, both of these limitations operate to ensure that a habeas petitioner is not deprived of an opportunity to litigate a claim not previously raised or a claim, that although previously raised, might not have been accurately adjudicated because of the unavailability of key evidence at the time of the prior proceeding.

Neither of these concerns is implicated here. Petitioner was not deprived of his opportunity to litigate his ineffective assistance of counsel claim. Further, petitioner did not contend that certain key evidence relating to the materiality of Simpson, James, and Grubin was unavailable to him at the time of the petition for new trial proceeding, thereby casting doubt on the accuracy and reliability of Judge Karazin's determination. In fact, petitioner offered nothing new on this issue, choosing instead to merely proffer their prior testimony to a second judge in the hopes of a different outcome. Thus, even assuming that the habeas context imposes the same limitations on collateral estoppel as it does on *res judicata*, none of the interests behind those limitations is present here. This being so, society's interests in promoting finality and preventing inconsistent determinations should have prevailed. As one commentator has noted:

At some point litigation must end. Some parties, perhaps considering the litigation a matter of principle or hoping to wear down their adversaries would litigate forever if given the opportunity. Apart from notions of economy, the judicial system would risk the embarrassment of a later decision contradicting an earlier. The dominant characteristic of Anglo-American law is its unity. Cases should not be the personal decisions of a single court; rather, they should reflect the accumulation of opinion and judicial thinking. Two courts disagreeing on the application of law to identical facts upsets that unity. The integrity of judicial decision-making would be risked at every relitigation.

Buckley, Colin Hugh, *Issue Preclusion and Issues of Law; a Doctrinal Framework Based on Rules of Recognition, Jurisdiction and Legal History*, 24 Hous. L. Rev. 875 (1987).

2. Petitioner failed to carry his burden of proving prejudice; the habeas court erred in finding otherwise

Petitioner argues that he carried his burden of proving prejudice. In support of this contention, he argues that this Court should adopt the habeas court's view of the new trial evidence over Judge Karazin's contrary determination. He then asks this Court to consider that evidence in light of the evidence produced at the criminal trial and argues that the new trial evidence creates a reasonable probability the jury would have rejected Coleman's testimony, which in turn creates a reasonable probability of an acquittal. PB: 84-91.

Petitioner's argument regarding prejudice cannot withstand scrutiny. As argued extensively in the opening brief; RB: 100-109; if the new trial evidence is properly viewed in light of the strength of the state's case, particularly in view of the multitude of witnesses who provided evidence of petitioner's admissions and confessions, and the extent to which these witnesses' testimony dovetailed with each other and with other evidence in the case, it is apparent that petitioner did not and cannot establish a reasonable probability of a different outcome, even assuming the rejection of Coleman's testimony. Moreover, given the fact that Coleman was corroborated at trial by two witnesses, and given the extent to which Coleman's testimony coincided with other evidence in the case, petitioner failed to prove that the addition of the new trial evidence would likely have led the jury to reject the evidence Coleman offered.

Before turning to an assessment of the new trial evidence in light of the criminal trial evidence, it important to recognize that petitioner's approach to the state's evidence is slanted and fails to accord respect to the jury's verdict. By presenting the evidence in the manner he does, petitioner essentially invites this Court to consider the criminal trial evidence, not in light of the jury's verdict, but in its worst possible light, drawing all inferences against the jury's finding. In addition, petitioner argues against the credibility of state's witnesses, sometimes treating as "fact" allegations that have no basis in the record. PB:88-91.

Petitioner's approach to the criminal trial evidence must be rejected. Aside from the possible impact of the new trial evidence on Coleman's testimony, which will be discussed

infra, petitioner has offered this Court no legitimate basis on which to reject the testimony of the rest of the state's witnesses. Moreover, if trial evidence is viewed in the manner promoted by petitioner, few verdicts would withstand scrutiny. By presenting the state's evidence in its worst possible light, and inviting this Court to draw all inferences in favor of petitioner's innocence, petitioner is arguing against the rationality of the jury's verdict. He invites this Court to assume the state's witnesses were incredible, despite the fact that the jury—the body tasked with making that determination --has found them credible. Under this approach even a conviction such as this, supported by three confessions and a multitude of admissions, as well as strong evidence of opportunity, consciousness of guilt, and motive, would appear weak. Verdicts based on lesser evidence – of which there are many-- would never survive.

In addition, petitioner's suggested method for determining prejudice is contrary to *Strickland's* mandate. *Strickland* teaches that the determination of prejudice must be made assuming a rational and reasonable fact finder:

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.

466 U.S. at 694.

In this simple statement, *Strickland* recognizes that the jury's decision must be viewed as fair and fairly determined. Further, *Strickland* states that the proceeding under review carries with it a "strong presumption of reliability". *Id.* at 696. In addition, *Strickland* recognizes that many of the jury's findings will be unaffected—and must be treated as unaffected—by whatever professionally unreasonable lapse or lapses are found. *Id.*, at 695-96.

Hence, this Court must presume the jury credited the evidence and inferences consistent with petitioner's guilt. Further, although it would not have been necessary for the jury to find every single state's witness credible in order to find petitioner guilty, because we cannot know which witnesses it credited, this Court must credit the evidence offered by *all*

state's witnesses, unless, as petitioner contends as to Coleman, a particular witness' credibility is reasonably affected by the particular lapse at issue. This Court must also presume that the jury rejected evidence and inferences consistent with petitioner's innocence. To do anything else would be contrary to the presumption of rationality and reliability to which the jury's verdict is entitled. Moreover, petitioner's approach would invite—indeed *require* --courts to relitigate the entire criminal case, including credibility of all the witnesses, in order to resolve claims of ineffectiveness. Nothing in *Strickland* permits, let alone mandates such an absurd result.²⁷

Viewing the criminal trial evidence with these principles in mind, many of petitioner's assertions fall away. For instance, petitioner's contention that Coleman was the only witness to state unequivocally that petitioner confessed to this murder; PB: 84; is not in accord with the evidence. As the record indisputably shows, both Higgins and Ridge provided evidence of unequivocal confessions. RB: 12-15. The jury was fully entitled to credit these confessions. More, because the evidence petitioner contends Sherman should have produced relates solely to Coleman's credibility, it provides no legitimate basis on which to discard the confessions contained in Higgins' and Ridge's testimony. The jury's presumed reliance on this evidence is unaffected by any failure to sufficiently impeach

²⁷ Despite *Strickland's* clear directive, petitioner argues "once reached, the prejudice prong assumes the prior proceedings were not fair because trial counsel performed deficiently." PB:81 n.106. Contrary to petitioner's contention, a reviewing court does not presume that the underlying proceeding was defective merely because petitioner has established an instance of professional incompetence. The presumption of reliability required by *Strickland* remains unless and until petitioner carries his burden of proof on *both* the performance and prejudice prong. This is so because, as *Strickland* teaches, a finding of deficient performance by itself is insufficient to establish a breakdown of the adversarial process; it must be a sufficiently prejudicial lapse for that to occur. *Id.* at 693 (It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding."). Thus, contrary to petitioner's suggestion, success on the first prong does not mean that petitioner is aided by a presumption of unreliability in attempting to carry his burden on the second.

Coleman.

Therefore, this Court must resist petitioner's invitation to dismiss Higgins' testimony as incredible²⁸, and to credit Ridge's testimony over her *Whalen* statement containing

²⁸ As to Higgins, petitioner presents a false picture of his testimony, and argues that he was motivated to testify by the prospect of a reward. PB: 90. The record does not support petitioner's assertions. Despite Sherman's extensive cross on this issue, Sherman was unable to develop any evidence that Higgins came forward because of the reward. Higgins testified that he *never* contacted authorities to let them know of petitioner's confession. CT 5/16: 220, 222. Further, even when authorities contacted him after an Elan alumnus provided his name, he initially denied having any information of value. *Id.*: 193-4, 195, 225-26. He explained that he "had no desire whatsoever to be involved in this." *Id.*: 183-84. Higgins testified that he decided to be fully cooperative only after speaking with Dorothy Moxley. He felt that she and John Moxley were the only ones who had the right to ask him to testify. When Mrs. Moxley urged him to do so, he did. *Id.*: 185-86, 203-4. Further, Higgins stated that he told a fellow Elan resident, Harry Kranick, about petitioner's confession the night it occurred or the next day, and later told Kranick's friend, Chuck Seigen. *Id.*: 187, 190, 195. He stated that although he could not remember specific conversations, he probably talked to them about it through the years. *Id.*: 220, 222. When, about six or eight years prior to his testimony, Kranick told him about a Peoples Magazine article that mentioned a reward, he did nothing. *Id.*: 186, 222, 227-28. And, when contacted *years later* by law enforcement, he initially denied having any particularly useful information. Finally, Higgins testified that he had not applied for a reward and had no intention of doing so. *Id.*: 229-30. Thus, despite Sherman's valiant efforts, he was unable to develop any testimony indicating Higgins was motivated to come forward by a reward. The testimony, in fact, is directly to the contrary: he did not come forward even after finding out about the reward, and he initially denied having information when contacted.

Petitioner's portrayal of the heart of Higgins testimony is also skewed and must be rejected. The record reveals the following: Higgins testified that one night when both he and Skakel had obtained the position of "night owl" at Elan, they were sitting on a porch outside a dormitory all night talking. Their official job was to take periodic "head counts" in the dormitory to ensure that no one ran away. CT 5/16: 180. Higgins said that because the duty lasted all night long, they probably talked about all kinds of things, including why each of them was in Elan. CT 5/16: 181. Skakel began to speak about a murder. Skakel told Higgins there was a party at his house. He told Higgins that "later", he was in his garage "going through some golf clubs." He related that he was "running through some woods. He had a golf club in his hands. He looked up. He saw pine trees. The next thing he remembers is that he woke up in his house." CT 5/16: 181-82. Skakel also mentioned that this happened around Halloween. *Id.* : 211. Higgins explained that although his testimony took only a few minutes, the conversation he described actually took "quite awhile." CT 5/16: 18, 209 (two hours). He described Skakel during all of this as quite emotional, "crying and sobbing." *Id.* He stated that during this conversation, "through a progression of statements" Skakel said "that he didn't know whether he did it, that he may have done it, he didn't know

petitioner's confession. See PB: 88-91.²⁹ Neither this Court nor the habeas court is equipped or authorized to second-guess credibility determinations made by the jury in 2002. To do so is not only contrary to the presumption of reliability and rationality that must attach to the jury's verdict, but it also ignores *Strickland's* teaching that in assessing prejudice, the jury's unaffected findings must stand.

Thus, even if Coleman's testimony were to be completely discounted in light of the new trial testimony, the state's evidence of guilt would remain strong. Because petitioner's two other confessions, as well as the multitude of other incriminatory statements by the petitioner, the evidence of opportunity and motive, the consciousness of guilt evidence, and petitioner's recorded statement to Hoffman placing himself at the scene of the brutal

what happened, eventually he came to the point that he did do it, he must have done it, I did it." CT 5/16:182. Higgins stated that because there was no one there but Skakel and himself at the time, he did not report it to the authorities at Elan, saying, "the less you did to stand out the better off you were." CT 5/16: 218. Had it occurred in front of others, he probably would have reported it to avoid getting into "pretty big trouble." CT 5/16: 219.

²⁹ As to Ridge, petitioner suggests the habeas court chose to credit her denials at trial rather than her *Whalen* statement. PB: 90. There are two problems with this assertion. First, the habeas court never mentioned her testimony, so there is no basis for petitioner's assertion as to what the court credited. Second, had the habeas court decided what to credit from the criminal trial, it would have acted *ultra vires*: it had no authority to override the jury's determination of facts and the credibility of witnesses on matters unaffected by the professional lapses at issue.

Even if this Court is tempted to look at the whole of Ridge's testimony to determine its plausibility, her denials on the stand are manifestly implausible. In order to fully appreciate this, it is best to review her trial testimony and, at the appropriate juncture, listen to the taped *Whalen* statement, while reading the transcript of that statement, as did the jury. See EPP/Main Menu/Audio/GeranneRidge; Appt. Pt 2:A1210-1316(transcript of taped statement). In her trial testimony, Ridge asserts that she made things up to tell Attanian because "he was so inquisitive about the case" and "he wouldn't let it die". CT 5/21: 23, 69-70. In reality, the phone call reveals that Ridge is the one who was talkative; Attanian asked very little. In fact, when their conversation was interrupted by another call, Ridge called him back. Finally, her assertion that she got most of the information she relayed about Skakel's confession from certain magazines she brought with her to court was shown to be false. When asked to identify where in the articles the specific information she had relayed appeared—that he was doing mind-altering drugs that night, that he was in a tree masturbating and spying on her, that when he found out his brother had sex with her he was so screwed up and violent that he did that to her—she was unable to do so. CT 5/21:80, 110-117.

assault looking to get a kiss from Martha are unaffected by the evidence offered to impeach Coleman, petitioner has not carried his burden of proving prejudice. See RB: 4-21; 76-77; 100-109.

Further, as argued in the initial brief, given the slight impact of the impeachment evidence produced at the new trial proceeding, and the substantial corroboration of Coleman at the criminal trial, petitioner failed to prove that the jury would have rejected evidence of petitioner's confession to Coleman even if they had heard these witnesses. RB:92-109. Coleman testified that the petitioner shared five details of the crime with him that correspond to other evidence in the case. Specifically, Coleman stated the petitioner told him the murder occurred in a wooded area, that he was trying to make advances toward the victim and she spurned his advances, that the murder weapon was a golf club, that he hit her so hard the club broke, and that he masturbated on the body. CT 5/17: 137-38. The "wooded area" corresponds to the area where the body was found and near where the major assault occurred. It is also a detail petitioner shared with Higgins, telling him he remembered "running through the woods" and "seeing pine trees." CT 5/16:181-82. The detail about his advances being spurned fits neatly with the state's evidence of motive—petitioner's infatuation with Martha and jealousy over her more amorous relationship with his brother. Further, it corresponds with Ridge's testimony that he was "so violent" and "so screwed up" after finding out his brother had sex with his girlfriend that he hit her with a golf club. Coleman also reported the petitioner told him the murder weapon was a golf club – hardly a typical murder weapon-- and that it broke, something only the perpetrator would likely know. Finally, petitioner told Coleman that he masturbated on the body. This particular detail fits nicely with Dr. Henry Lee's testimony that the bloody smears on the victim's inner thighs are consistent with bloody hands trying to pry her legs apart. CT5/8:149. It is also mirrored in the testimony of Meredith, Pugh, Ridge, and Hoffman. Each of these witnesses testified that petitioner told them he masturbated in a tree near the crime scene, and to Pugh, the tree under which Moxley's

body was found. As argued in the previous brief, Coleman had no connection to these other witnesses, and the record contains no explanation as to how Coleman would have known that masturbation figured in this case at all if not for petitioner's confession to him.

Further, as also argued in the main brief, Coleman's testimony was corroborated by his widow, Elizabeth Coleman, and by Jennifer Pease. See RB: 13-14, 106. Both women testified that Coleman had told them about petitioner's confession long before the criminal trial, grand jury investigation, or even the reopening of the investigation in the early 1990s. CT 5/20:91 (Elizabeth Coleman, 1986); CT 5/29: 102-3. (Jennifer Pease, Summer of 1979). Petitioner tries to undermine Pease's credibility by questioning the circumstances under which she contacted the state during trial. Petitioner also opines that Pease's testimony is "suspect" and "tainted". PB:13-14 n.35, 67. In reality, the jury had good reason to find Pease believable, and petitioner has not been able to develop anything since the trial to shake that assessment.

At the time of her testimony, Pease was an Assistant Branch Manager for the Bureau of Motor Vehicles in Maine. CT 5/29:100. She testified that she was sent to Elan at fourteen in 1978. In the spring of 1979, Pease stated that she met Greg Coleman, a fellow teenage resident. *Id.*:102. During the summer that followed, Coleman was assigned by the administration of Elan to be her personal "overseer" because she was perceived as an escape risk. *Id.*:103. During a private conversation late at night, Pease confided in Coleman her plans to escape. Coleman advised her not to attempt it, explaining that she would just end up like "Michael and they would end up beating the crap out of me." *Id.*:105. He then stated that he thought Michael was sick. When she asked why, he stated that Skakel had told him he "beat some girl's head in and killed her with a golf club." *Id.*:108.

Pease testified, at the criminal trial, that she contacted the State's Attorneys Office "last Tuesday" with this information. She explained that she was following reports of the trial on line, and when she saw that Coleman's widow had testified that Coleman had told her of Skakel's confession, she realized the information she had might be of use. CT 5/29:

109-11, 116. She also explained that she was angered by the way another Elan witness, Alice Dunn, had portrayed herself on the stand. Pease had very negative feelings about Dunn; she considered her cruel and abusive, and gave a couple of examples of the abuse she had witnessed Dunn engage in at Elan. CT 5/29:130-32.

Pease's testimony, therefore, offers significant corroboration of Coleman. Although petitioner has insinuated that Coleman (and by extension, his widow) were motivated by the reward in this case; PB: 66-67; petitioner failed to introduce any evidence indicating Coleman even knew about a reward at the time he first came to the attention of law enforcement.³⁰ Importantly, however, the fact that Coleman told Pease about Skakel's confession when they were both isolated teenage inmates at Elan, long before he would have had any knowledge of a reward, refutes any suggestion that Coleman fabricated the confession to claim a reward. Thus, the jury would have good reason to credit Coleman despite the new trial testimony on which petitioner relies.³¹ In such circumstances,

³⁰ The mere fact that Coleman may have had debts, as petitioner contends, does not show that he knew about the reward prior to coming forward or that it motivated him in any respect. See PB: 66-67. Coleman was not asked about the reward during his probable cause testimony which was introduced at trial. See CT 5/17: 132-99; CT 5/20:9-85.

He was, however, asked if he expected to receive anything in exchange for his testimony. Coleman responded that although he had asked the state for \$1200 to help with housing and other expenses, his request had been denied. See CT 5/17:22-26; 5/20:33-36. Coleman also asserted that he had asked for help in reducing his sentence, and that request had been denied as well. Further, although the state did house him apart from the general prison population when he came to Connecticut to testify on one occasion, Coleman stated that other than that, he had never benefited in any respect by testifying. CT 5/20:56, 60-61.

As to the circumstances which brought him to the attention of law enforcement, Coleman stated that in 1998, after watching a television show about this case that was leaning toward Tommy as the killer, he called the station. CT 5/17: 165-66. After that, law enforcement contacted him. CT 5/20: 52. He explained that he was motivated to come forward by seeing Mrs. Moxley and realizing her pain, and also by the fact that his son's mother had been killed by a serial killer. He did not report what he knew prior to that time because he thought the case was closed and "whoever had to know knew and wasn't going to be able to do anything about it." CT 5/20: 30, 27-32.

³¹ In addition to attempting to portray Coleman as an unlikeable and untrustworthy person, petitioner argues that the negative opinions held by the new trial witnesses

petitioner has not carried his burden of proving prejudice.

As to the value of the new trial testimony itself, petitioner argues that Coleman and Simpson cannot have been talking about different incidents, as respondent has argued the evidence suggests, because Coleman would have mentioned a second confession had one occurred. PB: 85-86.³² In so doing, petitioner seems to recognize that Simpson's testimony

regarding Coleman bolster the significance of their testimony and contribute to the finding of prejudice made by the habeas court. PB: 69-70. As the Commissioner argued earlier, none of this would be admissible in a criminal trial. RB: 105-06. Because these witnesses formed their impressions of Coleman decades prior to trial, they were irrelevant to determining Coleman's credibility at the time of his testimony – which was the only relevant time period. Furthermore, Pease's testimony highlights the limited utility of any such testimony. Pease testified that she confided in Coleman because she trusted him, thought he was a "good guy", in fact "one of the good people at Elan", who was "nice to her and nice to everyone." CT 5/29: 106, 118-19; 121. In contrast, she thought Dunn was cruel and abusive. CT 5/29:130. Considering the atmosphere of Elan, where residents were required to guard each other, administer discipline, report on each other, and participate in some of the bizarre and horrific practices of the school, – it is not surprising that many former residents would have negative feelings about their fellows. The trial testimony certainly did not portray Elan as a place that encouraged trust, empathy, and friendship among its residents. This would have been obvious to the jurors and, in the application of their collective common sense, they would likely have dismissed as unimportant any testimony about one former resident's negative feelings toward another.

Petitioner also argues that finding additional impeachment evidence was especially important here because Coleman's death prior to trial meant the jury would not view his demeanor while testifying. PB:65. This Court should resist petitioner's invitation to speculate on whether Coleman's absence inured to the state's benefit or the petitioner's. Despite petitioner's assumptions about Coleman's demeanor, it must be remembered that three different superior court judges were comfortable enough with his credibility to rest their probable cause determinations, at least in part, on his testimony. Judges Thim, Dennis and Kavanewsky were each able to assess Coleman's demeanor while testifying; none found him so lacking in credibility that he or she dismissed his testimony. Further, while Coleman's troubled history certainly provided fodder for Sherman's cross-examination, his responses appear to be straightforward. He did not evade Sherman's questioning or try to hide his many failings. A fair reading of his testimony, therefore, does not support the extremely negative inferences regarding Coleman's demeanor petitioner suggests this Court should draw.

³² Coleman testified he recalled one other instance in which petitioner confessed. It was during a group session, where petitioner was "talking about his guilt, about this situation" and he was instructed to say he was sorry to get "in touch with his feelings." CT 5/17:139-40.

contains at least an adoptive admission by the petitioner if not an explicit confession. See RB:103-04. Nevertheless, as the Commissioner argued in his initial brief, the fact remains that the conversation Simpson recalls seems to assume both he and Coleman were aware of petitioner's connection to the murder of a "girl". RB: 101-02. As argued previously, because the conversation Coleman recalled occurred just prior to the general meeting, which the criminal trial testimony indicated was the first time the murder was openly discussed, it appears that Simpson was recalling a later conversation. *Id.* Further, it must be remembered that Coleman was uncertain who was with him the night the petitioner confessed. Thus, Coleman may have been mistaken when he named either Simpson, Grubin, and James as the person who might have been present. Therefore, if Simpson is indeed describing a different occasion, Coleman might have forgotten the incident or simply not been aware that petitioner's "shit-eating grin" could be considered an adoptive admission.

In any event, even assuming Simpson and Coleman are describing the same event, Simpson's testimony only partially impeaches Coleman. Significantly, it also corroborates him. Further as to the crux of the issue— what petitioner actually said to Coleman— Simpson's testimony is of little help. As he admitted, his deafness prevented him from hearing what petitioner actually said. Therefore, as Judge Karazin found, Simpson's testimony is not material and is unlikely to have changed the outcome of the trial.

The habeas court and the petitioner have both over-valued the new trial testimony and undervalued the strength of the state's case. When the evidence is properly assessed, it is apparent that petitioner has not carried his burden of proving a reasonable probability of a different outcome based on the new trial testimony.

IV. THE HABEAS COURT ERRED IN FINDING PETITIONER'S DEFENSE TEAM DEFICIENT IN FAILING TO PURSUE THE MORGANTI SKETCH AS PART OF ITS THIRD PARTY CULPABILITY DEFENSE BASED ON KENNETH LITTLETON

A. The Habeas Court Erroneously Reasoned That This Court Already Conclusively Determined That The Defense Team Was Deficient, Under The First *Strickland* Prong, In Failing To Obtain The Morganti Sketch

The habeas court reasoned that the issue of whether the defense team was

incompetent for failing to obtain the Morganti sketch was conclusively decided by this Court already because on direct appeal, this Court concluded that the defense team “was on notice of the existence of the composite drawing,” sufficient to defeat the petitioner’s *Brady* claim; *State v. Skakel*, 276 Conn. 633, 702, *cert. denied*, 549 U.S. 1030 (2006); and further concluded, on appeal from the petition for a new trial, that the sketch “was not newly discovered because the petitioner did not meet his burden of proving that this evidence would not have been available for use at trial if due diligence had been exercised;” *Skakel v. State*, 295 Conn. at 522. See RB: 114-16. The respondent argues that the habeas court erred in so reasoning. *Id.* In response, the petitioner expends little effort defending the habeas court’s erroneous rationale, apart from asserting that the respondent’s argument that the habeas court was not bound by this Court’s prior decisions on the direct appeal and the appeal from the petition for a new trial allegedly “contradicts” the respondent’s argument that the habeas court should have been bound by certain factual findings by Judge Karazin when he ruled on the petition for a new trial. PB: 100 and n.120. This defense of the habeas court’s reasoning is not only inadequate, it is also incorrect.

Neither this Court’s decision on the *Brady* issue on direct appeal nor its ruling on the “newly discovered evidence” issue on the appeal from the petition for a new trial addressed, let alone decided, the issue of whether the defense team’s conduct in not securing a copy of the Morganti sketch fell below the standard of reasonable competence. Those decisions simply held that *if counsel had wanted to pursue* evidence relating to the Morganti sketch, the state provided sufficient notice of the existence of the sketch such that it was not “suppressed” by the state and *could have* been obtained with due diligence. Those decisions said nothing about whether counsel was professionally incompetent in failing to pursue the sketch, whether for strategic or other reasons short of professional incompetence, because the issue of counsel’s competence was never before this Court in those prior appeals and, consequently, there was no evidence before it, or the lower courts, upon which any decision on that issue could be based. Nor did this Court’s earlier rulings

render it logically impossible for any subsequent court to determine that, although trial counsel did not pursue the sketch with due diligence, he had sound reasons for not doing so. See *Williams*, 100 Conn. App. 94. Consequently, the habeas court erred in reasoning that it was estopped from making an independent determination as to counsel's competence, under the first *Strickland* prong, because that issue has never been addressed before by any court, in any form. *Williams*, 100 Conn. App. at 106-07.

In contrast, Judge Karazin's findings, when ruling on the petition for a new trial, that certain evidence from Alton Everett James III, Cliff Grubin and John Simpson was neither material nor reasonably likely to change the outcome of the criminal trial, fully and fairly decided the issues at stake now as to the prejudice prong of *Strickland*. See RB: 92-100. The same is true with respect to the issue of whether the defense team, prior to the criminal trial, was alerted to the fact that Tony Bryant was making allegations relative to Hasbrouck and Tinsley. See *infra*, Issue VI. A., *infra*. See also RB: 129-33. This identical issue was litigated before, and ruled upon by, Judge Karazin and yet the habeas court chose to ignore that ruling and, in fact, contradict it. This renders the habeas court's erroneous assumption that it was bound by the earlier rulings by Judge Karazin and this Court as to whether the Morganti sketch could have been obtained by counsel, if he so chose – an issue legally and logically distinct from the issue of whether counsel was constitutionally incompetent for choosing not to pursue it – all the more perplexing.

For these reasons, contrary to the petitioner's suggestion, there is nothing contradictory about the respondent's arguments that the habeas court erred in misapplying the doctrine of collateral estoppel with respect to the first *Strickland* prong in this case and also erred in refusing to apply that doctrine with respect to the second *Strickland* prong, under the circumstances here.

B. The Petitioner Failed To Satisfy Either *Strickland* Prong With Respect To His Claim That Counsel Was Ineffective In Failing To Obtain The Morganti Sketch

The petitioner's arguments that he established the defense team's incompetence

and necessary prejudice relative to the Morganti sketch are both premised on the contention that the sketch would have greatly assisted in proving that Littleton was the person responsible for Martha's death.³³ The record does not support this contention.

Morganti indicated that he spoke with only one man that evening, but that he saw someone at a later point that evening, in the dark, from a distance of 100 yards away, and believed that it was the same man. App. Pt 2: A-1457, 1466. See also RRA: A-13, A-15. Although Morganti never obtained the name of the man with whom he had spoken earlier, he did obtain his address: Walsh Lane. *Id.* Morganti also provided a detailed description of both the person and his clothing. *Id.* In addition, he assisted in the creation of a sketch of the person he encountered. App. Pt 2: A-1466. As the habeas court correctly reasoned, any jury most assuredly would have inferred that the sketch was based upon Morganti's recollection of the man he had the face to face conversation with, not the man he later saw from a distance of 100 yards in the dark. MOD: 22-23.

Morganti testified at a deposition that, at the time of the 1975 investigation, another officer, Al Robbins, looked at the sketch and knew "exactly who that is:" Carl Wold. RRA: A-11, A-35, A-61. Carl Wold lived on Walsh Lane. App. Pt 2: A-1460. Wold was interviewed and confirmed that it was he who spoke with a special officer that evening and corroborated both the substance of the conversation and the clothes he wore. App. Pt 2: A-1460. The only point of divergence between Morganti's accounts and Wold's account related to the time frame of their face-to-face encounter: The times claimed by Morganti varied between 8, 9, 9:30 and 10 p.m.; App. Pt 2: A-1457, 1466. See also RRA: A-14;

³³ Overall, the petitioner's claim relative to a third party culpability defense as to Kenneth Littleton is at war with his argument that the defense team's decision to pursue such a defense was so completely unreasonable as to constitute incompetence. His arguments as to the persuasive case that could have been mounted against Littleton, if only trial counsel also had made an effort to introduce the Morganti sketch; PB: 103-06; reflects an implicit recognition that a third party culpability defense against Littleton was not only a theoretical option, but a potentially persuasive one. See also PB: 103 (criticizing habeas court for having "dim view" of third party culpability defense based on Littleton).

whereas Wold was certain that it could not have been later than sometime around 8 p.m., a fact corroborated by his father. App. Pt 2: A-1460 to 1461.

The habeas court itself evaluated all of this evidence and understandably concluded that the sketch was *not* of Littleton, but rather was of Wold, the man with whom Morganti had the face to face confrontation and who undoubtedly was the person that Morganti had in mind when assisting in the creation of the sketch. MOD: 22-23. Nevertheless, the court inexplicably considered Attorney Sherman to have been deficient for having reached the exact same conclusion and deciding that any attempt to persuade the jury otherwise would be fruitless and easily rebutted by the state. HT 4/17: 80-93. For the reasons argued more fully in the Respondent's Initial Brief, the habeas court erred in so concluding. See RB: 116-19.³⁴

³⁴ The petitioner's argument in support of his theory that the sketch was of Littleton, and not Wold, is entirely dependent upon his assumption that Morganti was absolutely certain that he must have had the face-to-face confrontation at 10:00 p.m. with the man he also saw a few minutes later, thereby excluding Wold (based on the statements given by Wold and his father that Wold was home by 8:15) and opening up the possibility that it was actually Littleton with whom Morganti spoke. PB: 103-04. However, nothing in the hearsay account contained in the police report upon which the petitioner relies indicates that there was any particular degree of certainty in Morganti's recollection that it was "around 10:00 p.m." See App. Pt 2: A-1457. Indeed, Morganti later gave different accounts of the time, one putting the face-to-face encounter closer to 8:00 p.m.; App. Pt 2: A-1466; and another putting that encounter "around 9:00" or 9:30. RRA: A-14. Furthermore, Morganti's varying estimates would have stood in stark contrast to the more certain recollections of both Wold and his father, whose accounts of the pertinent times Wold was out of the house (leaving at approximately 7:20 p.m. and returning home by 8:15) were not only consistent with each other, but further corroborated by their specific recollection of what Wold did after returning home from his walk, before watching *The French Connection*, which began at 9 p.m. App. Pt 2: A-1460 to 1461.

Perhaps most importantly, however, with the exception of the discrepancies in the time, Special Officer Morganti's account of the encounter with the individual is so highly consistent, in most respects, with Wold's account of his encounter with the officer as to render ludicrous any suggestion that that they were not both talking about the same encounter and Attorney Sherman had every reason to avoid losing credibility with the jurors by attempting to suggest as much. Compare App. Pt 2: A-1457 (containing Morganti's description of individual he encountered (6' tall, 200 lbs., glasses), his clothing (including "fatigue jacket", "tan slax" (sic)) and content of the conversation (when asked where he was

An attorney need not pursue a matter that he reasonably believes would prove fruitless. *Harrington*, 562 U.S. at 108. Moreover, as this Court has recognized in the appellate context, “[t]he effect of adding weak arguments will be to dilute the force of the stronger ones. . . .” *State v. Pelletier*, 209 Conn. 564, 567 (1989), quoting *Jones v. Barnes*, 463 U.S. 745, 752 (1983). Of course, this is no less of a concern when arguing to a jury than it is when arguing to appellate judges. Thus, “[t]here is a ‘strong presumption’ that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than ‘sheer neglect.’ *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1 [(2003) (per curiam)].” *Harrington*, 562 U.S. at 109. Here, the habeas court’s expressed belief that the sketch depicts Carl Wold only further corroborates the reasonableness of Attorney Sherman’s assessment that any effort to persuade the jury that the Morganti sketch depicted Littleton, rather than Wold, was likely to have been fruitless and easily defeated by the state.

Furthermore, the petitioner overstates the significance of the sketch itself. The sketch was *not* a picture of a person anyone saw murdering the victim. It was a sketch of a

going, individual replied to his home on Walsh Lane)) with *id.* at A-1460 (containing Wold’s description of encounter with the “special police officer,” describing Wold (6’1” tall, 210 lbs., glasses), Wold’s clothing at the time (including “field jacket” and tan slacks), and content of the conversation (when officer asked where he was going, Wold replied to his home on Walsh Lane)).

Given Morganti’s inconsistent responses as to the time of the face-to-face confrontation – inconsistencies that no doubt would have been emphasized by the state at the criminal trial – the jury undoubtedly would have concluded, as did both the habeas court and Attorney Sherman, that: (1) Wold and Morganti were both describing the same encounter; (2) the time estimate by Wold and his father, placing the face to face encounter closer to around 8 p.m., was more reliable than Morganti’s; (3) Morganti’s recollection of having seen the same individual only a few minutes later means the second sighting still could have been of Wold, who was out walking until 8 or 8:15; (4) the sketch unquestionably would have been based on Morganti’s description of the man with whom he had the first encounter, face-to-face, at around 8 p.m. (i.e., Wold); and (5) even assuming, for the sake of argument, that the sketch instead could have been based on Morganti’s questionable ability to describe the person he believes he saw a few minutes later in the dark, 100 yards away, the sketch still had no relevance to the murder, which could not have occurred until hours later.

person that Morganti believed he saw walking in the neighborhood at some point that evening. Even in the unlikely event that the defense team could have convinced the jury to believe the sketch depicted Littleton, it was hardly the “smoking gun” that the petitioner makes it out to be. Consequently, it was error for the court not to apply a strong presumption of competence to the defense team’s decision not to pursue the sketch in furtherance of their third party culpability claim against Littleton.

Finally, the petitioner argues that the respondent failed to present the testimony of either Morganti or Wold at the habeas trial to establish that their testimony, in fact, would have undermined any claim by the defense that the Morganti sketch depicted Littleton rather than Wold. PB: 98-99 n.119. In so arguing, the petitioner once again operates under the mistaken assumption that he can meet his heavy burden of presenting evidence to establish that he was denied the effective assistance of counsel merely by arguing that the respondent failed to present evidence to prove the contrary. See *Burt v. Titlow*, 134 S.Ct. 10, 17 (2013) (“It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance.”) (Internal quotation marks omitted). It was not the respondent’s burden to provide any such proof. Rather, it was the petitioner’s burden to prove his claim that trial counsel was ineffective in failing to secure and present evidence of the sketch. As part of that burden, he had to demonstrate that the jury, after hearing all of the available evidence regarding the sketch, including the circumstances under which it was created, is reasonably likely to have found that it depicted Littleton and acquitted as a result. As argued here, as well as in the Respondent’s Initial Brief, the petitioner failed to demonstrate that the sketch was so compelling that the defense team’s failure to present it to the jury was nothing short of incompetent and that the jury is reasonably likely to have changed its verdict if the defense team had presented it.

V. THE HABEAS COURT ERRED IN FINDING THE DEFENSE TEAM DEFICIENT FOR NOT PRESENTING A THIRD PARTY DEFENSE BASED UPON TONY BRYANT'S ALLEGATIONS BUT PROPERLY FOUND NO PREJUDICE

A. The Habeas Court Erred In Allowing The Petitioner To Relitigate The Factual Issue Of When The Defense Team First Became Aware Of The Tony Bryant Allegations

The respondent has argued that the habeas court, in criticizing trial counsel for failing to "have investigated [Tony] Bryant's story;" MOD: 30; erred in ignoring Judge Karazin's finding, during his ruling on the petition for a new trial, that Tony Bryant's allegations were "newly discovered" and, therefore, could not reasonably have been discovered by trial counsel, even in the exercise of due diligence. *Karazin* MOD: 30. See RB: 129-33. The respondent further has argued that the fact that the petitioner inexplicably did not present, at the hearing on the petition for a new trial, the testimony of Marjorie Hauer that he later presented at the habeas trial, relative to Hauer allegedly having informed trial counsel of the Bryant allegations at the start of the criminal trial, disentitled the petitioner to a relitigation of the factual issue as to whether trial counsel was aware of the allegations prior to trial, an issue already decided by Judge Karazin. RB: 130-32.

The petitioner's first two points in rebuttal are both surprising and damning to his position. He disingenuously suggests that he "did present evidence in the 2007 proceedings that counsel was aware of [the Bryant] allegations prior to trial," citing testimony from Crawford Mills during that proceeding indicating that Mills informed both trial counsel and the state's attorney of the allegations, although he did not reveal Bryant's name to them. PB: 121. However, as all parties to the new trial proceeding acknowledged, unless Mills provided a name, or some other information leading to his informant, Sherman had no opportunity to uncover Bryant or his allegations. Thus, contrary to the petitioner's suggestion, he did not present Mills' testimony in order to establish "that counsel was aware of the allegations prior to trial." On the contrary, he presented Mills testimony in order to prove the opposite, i.e., that counsel *could not* have presented testimony from Bryant about the allegations because Mills refused to give up his name.

The petitioner further acknowledges that he made no effort to present evidence from *Ms. Hauer* about her alleged attempt to inform Attorney Sherman of Bryant's allegations; PB: 121; despite the fact that she testified at that same proceeding and was asked other questions specifically relating to Bryant, Hasbrouck and Tinsley. NT 4/24: 83, 87, 90-93. This suggests that the petitioner, while presenting Mills' testimony, which forced the state to concede that trial counsel could not have known about Bryant in the exercise of due diligence, refrained from questioning Hauer, as he did Mills, about whether *she* alerted Sherman to the Bryant allegations, in the hope of using it in this subsequent habeas proceeding, where it would be more useful, if he was not successful in his petition for a new trial. Permitting a party to profit from such gamesmanship unquestionably undermines the public's confidence in the legitimacy and finality of trial court judgments, one of the very concerns the doctrine of collateral estoppel was created to address. *In re Ross*, 272 Conn. at 662.

In any event, whether Hauer's testimony on this subject was withheld by the petitioner intentionally or simply out of ignorance, neither explanation justifies the habeas court's decision to disregard Judge Karazin's finding that trial counsel was *not* aware of the Bryant allegations, nor could he have become aware of them, even with the exercise of due diligence. The petitioner argues that it was "perfectly permissible" for him to pursue, and ultimately secure, a favorable ruling from Judge Karazin that trial counsel could not reasonably have known of the Bryant allegations, but then avoid the consequences of that finding when it would have a deleterious effect on his claim of ineffective assistance of counsel, because this evidence from Hauer allegedly was not discovered until after the 2007 proceeding and, therefore, was "new". PB: 121. However, the respondent is unaware of any caselaw which permits a party to avoid the effects of collateral estoppel, and relitigate a factual issue squarely decided in a prior proceeding, simply by alleging that he discovered "new" evidence from an available witness who was, in fact, previously called to testify. Rather, for obvious reasons, grounded in sound policy, our law consistently requires a party to demonstrate that this allegedly new evidence *could not* have been

discovered, with due diligence, in time to present it at the prior proceeding. See, e.g., See *Skakel v. State*, 295 Conn. at 467 (new trial only permitted when, *inter alia*, petitioner shows allegedly “new” evidence could not have been discovered previously with exercise of due diligence); Practice Book §23-29(3) (permitting dismissal of successive claims unless petitioner, *inter alia*, “state[s] new facts or . . . proffer[s] new evidence *not reasonably available at the time of the prior petition*”) (emphasis added.)

Here, the fact that Hauer inexplicably either decided *sua sponte* to bring this information about Tony Bryant to the attention of the petitioner’s present counsel only after the petition for a new trial, or was only then asked for such information by petitioner’s counsel, after the petitioner lost on the petition for a new trial, should bother this Court more than it apparently did the habeas court. Particularly in light of the fact that Ms. Hauer testified for the petitioner at the 2007 proceeding about Bryant, Hasbrouck and Tinsley, and in light of the petitioner’s further assertion here that he deliberately elicited evidence from Crawford Mills about whether he informed trial counsel of Bryant’s allegations, the record does nothing to support, and in fact appears to undermine, any claim that the petitioner could not have uncovered from Ms. Hauer in 2007 the facts regarding what *she* purportedly told trial counsel about those same allegations. Because there is nothing in this record to demonstrate that the petitioner’s allegedly “new” evidence from Ms. Hauer could not have been discovered, and presented to Judge Karazin, during the prior adjudication of this identical fact (i.e., whether trial counsel had any reason to know about the Bryant allegations prior to the criminal trial), the habeas court erred in effectively overruling Judge Karazin’s factual finding in this regard.

Whether Hauer’s testimony could have, and should have, been uncovered with the exercise of due diligence in time for the 2007 proceeding appears to have been of no concern to the habeas court. This error, troubling enough on its own, is only magnified by the inconsistency with which the habeas court approached the issue of collateral estoppel. The habeas court’s willingness to ignore Judge Karazin’s finding that Attorney Sherman

could not reasonably have known about Bryant's allegations is so unjustifiably inconsistent with its earlier rationale that it was bound by the prior courts' rulings as to counsel's actions relative to the Morganti sketch that the habeas court does not even attempt to address the contradiction. Accordingly, the habeas court erred in allowing the petitioner to relitigate the issue as to trial counsel's knowledge, or lack of knowledge, of the Bryant allegations in time to use them at the criminal trial.³⁵

B. Even Assuming That Trial Counsel Was On Notice Of The Bryant Allegations, The Petitioner Failed To Demonstrate That Trial Counsel Was Ineffective In Failing To Pursue A Third Party Culpability Defense Based Upon Those Allegations

Turning to the merits of the petitioner's claim of ineffectiveness, the petitioner attempts to construct a theory under which the jury could have believed Tony Bryant's hearsay statements about Hasbrouck and Tinsley because some of the details of Bryant's story could be reconciled with some of the other evidence in the case. PB: 126-30.³⁶ This

³⁵ The petitioner's reliance on *Williams*, 100 Conn. App. at 97-98, in support of his claim that he should be allowed to ignore a contrary factual finding by a previous court, is misplaced. See PB: 121. The court hearing the petition for a new trial in *Williams* made no finding that trial counsel failed to meet the Sixth Amendment standard for reasonably competent assistance by failing to uncover the allegedly new evidence; it simply concluded that trial counsel *could have* uncovered the evidence with due diligence, if he so chose. Accordingly, the *Williams* court properly reasoned that the earlier court's ruling to that effect did not resolve a factual issue identical to the one before the habeas court and, consequently, that ruling did not have collateral estoppel effect. *Williams*, 100 Conn. App. at 103-07. Here, in contrast, the petitioner is attempting to circumvent Judge Karazin's finding on an issue identical to that which the habeas court erroneously allowed him to relitigate, i.e., whether trial counsel was aware of, or reasonably could have uncovered, the Bryant allegations. *Williams* does not stand for the proposition that he should be permitted to do so.

³⁶ When doing so, the petitioner erroneously relies on a selective and slanted view of the evidence presented during the trial before Judge Karazin. PB: 106-17. Petitioner fails to acknowledge that the vast majority of this information was not admitted as substantive evidence in the habeas proceeding. In fact, on the Bryant issue, the only evidence admitted by the habeas court was the deposition of Barbara Bryant and the testimony of Crawford Mills. See RB: 88 n.41. The remainder of the "evidence" on which the petitioner relies here was never, in fact, evidence presented to the habeas court for substantive use. Thus, it is improper for the petitioner to attempt to rely on it as such here.

theory is unpersuasive, for a number of reasons.

First, the house of cards that the petitioner builds still has its foundation almost exclusively in the credibility of Tony Bryant. Glaringly absent from the petitioner's brief is any mention of the habeas court's findings regarding the wealth of evidence that was presented below, and undoubtedly would have been presented at the criminal trial, that substantially undermines Bryant's credibility. As the court summarized:

Attorney Richard Alexander of Austin, Texas, testified that in 1991, while he was a partner in a large law firm with an Austin office, he hired Bryant as an associate attorney on Bryant's representations that he was then a member of the Maryland and Washington D.C. Bars. Alexander indicated that, as was the practice, Bryant was hired with the understanding that his retention would require that he take and pass the Texas Bar examination. Subsequently, after Alexander had been led to believe that all new associates had passed the Texas Bar, he learned that Bryant had failed. And, on further inquiry, Alexander discovered that Bryant was not, in fact, a member of either the Maryland or D.C. Bar. As a consequence, Bryant was discharged At trial before a jury, this trail of deceit would likely erode any confidence in Bryant's credibility and thus nullify any potential impact of his tale.

MOD: 33. Bryant's pattern of dishonesty relative to his bar admissions, coupled with his robbery conviction in California; HT 4/19: 153: would have provided ample reason for reasonably competent counsel to have avoided making a third party culpability defense based on Bryant's "tale" about Hasbrouck and Tinsley, and certainly would have provided the jury with ample reason to reject such a defense, even if trial counsel had pursued it. The fact that the petitioner does not even attempt to address this aspect of the court's rationale speaks volumes.³⁷

³⁷ On appeal from the petition for a new trial, a highly significant factor underlying Justice Palmer's belief in the credibility of Bryant's story was that "the record reveals nothing about Bryant or his background to suggest either that he is the kind of person who would provide testimony falsely implicating two innocent people in a brutal murder or that he had any reason or motive to do so" *Skakel v. State*, 295 Conn. at 554 (*Palmer, J., dissenting*). See also *id.* at 601 ("[S]ignificantly, there is nothing in the record concerning Bryant's background or character that would cast genuine doubt on his credibility or trustworthiness as a witness. In particular, the record is devoid of evidence establishing that Bryant has a reputation for untruthfulness or that he otherwise has demonstrated that

Second, in addition to Bryant's personal lack of credibility, the petitioner's theory is further undermined by a total lack of any reliable and/or meaningful corroboration of his allegations, a fact noted, not only by the habeas court; MOD: 32; but also by Judge Karazin when ruling on the petition for a new trial; *Karazin* MOD: 35 ("The testimony of Bryant is absent any genuine corroboration"); and the majority of this Court on direct appeal therefrom. *Skakel v. State*, 295 Conn. at 486-501. In the present appeal, the petitioner does nothing more than reiterate the arguments made, and soundly rejected by *all* courts, including this Court, as to whether Bryant's story was sufficiently corroborated. See PB: 126-30. Notwithstanding the petitioner's efforts to point out relatively innocuous facts surrounding the murder that are not necessarily inconsistent with Bryant's story – a story that Bryant articulated only after reading Crawford Mills' screenplay about the murder – as this Court properly concluded on appeal from the petition for a new trial, "there is no evidence, *independent of Bryant*, to corroborate any significant aspect of his account of the events of the night of October 30, 1975, whereas there is a plethora of evidence to contradict his account." (Emphasis in original). *Skakel v. State*, 295 Conn. at 493-94; see *id.* at 486-501. Insofar as the petitioner's argument in this appeal adds nothing new to the debate, the respondent hereby incorporates the majority's persuasive rebuttal of the petitioner's claim of corroboration here as well. See *Skakel v. State*, 295 Conn. at 486-501. More importantly, given that the evidence presented at the habeas trial below only further undermines the reliability of Bryant's story, by reflecting Bryant's clear penchant for dishonesty, the conclusion reached by *all* prior courts, that Bryant's allegations were untrustworthy, has only been fortified.³⁸

he has a tendency to be dishonest.") (Footnote omitted). As the habeas court correctly recognized, the record created at the subsequent habeas trial contains ample evidence undermining Bryant's credibility and unquestionably renders his allegations only all the *more* untrustworthy than they appeared previously.

³⁸ There has been a running debate, throughout the petitioner's postconviction proceedings, as to whether Bryant's hearsay allegations even would have been admissible

Finally, while this Court's discussion, in the prior appeal, of the "plethora of evidence" contradicting Bryant's allegations is, by itself, sufficient to undermine the petitioner's claim of prejudice from trial counsel's failure to pursue a third party culpability claim on the basis of those allegations, it must be remembered that the petitioner also bore the burden below of demonstrating counsel's incompetence in this regard. Consequently, unlike in the context of the petition for a new trial, where the petitioner only needed to demonstrate that this new evidence "is likely to produce a different result in the event of a new trial;" *Skakel v. State*, 295 Conn. at 467; in the context of this habeas case, the petitioner also bore the burden of demonstrating that any and all reasonably competent defense attorneys unquestionably would have presented this defense. Thus, the petitioner

at the criminal trial. Judge Karazin, when ruling on the petition for a new trial, ruled that the evidence would have been admissible, but would not have changed the outcome of the criminal trial. *Karazin* MOD: 34, 36. On appeal therefrom, all but one justice agreed that the evidence would not have changed the outcome of the criminal trial; *Skakel v. State*, 295 Conn. at 500-01; and two justices, while concurring in that assessment, went further and also concluded that the evidence of Bryant's allegations would not have been admissible. *Id.*, at 523-53 (*Zarella, J., and McLachlan, J., concurring*). *But see id.*, at 553-696 (*Palmer, J., dissenting*) (concluding that evidence both admissible and likely to have changed verdict). The habeas court, for its part, appears to have agreed with the justices who concluded that the evidence regarding the Bryant allegations would not have been admissible, but also to have concluded that, even if admitted, this evidence was not likely to have changed the verdict, at least in part because of the evidence, first presented to the habeas court, that demonstrated that Bryant lacked credibility. MOD: 31-33.

In the present habeas case, in order to have met his burden, under *Strickland*, of demonstrating that Bryant's allegations are reasonably likely to have changed the outcome of the criminal trial, the petitioner bore the burden of demonstrating *both* that (1) evidence as to the allegations would have been admitted by the trial court in the first place *and* (2) this evidence, if admitted, would have persuaded the jury to change its verdict. Because, with the exception of one dissenting justice, the overwhelming majority of justices and judges properly have concluded that the evidence of Bryant's allegations, even if admitted into evidence, was too untrustworthy and unpersuasive to have changed the outcome of the criminal trial, it is unnecessary for this Court to re-enter the debate as to whether this evidence was even admissible. Nevertheless, should this Court choose to do so, the respondent hereby adopts Justice Zarella's thorough and cogent articulation as to the myriad reasons why such evidence would not properly have been admitted in the first place, thereby further undermining the petitioner's claim of prejudice. *Skakel v. State*, 295 Conn. at 523-53 (*Zarella, J., concurring*).

here bore the burden of not only demonstrating that evidence of the Bryant allegations is likely to have changed the verdict – a burden that this Court already has determined he failed to meet – but also that this evidence was so compelling as to have deprived the defense team of *any* of its usual wide discretion to pursue a different strategy. The Bryant evidence certainly fell far short of demonstrating this.

There can be little dispute that Attorney Sherman's strategy to avoid a defense implicating more than one third party suspect was a reasonable strategy and, in fact, neither the habeas court nor the petitioner appears to take serious issue with that proposition. Sherman, a highly experienced criminal defense attorney, was of the opinion that Kenneth Littleton was the strongest third party suspect. The habeas court was of the opinion that Tommy Skakel was the strongest third party suspect. The petitioner seems to be of the view that *all four* suspects discussed here (Tommy Skakel, Littleton, Hasbrouck and Tinsley) were the strongest third party suspects, a luxury afforded to habeas litigators seeking to second-guess trial counsel's decisions in every possible respect but, unfortunately, not to criminal trial attorneys forced to make the often difficult decision of choosing between competing defenses in order to best present their client's case to the jury.

Having chosen to contradict Judge Karazin and find that trial counsel was made aware of the Bryant allegations through Ms. Hauer, the habeas court nevertheless also should have presumed, in accordance with *Strickland*, that trial counsel made a strategic determination that Mr. Littleton was the most viable third party suspect, notwithstanding counsel's alleged awareness of the Bryant allegations. The habeas court erred in failing to accord counsel's decision that presumption.

VI. THE HABEAS COURT ERRED IN FINDING THE DEFENSE TEAM DEFICIENT FOR FAILING TO UTILIZE CERTAIN STATEMENTS IN POLICE REPORTS TO REBUT ASPECTS OF THE STATE'S CASE BUT PROPERLY FOUND NO PREJUDICE

Attorney Sherman presented evidence at the criminal trial that the petitioner had a number of psychological, educational and behavioral problems at the time his family made

the decision to send him to Elan. RB: 154. There also was evidence that the petitioner himself stated to Dorothy Rogers and Greg Coleman that his family had sent him to Elan to avoid the police investigation into Martha Moxley's murder because his family thought he was responsible for her death. *Id.* This statement was corroborated, to some degree, by further evidence from Mildred "Cissy" Ix that the petitioner's father had revealed to her that the petitioner had admitted to his father, at some unspecified time, that he may have killed Martha. RB: 140. There was further evidence as well that, during the petitioner's time at Elan, officials at the school confronted the petitioner with accusatory statements suggesting that they had reason to believe that he was involved in Martha's murder, even though the police did not consider the petitioner to be a suspect at that time. RB: 140-41, 154.

In its closing argument, the state acknowledged that evidence was presented regarding the petitioner's various "problem[s]." It argued that the jury nevertheless should infer that the primary reason that his family sent him to Elan was because of their concern that he was responsible for the murder. The state argued that this inference was not only reasonable based on Ix's testimony, but also from the corroborating testimony of Rogers and Coleman indicating that the petitioner himself admitted that this was the reason for his presence at Elan. The state argued that this inference is further supported by the evidence indicating that Elan officials were accusing the petitioner of being involved in the murder, even though the police did not consider him a suspect and, therefore, it was reasonable to infer that Elan officials most likely learned about the petitioner's possible involvement from his family. RB: 154-55.

In his habeas corpus petition, the only allegation of ineffectiveness relating to this subject was contained in paragraphs 341c and 342, in which the petitioner alleged that Attorney Sherman "failed to adequately prepare for and present an effective closing argument" relative to the issue of why the petitioner was sent to Elan. Fourth Amended Petition, dated May 17, 2013, at 54-59, para. 341c, 342. (App. Pt 1: A-889-90, A-891). On March 1, 2015, prior to the habeas trial, Judge Sferrazza granted respondent's motion for

summary judgment on these allegations. See RB: 144.

At the habeas hearing that followed, the petitioner presented no evidence or argument suggesting that Sherman should have argued that he was sent to Elan only as the result of a DUI arrest in Greenwich. Importantly, petitioner's own testimony at the habeas trial was that his poor school performance was his father's primary motivation in sending him to Elan. See RB: 157-58.

As discussed more fully in the Respondent's Initial Brief, it was only after the close of evidence that the habeas court itself contacted both habeas counsel by email and raised, *sua sponte*, additional potential claims of ineffectiveness that the habeas court theorized could have been asserted on the basis of its discovery of a Greenwich police report regarding a drunk driving offense committed by the petitioner shortly before his arrival at Elan. As the habeas court set forth in the argument presented in its emails to counsel, in the court's view, the hearsay statements in the police report could have been utilized by Sherman to fashion a defense theory that, contrary to the state's theory, the only reason the petitioner was sent to Elan was because of the drunk driving offense, not his suspected involvement in the murder.

Although the habeas court expressly agreed that the petitioner did not raise this claim himself, it nevertheless decided that it could consider the new claim it had initiated because the transcript from the habeas trial reflects that the petitioner testified at that trial, without objection, "complaining that Sherman did not counter the state's claim that he had been sent to Elan by his family because of the murder." App. Pt 2: A-1516; RB: 149. The court ultimately ruled that trial counsel's failure to utilize the police report in the manner suggested by the court fell below the standard of reasonable competence, but that there was no reasonable likelihood that the outcome of the trial would have been different if trial counsel had done so because the issue of exactly why the petitioner was sent to Elan was "tangential to the main issues in the case." MOD: 81.

In his initial brief, the respondent argued that it was improper for the habeas court to

consider this claim at all because it was initiated by the habeas court. In addition, the respondent argued that the court also erred in finding trial counsel incompetent for failing to utilize the police report to construct the argument the habeas court suggested. The petitioner counters that the habeas court properly considered this issue; that the court correctly determined that counsel was deficient in this regard; and that the habeas court erred in finding no prejudice.

A. The Habeas Court Erred In Ruling On A Claim Not Raised In The Amended Petition, But Rather Raised And Argued For The First Time By The Habeas Judge Himself

The petitioner argues that the respondent's assessment that the habeas court itself, not petitioner's counsel, first raised and advocated this issue represents "a gross mischaracterization of the procedural posture on this issue and border[s] on the disingenuous." PB: 137. However, it is difficult to reconcile the petitioner's accusation with the habeas court's clear and unchallenged ruling that the claim was not fairly raised by the petitioner anywhere in his pleadings; MOD: 80 n.51; the habeas court's express recognition, in both the emails and its Memorandum of Decision, that it was the court itself which first "discovered" this potential claim; Court Exhibit IV:A ("In reviewing the criminal trial transcript *I have come across an issue* that may or may not be framed by the pleadings.") (Emphasis added); MOD: 80 n.51 ("*the court discovered this issue* in its review of the Greenwich police report") (emphasis added); and the substance of the emails themselves, clearly setting forth the legal analysis by the habeas court in support of such a claim on the petitioner's behalf; App. Pt 2: A-1502 to 1521. In short, even the habeas court was not buying the petitioner's theory that it was he, and not the habeas judge, who first raised this issue and formulated the arguments in support thereof.

Although the petitioner attempts to recharacterize the habeas court's unusual actions in this regard as merely reflecting "a desire to be informed of the precise issues before it, as it had clearly already begun a complete review of the underlying criminal trial record and did not want to waste time on issues that were not presented;" PB: 141 n.167; it

is this statement which borders on “disingenuous” and a “gross mischaracterization” of what occurred below. The habeas court had no hesitation in finding that the amended petition before it did not assert the claim that the court itself was proposing, but the court proceeded to rule on this unasserted claim nevertheless. MOD: 80 n.51. Thus, whatever the habeas court’s motivation for its decision to formulate this entirely new claim for the petitioner, that motivation clearly was *not* any alleged concern for wasting its time on “issues that were not presented” by the petitioner.

Moreover, as the respondent noted in his initial brief, any doubt as to whether the court was taking upon itself the role of petitioner’s advocate for this issue is dispelled by the fact that the petitioner’s arguments on this claim in his post-trial brief relied upon nothing that had not already been pointed out by the habeas court. *Compare* Petitioner’s Posttrial Brief at 54 n.80 *with* Court Exhibits IV:A and IV:B. As the petitioner well knew, he need only have parroted the very same arguments championed by the habeas court in order to prevail on this claim of attorney incompetence and, not surprisingly, he did both.

The judge – especially one sitting as the factfinder -- initiating a potential claim for relief for the benefit of one party is troubling enough. Effectively holding the party’s hand and walking him through each piece of evidence and legal argument that can be mounted in support of that claim unquestionably crosses the line, undermining confidence that the the judge can decide the issue impartially thereafter. Moreover, this Court need not decide whether the habeas court’s ruling in the petitioner’s favor on this issue was the result of actual bias. It is enough that the actions of the habeas court in advocating this issue on the petitioner’s behalf lends an appearance of partiality to its adjudication of that issue to have made it all the more imperative for the court to have followed well-established law that unpleaded claims should not be considered by the court. See *Rosado*, 292 Conn. at 20-21.

The petitioner rightly criticizes the respondent’s reliance on *Johnson*, 285 Conn. at 580, as authority for the proposition that a habeas court is not authorized to look beyond the pleadings to address claims not presented by the parties. PB: 141. Although *Johnson*

does implicitly support that proposition, *Johnson* more directly focuses on the limits on appellate review of unpleaded claims, not the habeas court's ability to consider them in the first instance. *Id.* Nevertheless, there is a wealth of other authority specifically holding that the petitioner's failure to present a claim in the petition precludes *both* the habeas court and a subsequent appellate court from considering that claim. See *Lebron v. COC*, 274 Conn. 507, 519 (2005) ("While **the habeas court** has considerable discretion to frame a remedy that is commensurate with the scope of the established constitutional violations ... **it does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised**...."), (emphasis added) (Citations omitted; internal quotation marks omitted), overruled on other grounds, by *State v. Elson*, 311 Conn. 726 (2014); accord: *Greene v. COC*, 131 Conn. App. 820, 822 (2011), *cert. denied*, 303 Conn. 936 (2012); *Cole v. COC*, 102 Conn. App. 595, 599-600, *cert. denied*, 284 Conn. 924 (2007).

Equally unpersuasive is the habeas court's rationale that the petitioner's passing and unobjected to habeas testimony, complaining that Sherman did not counter the state's claim that he had been sent to Elan by his family because of the murder, opened the door to the habeas court's consideration of any and all unpleaded claims that might in any way relate to that general subject. The reasoning employed by the court, i.e., that any statements by witnesses that are not relevant to the claims specifically pleaded -- and, therefore, may not be objected to by a party because they are rightly deemed not to matter at the time -- nevertheless later can serve as the basis for either the opposing party or the court to fashion any legal claim it wishes for the first time post-trial, is unsound. Indeed, if this Court were to allow a party to be ambushed with unpleaded claims on the basis of the reasoning employed by the habeas court, the respondent's only recourse would be to object to each and every question and answer, as well as each and every piece of other evidence, unless the petitioner expressly articulates that the *sole* purpose of its proffer relates to a specific issue asserted in its pleading and not any others that the petitioner -- or the court itself -- might later chose to fashion. Neither equity nor judicial economy would be

served by such a practice.

Nor is there merit to the petitioner's suggestion that the fact that the respondent did not object to the submission of "1,800 pages of the State's discovery" rendered any possible claim that later could be fashioned on the basis of those documents fair game. PB: 137. The reason why this evidence was admitted without objection is because such discovery was relevant to establish what information trial counsel was aware of prior to trial which, in turn, may have been relevant a number of claims of ineffectiveness that were expressly articulated in the Amended Petition. That this evidence was relevant to, and therefore admissible for, these *specifically pleaded claims* cannot reasonably be construed as implicit consent by the respondent to any and all *unpleaded* claims that either the petitioner or the habeas court also might later choose to formulate. Thus, this evidence serves as no justification for the habeas court's decision to both raise and decide the unpleaded issue as to whether Attorney Sherman should be found ineffective for failing to utilize particular police reports buried within those 1800 pages – reports that were *never* averred to in any of the multiple pleadings and *never* addressed at any point by the petitioner during the lengthy habeas hearing – in an effort to demonstrate that the petitioner allegedly was sent to Elan only as the result of a DUI offense.

B. The Petitioner Failed To Demonstrate Either Incompetence Or Prejudice On The Basis Of Attorney Sherman's Failure To Utilize The Greenwich Police Reports

The essence of this particular claim of ineffectiveness is that any reasonably competent attorney would have utilized the Greenwich police reports to establish that, contrary to the state's suggestion to the jury that the petitioner's involvement in Martha's murder was among the many reasons his family wanted him placed in Elan, the only reason the petitioner was sent to Elan was because of the drunk driving incident addressed in a certain police report. However, there is a dearth of evidence to support such a theory and, in fact, the petitioner himself placed particular emphasis on reasons *other than his drunk driving arrest* for his family's decision to send him to Elan. See RB: 157-58.

Consequently, the habeas court should have rejected this claim under both *Strickland* prongs for this reason as well.³⁹

Two points bear repeating here: First, it is not true, as the petitioner and the habeas court have suggested, that trial counsel did not introduce evidence establishing reasons other than the murder investigation for petitioner's placement at Elan. As recounted in Respondent's Initial Brief, the petitioner's sister, Julie Skakel, testified at the criminal trial to a host of behavioral, educational and emotional issues that may have led to his placement. RB: 155-56. In turn, the state specifically acknowledged these other factors in its summation. *Id.* at 156. As also argued in the Respondent's Initial Brief, a reasonably competent attorney would have good reason for not delving too deeply into petitioner's other issues. Doing more than Attorney Sherman did here might have led to a substantial amount of damaging information regarding his client's mental instability, cruelty to animals and personality disorders coming before the jury. Nor would a reasonably competent attorney necessarily want to dwell on petitioner's drunk driving arrest. Doing so risked opening the door to the fact that the petitioner tried to run over a police officer in the course of that incident. Thus, trial counsel's approach to this issue demonstrates sound judgment. He was able to suggest other issues that may have led to petitioner's placement in Elan through a witness who was sympathetic to his client and, hence, likely cast those issues in as positive a light as possible. By not going further, he prevented highly damaging

³⁹ The petitioner asserts, with little explication, that the respondent's argument that the trial prosecutor never argued that the *only* reason for the petitioner's presence at Elan was his involvement in the murder "misses the point." PB: 146 n.169. However, it is the petitioner who fails to grasp the logic of the claim that the habeas court raised for him. The state expressly acknowledged that, in addition to his family's concern for the petitioner's possible involvement in Martha's murder, there were a number of potential explanations for petitioner's presence at Elan. Thus, the mere presentation by Attorney Sherman of evidence relating to yet one more reason why the petitioner may have been sent there – i.e., the drunk driving incident – would not have contradicted the state's argument that, while other circumstances undoubtedly factored into the decision, it was the concern for his involvement in Martha's murder that most likely explained why the family took the drastic measure of urging his placement at Elan.

evidence from coming before the jury.

Second, petitioner presented no proof that the *sole* reason for his placement was the drunk driving arrest and, as argued previously; such a proposition was not only contradicted by his sister's testimony at the criminal trial, but by the petitioner himself in his habeas testimony. Hence, the record of this proceeding and that of the criminal trial flatly refutes the factual underpinnings of the habeas court's claim: there is no evidence that the DUI arrest was the sole reason for petitioner's placement in Elan and, in fact, Sherman did provide the jury with a number of relatively benign reasons suggesting why he may have been sent there.

With these points in mind, it is clear that petitioner failed to prove that any reasonably competent criminal defense attorney unquestionably would have utilized the police reports in the manner the habeas court advocates. The mileage that this theory of ineffectiveness attempts to get from the Greenwich police report far exceeds its capacity. Even taking the April 1978 report at face value, it does not establish that petitioner's DUI arrest was the sole reason for his placement at Elan. On the contrary, that same report expressly states that "recently . . . Michael Skakel has been causing *numerous problems for the family.*" (Emphasis added.) App. Pt. 2: A-1494.

Moreover, although the petitioner cites *Baughman v. Collins*, 56 Conn. App. 34, 37 (1999), *cert. denied*, 252 Conn. 923 (2000), for the proposition that, "to the extent the reports contained information by individuals with a duty to report, such as fellow police officers, the reports themselves would be admissible at trial as business records;" PB: 145 n.168; nothing in *Baughman* allows for the substantive admission of information, even from fellow officers, that is itself based on either hearsay or speculation. *Baughman*, 56 Conn. App. at 37. Here, the petitioner has made no showing that any police officer, or other person "with a business duty to transmit" the information contained in the police report, would have been competent to verify, on the basis of personal knowledge, all of the factors that motivated the petitioner's *family* ultimately to decide to that the petitioner should be

sent to Elan. Consequently, the habeas court erred in concluding that Sherman could have mounted a rebuttal to the state's theory by attempting to enter the police report into evidence as substantive proof of why the petitioner was sent there. MOD: 81 n.51.

Furthermore, even assuming the police reports would have been admissible for this purpose, there is no merit to the petitioner's further suggestion that these reports would have been more useful to the defense in demonstrating alternate theories as to why the family sent the petitioner to Elan than was the firsthand testimony from the petitioner's own family members as to their reasons. PB: 146.⁴⁰ Although the petitioner acknowledges the evidence in the record from the petitioner's sister in this regard, he fails to acknowledge that it was Attorney Sherman who elicited this evidence, thereby undercutting the habeas court's determination that Sherman failed to make reasonable efforts to rebut the state's theory that the petitioner's involvement in Martha's murder was among the reasons the petitioner was sent to Elan. Moreover, the petitioner's suggestion that this evidence directly from a family member as to why he was sent to Elan is less authoritative than vague and inconclusive statements in a police reports – statements which, if anything, only *corroborate* that the petitioner was sent there because of "numerous problems" -- is patently untrue.⁴¹ Indeed, as already noted, by eliciting this evidence from a witness

⁴⁰ Ironically, the petitioner asserts that Julie could not testify as to the circumstances surrounding the petitioner's admission to Elan "with any degree of certitude." PB: 146. The reason the petitioner sees no "certitude" is because there was no one, single reason for the petitioner's admission to Elan – which is precisely why the habeas court erred in assuming that the DUI was the *only* explanation.

⁴¹ It cannot be stressed enough that *nothing* in the Greenwich police report states that the petitioner was taken to a hospital in Maine solely as a consequence of his drunk driving arrest. In the absence of any testimony as to how the statements in the police report came about and what they meant, the habeas court simply speculated that, because the petitioner was arrested for DUI shortly before he went to Elan, his arrest must have been the only reason for his going there. Indeed, the fact that this very same report notes that "recently . . . Michael Skakel has been causing numerous problems for the family;" App. Pt 2: A-1494; renders it equally as plausible that the family already had made plans to send Michael to Elan before, and/or regardless of, his drunk driving arrest. The habeas court clearly erred in engaging in conjecture in lieu of holding the petitioner to his burden of

sympathetic to the petitioner, trial counsel was able to present alternate reasons for the petitioner's placement in the least damaging light.

The petitioner further argues that the hearsay statements in the police report nevertheless "provided a basis upon which trial counsel could have elicited testimony from Detective Lunney and Deputy Chief Keegan concerning their knowledge of the issue" PB: 145 n. 168. However, if this were true, then the petitioner had an obligation to present testimony to this effect at the habeas proceeding, rather than hide behind mere speculation as to what those witnesses might or might not have said about their alleged personal knowledge of the family's motivation for sending the petitioner to Elan. *Johnson*, 285 Conn. at 584 (petitioner's burden in habeas proceeding "is not met by speculation . . . but by demonstrable realities"). In short, petitioner's argument in this regard only further highlights the evidentiary deficiency in his case and the questionable foundation underlying the habeas court's finding of incompetence.

Because the habeas court erroneously viewed the Greenwich police report itself as admissible substantive evidence, and in the absence of *any* further evidence that corroborated the conclusion that the court lightly drew from it, i.e., that it constituted definitive proof that the petitioner was not sent to Elan, even in part, because his family suspected his responsibility for Martha's murder, the habeas court erred in branding trial counsel incompetent for failing to utilize the report for those purposes. For the same reason, the petitioner also failed to demonstrate any prejudice because the record remains devoid of any admissible and reliable evidence that, contrary to the petitioner's admissions to Rogers and Coleman, and notwithstanding the accusations by Elan officials toward the petitioner relative to Martha's murder, the petitioner was at Elan only because of the drunk driving incident.⁴² Finally, as the habeas court correctly concluded, the evidence as to the

presenting actual evidence as to the genesis and meaning of these statements in the report.

⁴² The petitioner's bald assertion that the state's argument that at least one of the

reasons why the petitioner may have been sent to Elan was so tangential to the main issues in the case that the jury was unlikely to have given it significant weight when deciding the petitioner's guilt or innocence. MOD: 81.

For all of these reasons, the petitioner failed to prove that the defense team was incompetent for failing to utilize the Greenwich report in pursuit of a claim that he was sent to Elan only as a result of his DUI or that *Strickland* prejudice resulted from that omission.

C. The Petitioner Makes No Effort To Rebut The Respondent's Arguments That The Habeas Court Erred In Finding Trial Counsel Incompetent For Failing To Object To Testimony As To Why The Petitioner Believed He Was Sent To Elan And Further Erred In Finding That The State Claimed There Was No Contact Between Elan Officials And Greenwich Police

The petitioner makes no attempt to address the habeas court's erroneous assumption that trial counsel even could have, let alone was constitutionally required to, object to the clearly admissible testimony from Ix, Coleman and Rogers which supported

reasons why the petitioner was sent to Elan is because his family suspected his responsibility for Martha's murder "was not the truth;" PB: 146 n.169; conveniently ignores the evidence. Nothing in the Greenwich police reports eliminated the damning admissions that came from the petitioner's own mouth, as testified to by Rogers and Coleman, as to the real reason he was sent to Elan, nor did it eliminate the evidence indicating that Elan officials seemed to have some reason to confront the petitioner about his involvement in Martha's murder, even though the police did not suspect him at that time. The petitioner nevertheless asserts that "[m]erely because a series of witnesses testified as to this point, however, it does not follow that their claims were based in fact." PB: 131 n.161. However, the petitioner's argument that the trial prosecutor erred in basing his argument on live testimonial evidence, from sworn witnesses who heard the petitioner's admission firsthand, is rather remarkable, given that the petitioner's own theory to the contrary rests only on a speculative interpretation of hearsay statements in a police report, the foundation for which was *never* established by any evidence whatsoever.

At bottom, the prosecutor unquestionably had a right to point out the evidence from Rogers, Coleman and others and ask the jury to draw reasonable inferences therefrom, notwithstanding the questionable contrary inference that the habeas court itself later drew from the vague, hearsay statements in the police report. Having failed even to assert this claim in his petition below, let alone ask to present further, incontrovertible evidence that (1) the petitioner was sent to Elan *only* as the result of the drunk driving incident and (2) the prosecutor *knew* that this was the only reason the petitioner's family did so, the petitioner's glib assertion that the state and/or Attorney Sherman knew that the inference the state was asking the jury to draw "was not the truth" finds no support in the record.

the state's theory that the petitioner was sent to Elan primarily, even if not solely, because of his suspected involvement in Martha's murder. See RB: 141. The respondent presumes, as should this Court, that the petitioner makes no attempt to defend the habeas court's reasoning in this regard because it is indefensible.

As for the habeas court's criticism of trial counsel's failure to "rebut" the state's alleged suggestion that there was no contact between Elan officials and Greenwich police during the petitioner's stay at Elan, the petitioner relegates his discussion of this issue to a brief footnote. PB: 147 n.170. Therein, he once again does not attempt to defend the habeas court's reasoning, but rather attempts to salvage it by erroneously recharacterizing it.

As discussed more fully in the Respondent's Initial Brief, at *no* point during the trial or closing argument did the state erroneously suggest to the jury that there was never any contact between Greenwich police and Elan officials. RB: 166-67. Nevertheless, the habeas court expressly chides Attorney Sherman for failing to "rebut" any suggestion to this effect by the state, even though the state never made such a suggestion. MOD: 80, 81. Apparently recognizing that the habeas court is wrong in this regard, the petitioner avers that the habeas court did not misconstrue the state's argument as suggesting there was no contact between Elan and the Greenwich police, but rather, the court was "simply alerting *this* Court [i.e., the Supreme Court] that its prior finding from the direct appeal" that there was no such contact "was based on inaccurate information." (Emphasis added.) PB: 147-48 n.170. This interpretation is so inconsistent, not only with the plain language of the habeas court's decision⁴³, but also the *logic* of its finding of incompetence that the petitioner's

⁴³ The habeas court stated:

If [Attorney Sherman] had read the Greenwich police file, he readily could have questioned Lunney and Keegan about their contacts with the New York and Maine police and their direct contacts with Elan. While the court has no reason to believe either police officer would have denied such contacts, Attorney Sherman could have used the Greenwich police reports to rebut any suggestion. With the resources available to him, Attorney Sherman could

effort to suggest otherwise is specious. It would have made no sense for the habeas court to expressly and repeatedly criticize trial counsel for failing to correct, *at the criminal trial*, any erroneous inference that there was no contact between Elan and the police while nevertheless recognizing that this erroneous inference was not first articulated *until this Court's opinion in the subsequent appeal*. Clearly, the habeas court's criticism of trial counsel was based on its erroneous belief that "Attorney Benedict . . . crystaliz[ed] the claim [that there was no contact] in closing argument;" MOD: 80; and that it was *the state* which "false[ly] claim[ed]" at the trial that there was a lack of contact; *id.* at 81; a belief so belied by the criminal trial record that the petitioner rightly makes no effort to claim otherwise.

Accordingly, the habeas court clearly erred in finding trial counsel incompetent in failing to object to testimony supporting the state's theory as to the primary reason petitioner was sent to Elan; MOD: 79-80; and also clearly erred in finding counsel incompetent for failing to rebut an argument that the state never made, i.e., that there was no contact between Elan and Greenwich police. MOD: 81.

VII. THE HABEAS COURT ERRED IN FINDING THAT COUNSEL'S FAILURE TO PRESENT EXPERT TESTIMONY FROM RICHARD OFSHE ON COERCED CONFESSIONS FELL BELOW THE STANDARD OF REASONABLE COMPETENCE BUT PROPERLY FOUND NO PREJUDICE

Before turning to a refutation of petitioner's arguments, it is important to clarify the purpose for which testimony regarding the nature of Elan and its abusive treatment of petitioner was offered at trial. Petitioner and the habeas court seem to be operating under the false impression that the state offered evidence of petitioner's statements during the

have defeated *this false claim during the evidence portion of the trial which, in turn, would have prevented Attorney Benedict from crystalizing the claim in closing argument*. Attorney Sherman's failure in this regard was not a matter of tactical choice. It was a negligent omission, a failure of effectiveness.

(Emphasis added) (footnote omitted). MOD: 80. The court later again referred to "Attorney Sherman's inexcusable lapse in regard to *the state's false claim* of cover-up as it related to the reason for the petitioner's presence at Elan *and the feigned lack of contact between the Greenwich police and Elan*. . . . (Emphasis added). *Id.* at 81.

abusive general meeting as inculpatory admissions. It did not. The evidence regarding statements made, or not made, by the petitioner during the abusive and coercive general meeting was elicited by the defense, not the state. As Sherman explained, he intentionally elicited such evidence – not only through cross examination of former Elan residents who were called as state’s witnesses, but also by calling additional residents as defense witnesses -- to show that, even when pressured and abused, the petitioner did not confess. See RB: 170. The obvious aim of such testimony was to demonstrate that, if the petitioner did not admit to killing Martha in the face of such abuse and coercion, it is unlikely that he would have done so to Coleman or Higgins, as they claimed.

Therefore, the whole premise of petitioner’s claim regarding the supposed need for expert testimony is askew. This was not a situation where the state was offering ambiguous statements made by the petitioner during the general meeting and arguing they should be treated as admissions. Rather, *neither the state nor the defense claimed these statements by petitioner were admissions*. The defense simply sought to demonstrate that the fact that petitioner did not confess even when brutalized undermined the reliability of the state’s evidence that he had made admissions on other occasions.

Once the nature and purpose of this evidence is properly understood, it is apparent that there was no need for an expert to somehow blunt the impact of otherwise incriminatory evidence. The evidence of the brutal tactics used at Elan, and petitioner’s response to it, was part of the defense strategy. Thus, there was no need for the defense to challenge evidence it was offering. Nor was there any need to move to suppress this evidence. It was part of the defense case, not the state’s. In light of this, the petitioner failed to satisfy either prong of *Strickland* with respect to this claim of ineffectiveness.

A. The Habeas Erred In Finding Counsel Incompetent

Attorney Sherman and his defense team conducted a substantial investigation into how best to deal with the statements that the petitioner made during his stay at Elan. As noted in the Respondent’s Initial Brief, these efforts included bringing in special legal

assistance from New York, which helped to successfully limit the number of statements from Elan that the state could even present to the jury. RB: 168-69. Counsel further consulted with a number of mental health professionals (Elizabeth Loftus, Dr. Zenana (sic) from Yale, Dr. Avijona (sic), Dr. Berman from Boston, and also the petitioner's personal psychologist from California, Shanay Richards, and the petitioner's addiction specialist, Bob Timmons) whose goal was to assist the defense in attempting to undermine the significance of any statements the petitioner made at Elan.⁴⁴ HT 4/17: 161-62. After consulting with these experts, Sherman decided that not only would their testimony not be particularly helpful in undermining the statements, but also that, if they were put on the stand, the state might be able to elicit some very damaging information regarding the petitioner's "anti-social personality disorder." *Id.* at 162-63.

After this extensive investigation and consideration, Attorney Sherman made a strategic decision to approach the Elan statements in the following fashion: (1) educate the jury as to the coercive environment at Elan by presenting firsthand accounts through the testimony of former residents; and (2) make the jury aware that, despite this immense pressure and physical abuse, the petitioner never gave his tormentors the confession they were looking for thereby demonstrating it was unlikely the petitioner would have confessed to *anyone* under *any* circumstances. With respect to the first part of the strategy, in addition to cross examining former Elan residents Charles Siegan and Alice Dunn about the coercive tactics used at Elan⁴⁵, the defense team presented, as their own witnesses, a number of other former Elan residents to testify, from firsthand experience, about Elan's

⁴⁴ The petitioner addresses only the defense team's use of Loftus and argues that her limited area of expertise undermined her usefulness. PB: 163-64. The petitioner fails to acknowledge that Sherman testified that he not only consulted with Loftus when investigating this issue but also consulted with, and had the petitioner examined by, a *number* of mental health experts and therapists in an effort secure evidence to explain the petitioner's statements at Elan. HT 4/17: 161-62.

⁴⁵ CT 5/16: 89-101 (Siegan testifies on cross examination to abusive tactics at general meetings and fact that petitioner never confessed during those meetings); CT 5/17: 79-86 (Dunn testifies on cross to same.)

tactics.⁴⁶ See *State v. Skakel*, 276 Conn. at 646.

At the habeas trial, Attorney Sherman provided a wealth of reasons, discussed both *infra* and in the Respondent's Initial Brief, as to why he would have chosen not to call Richard Ofshe. See RB: 170-71. The petitioner's effort, and the habeas court's decision, to readily second guess Attorney Sherman in this regard cannot be reconciled with *Strickland's* mandates, for a number of reasons. First, as mentioned above, Sherman's strategy in presenting Kavanagh, Peterson, McFillan and Wiggins, as well as when cross-examining Siegan and Dunn—the former Elan residents through whom the bulk of the testimony about Elan's brutality was admitted—was to establish for the jury that petitioner did not confess, even when under extreme pressure to do so and, therefore, it is unlikely he made the admissions claimed by the state's witnesses in less coercive settings. Therefore, there was no purpose in presenting an expert to explain why the petitioner may have made admissions when subjected to extreme measures because Sherman's whole point in presenting evidence as to those extreme measures in the first place was to argue the significance of the fact that the petitioner still did *not* confess.

Second, there is no evidence that every reasonably competent criminal defense attorney practicing in Connecticut in 2002 even would have been expected to be aware of, let alone invariably call, Richard Ofshe as a witness in this case. Third, in both defending the habeas court's finding of incompetence by Sherman in this regard, as well as attacking the habeas court's finding of no prejudice, the petitioner continues to overstate the

⁴⁶ CT 5/23: 114-26 (Sherman asks Sarah Petersen whether petitioner admitted to murder at general meeting, even when subjected to abusive treatment by others; Petersen says petitioner said he didn't do it); CT 5/23: 170-77 (Sherman asks Michael Wiggins whether petitioner admitted to murder at general meeting, even when forced to wear sign saying "confront me on why I killed Martha Moxley"; Wiggins says no); CT 5/23: 207, 208-09 (Sherman asks Donna Kavanaugh whether petitioner admitted to murder at general meeting, even when being forced to wear sign saying "I am a murderer"; Kavanaugh says no); CT 5/24: 10-18 (Sherman asks similar questions of Angela McFillan.) See also CT 6/3: 64, 76-78 (Sherman argues fact that petitioner did not confess at general meeting, despite abuse).

significance of Ofshe's testimony. Fourth, the petitioner's argument also fails to give the proper deference to the legitimate strategic concerns with presenting such testimony, as explained by Attorney Sherman.

1. **There is no evidence that every reasonably competent criminal defense attorney practicing in Connecticut in 2002 would have known of Richard Ofshe's alleged expertise in rebutting statements made at institutions such as Elan, let alone necessarily would have called him to testify.**

The petitioner made no showing below that there was any "expert", other than Richard Ofshe, who would have, or even could have, provided the type of testimony that Ofshe presented at the habeas trial relative to Elan. Thus, the premise of the petitioner's claim of ineffectiveness in this regard is that every reasonably competent criminal defense attorney practicing in Connecticut in 2002 would have called Richard Ofshe himself to testify at his criminal trial. However, even assuming, for the moment, that every reasonably competent defense attorney would have known at the time that Richard Ofshe even existed as a potential resource – a highly questionable assumption, for sure – all but one of the published opinions cited by the petitioner (which themselves were entirely from jurisdictions outside of Connecticut) which even mention Ofshe do so relative to his expertise in police questioning. See PB: 166 n.181.⁴⁷ The only published opinion to address Ofshe's alleged expertise relative to questioning other than police interrogation -- is an opinion from Louisiana, a jurisdiction with which all Connecticut criminal defense attorneys presumably do not familiarize themselves on a regular basis. See *Ledbetter v. COC*, 275 Conn. 451, 463 (2005) (counsel normally not expected to research sister states in order to provide effective assistance), *cert. denied*, 546 U.S. 1187 (2006). Moreover, even in that Louisiana case, the court *excluded* Ofshe's testimony, finding "the area of research on false confessions caused by high-control groups to be vague and speculative, at best, and such

⁴⁷ Moreover, even in the context of police questioning, there is a split of authorities as to whether this type of expert testimony is properly admissible. See *Lamonica*, 44 So. 3d at 904 (citing split of authorities).

research does not satisfy the standard of *Daubert*." *State v. Lamonica*, 44 So. 3d 895, 906 (La. Ct. App. 2010), *writ denied*, 57 So.3d 331 (2011).⁴⁸

In an effort to exploit the path not chosen, the petitioner's present counsel searched for, and found, Richard Ofshe and now theorizes that, if Attorney Sherman only had thought along the same lines as present counsel, he also could have found Ofshe and then would have had no choice, under the prevailing professional norms, but to present Ofshe's testimony. However, as *Strickland* makes clear, this is not even a proper analytical framework within which to evaluate counsel's conduct. *Strickland*, 466 U.S. at 689 ("Even the best criminal defense attorneys would not defend a particular client in the same way.") To accept the premise of the petitioner's claim in this regard would be to render all criminal defense attorneys vulnerable to charges of incompetence whenever subsequent counsel comes up with a new idea. See *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir.1995) ("It is meaningless ... for [the court] now to claim that [an attorney could] have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television."), *cert. denied*, 517 U.S. 1111 (1996). For this reason alone, the petitioner's claim of attorney incompetence relative to Ofshe's potential testimony should have been rejected.

2. The petitioner overstates the significance of Ofshe's testimony

Notwithstanding that, as discussed above, the state never relied on any statements made at the abusive general meetings as proof of petitioner's guilt, the habeas court nevertheless found trial counsel deficient by reasoning that, without testimony such as

⁴⁸ The petitioner's suggestion that the *Lamonica* court precluded Ofshe's testimony only because he had been away from the field for a period of time; PB: 167 n.182; is belied by that court's written decision. Although this was one factor, the court made clear that it was equally concerned with the "vague and speculative" nature of Ofshe's proffered testimony. *State v. Lamonica*, 44 So. 3d 895, 906 (La. Ct. App. 2010). As the *Lamonica* court further observed, even in the context of police questioning, there is a split of authorities as to whether this type of expert testimony is properly admissible. *Id.* at 904 (citing authorities going both ways).

Ofshe's, jurors were incapable of figuring out for themselves that any statements elicited at the abusive Elan general meetings were unreliable and most likely made by the petitioner simply to stop the abuse. MOD: 87 and n.55. Tellingly, the petitioner expends little effort attempting to defend the habeas court's reasoning in this regard and, at one point in his brief, appears to concede that such a proposition *is* a matter of common sense. See PB: 172.⁴⁹ He argues, instead, that testimony like Ofshe's was essential in order to explain how the abuse the petitioner suffered at the general meetings might have had a psychological spillover to his private conversations with Higgins and Coleman. PB: 156-57. However, as the habeas court expressly found, "Dr. Ofshe acknowledged that his expertise would not have permitted him to opine on the truthfulness of the petitioner's alleged responses to individual questioning away from a group setting; nor would it have provided an explanation for his claimed direct admissions to Coleman or Higgins." MOD: 87. This finding is fully supported by the record. See HT 4/22: 60-66. Although the petitioner asserts that other portions of Ofshe's testimony contradict this acknowledgment of the limited usefulness of his "compromise strategy" testimony in this particular case; see PB: 156-57; there are at least two problems with the petitioner's reliance on this testimony. First, the habeas court obviously did not find this portion of Ofshe's testimony to be credible, or otherwise support the inferences that the petitioner is drawing from it, because it expressly found that Ofshe's testimony would *not* have assisted the defense with respect to the petitioner's volunteered statements to Coleman and Higgins, made outside the coercive group meetings. MOD: 87.

⁴⁹ As noted in the Respondent's Initial Brief, the concept that admissions are unreliable if they are elicited only after intense physical and psychological coercion is hardly rocket science, such that jurors are incapable of grasping the point without expert assistance. RB: 175-76. In rebuttal, the petitioner relies only on Dr. Ofshe's assertion that "jurors do not understand why a person would confess, or make equivocal admissions, if he is in fact innocent." PB: 165. However, when the proposition is stated more accurately -- whether jurors are capable of understanding, without expert testimony, why a purportedly innocent person might confess, or make equivocal admissions, *when he is being physically and mentally abused precisely in order to elicit such admissions* -- the obvious answer is a resounding yes. Attorney Sherman was not unreasonable in relying upon the jury's common sense in this regard.

Second, if nothing else, such contradictory testimony from Ofshe admitting, on the one hand, that his theory does not help to explain petitioner's statements to Coleman and Higgins but, on the other hand, it might explain some statements made in a noncoercive environment, would only further undermine the petitioner's claim that the jury would have found Ofshe's testimony persuasive.

In any event, as already argued extensively, to have presented Ofshe to attempt to explain away admissions elicited by abuse and coercion would have conflicted with Sherman's strategy of attempting to prove to the jury that *no such admissions were ever made by petitioner* during the abusive general meetings, and thereby, attempt to cast doubt on whether petitioner truly is likely to have made the other admissions, *outside* the abusive general meetings, that the state's witnesses claimed he did. This was a perfectly reasonable strategy, one that was not dependent upon Ofshe's testimony, which, if anything, only would have greatly confused the jury and distracted it from the point the defense was trying to make. This is especially so given the questionable utility of Ofshe's "compromise strategy" in explaining statements made during private conversations by teenage residents – not in response to pummeling by the administration of Elan. Given that even Ofshe was, at the very least, unclear as to how his theory would apply in these situations, and especially in light of his concession that it would not help explain petitioner's most damning admissions to Coleman and Higgins, Sherman's strategic decision to attempt to persuade the jury these admissions were never made, rather than concede they were made and explain them away, was professionally reasonable.

Equally unsound is the petitioner's assumption that Ofshe also could have provided testimony as to the workings of Elan that was superior to that provided by the actual residents of Elan that Sherman did call as witnesses. The cases cited by the petitioner demonstrate that Ofshe previously has been qualified as an expert on police interrogation methods and that his attempt to testify as an expert outside the confines of police questioning was rebuffed by the one court that has addressed it. More importantly,

however, even assuming that it can be said that Ofshe had attained a familiarity with, and specialized knowledge as to, the workings of Synanon, Ofshe expressly and repeatedly admitted at the habeas trial that he not only has no firsthand experience with Elan but, in fact, has never even studied the practices and procedures at Elan. HT 4/22: 67 ("I haven't studied Elan"); 69 ("I don't know because I haven't studied Elan" and "I don't know enough about Elan to know how it worked. . . . I'd want to continue research on Elan and interview people so that I had a basis for answering your question").⁵⁰ Thus, there simply would have been no foundation upon which to elicit testimony from Ofshe as to the actual practices and procedures at Elan, let alone testimony from him that somehow was superior to that proffered by trial counsel through the residents who actually lived there.

While touting the alleged significance of testimony that trial counsel failed to present from Ofshe regarding the workings of Elan, an institution with which Ofshe readily admitted he was not familiar, the petitioner attempts to dismiss the wealth of evidence that was presented by Attorney Sherman and the defense team, from residents who experienced the abuse firsthand. He asserts that, "[a]lthough the Elan witnesses were permitted to discuss the torment inflicted upon Mr. Skakel, they were not allowed to testify about the conditions

⁵⁰ In his brief, the petitioner cites HT 4/22: 11-12 in support of the proposition that Synanon had "a behavioral modification program similar to Elan." PB: 153. However, even Ofshe had to qualify that it was merely his assumption that the two institutions operated in the same fashion. See HT 4/22: 11 (Ofshe refers to Synanon as "the *supposed* therapeutic community that Elan was modeled after") (emphasis added.). In light of Ofshe's admission that he had never studied Elan at all; HT 22; 67, 69; he would not have been competent to testify as to whether it *in fact* operated the same way as Synanon.

Furthermore, the petitioner readily admits that Ofshe "never studied Elan directly," but argues, nevertheless, that Ofshe testified he "would have done the research and work necessary to testify as an expert on Elan" if he had been called by the defense in 2002. PB: 154 n.177. Put another way, the petitioner claims that the defense team was incompetent for failing to call Dr. Ofshe in 2002 because Ofshe was an expert on the coercive practices of Elan -- even though the petitioner admits that Ofshe was *not* an expert on anything about Elan in 2002 and, in fact, still isn't -- because this Court should speculate that Ofshe nevertheless could have *become* an expert on Elan and further speculate that, upon actually attaining such expertise, Ofshe still would have testified in a manner favorable to the defense. The absurdity of this argument should be readily apparent.

of Elan, in general, or the various ways in which other residents were tortured." PB: 152. In so arguing, petitioner overlooks substantial evidence that was admitted at the criminal trial regarding the general conditions of Elan, and about the abusive treatment of residents other than petitioner. See fn. 46, 47, *supra*; see also CT 5/16: 68-77 (testimony of Charles Seigan as to general conditions and practices as Elan); CT 5/17: 84, 86, 95 (testimony of Alice Dunn as to same). Furthermore, even if the petitioner's claim that no witnesses were allowed to testify about abuse inflicted on other residents were not belied by the record, he likewise fails to explain how yet further evidence from Ofshe as to "the conditions of Elan, in general or the various ways in which other residents were tortured" would be anything more than circumstantially corroborative of the powerful *direct* evidence that Attorney Sherman elicited from firsthand witnesses, which, as the petitioner himself concedes, included testimony directly addressing "the torment inflicted upon Mr. Skakel." Indeed, notably absent from the petitioner's brief is any acknowledgement that Attorney Sherman not only presented evidence demonstrating the untrustworthiness of any statements elicited as the result of beatings, but also obtained a concession by the state in its closing argument with respect to that very point.⁵¹

⁵¹ The petitioner also erroneously states that the residents whom Attorney Sherman called to testify at the criminal trial were precluded from testifying about the coercive atmosphere at Elan and further suggests that this was because of their lack of expertise, thereby rendering Ofshe's testimony all the more essential. PB: 168-69. In support of this argument, the petitioner makes specific reference to the trial court's exclusion of testimony relating to the abuse of another resident, Kim Freehill. PB: 152. What the petitioner fails to point out is that the trial prosecutor objected on the grounds that testimony about the conduct directed at Freehill was not relevant to the more pertinent issues regarding the *petitioner's* statements and the conduct directed toward him. CT 5/23: 117-24. There is no indication whatsoever in the record that this testimony was excluded on the ground that the witness was not qualified to testify to these facts because she was not an expert. Indeed, if anything, the instances cited by the petitioner in which the criminal trial court exercised its discretion to focus the questioning to the more relevant issue of the petitioner's experiences rather than that of other residents, strongly suggests that, even if trial counsel *had* attempted to call Ofshe to testify about the experiences of other residents at other institutions, the trial court, consistent with these other rulings, very well might not have allowed it. In any event, as discussed more fully in the Respondent's Initial Brief, the

Finally, as the petitioner himself recognizes, Dr. Ofshe also would have stressed to the jury "that all confessions need to be corroborated by objective, verifiable facts." PB: 162. The petitioner erroneously presumes that this testimony would have only helped his case because, the petitioner argues, there were certain discrepancies between the evidence and the petitioner's incriminating statements to Higgins and Coleman. Specifically, he notes that Higgins testified that the petitioner "indicated that he was at a party on the night of the murder and that he retrieved a golf club from his garage." PB: 162. However, neither the petitioner's dispute as to whether a teenager reasonably might refer to a gathering of kids for fun on the night before Halloween as a "party" nor the fact that Higgins, due to perhaps less-than-perfect recall of the petitioner's exact phrasing, mistakenly remembered the place where the petitioner said the golf club was located as a "garage" rather than a mud room or shed can mask the fact that the petitioner's statements to Higgins were, on the whole, *corroborated* by the other evidence in the case. The petitioner notes that Coleman testified that the petitioner "claimed to have hit Martha with such force that the club broke in half and that he returned to the body two days after the murder and masturbated on her." PB: 162. Once again, however, except for the discrepancy – whether due to the petitioner or the imperfect recollection of Coleman – as to a two day opportunity within which to return to the body in order to defile it, the account given by the petitioner was not contradicted by the evidence and, in fact, was *corroborated*. The evidence of Martha's injuries and death, as well as the condition of the broken golf club, were consistent with the petitioner's account to Coleman as to the manner of her death and the petitioner's admission to Richard Hoffman as to having masturbated at a location near where the victim's body was found -- an admission made at a time far removed from any beatings at Elan – corroborated the account he had given to Coleman

defense team clearly did elicit evidence from various lay witnesses establishing that residents were subjected to beatings at Elan and that they would admit to things simply to get the beatings to stop and, more importantly, that the petitioner himself was subjected to such experiences during his stay at Elan. See fn. 46, 47, *supra*.

earlier as to having done so.⁵²

At bottom, then, while Ofshe would have rendered minimal, and essentially unnecessary, assistance to the defense by further educating the jurors on the common sense proposition that coerced confessions are unreliable, his testimony also might have *hurt* the defense by lending expert support to the fact that, because the petitioner's statements to Coleman and Higgins included a number of details corroborated by other "objective, verifiable facts," those statements were all the *more* reliable, and not even vulnerable to challenge under his "compromise strategy" theory. See HT 4/22:53-54 (Ofshe's testimony that unreliability of coerced statements does not apply to admissions corroborated by "objectively knowable facts of the crime"). Thus, contrary to the habeas court's assumption, the petitioner failed to demonstrate that expert testimony from Ofshe was even wise, let alone essential, in order for Attorney Sherman to have met the standard of reasonable competence.

3. The petitioner fails to give proper deference to trial counsel's explanation as to why Ofshe's testimony would not have been strategically beneficial in this case

Even assuming that Ofshe's testimony carried the benefits claimed by the petitioner, both the petitioner and the habeas court still would have erred in failing to give proper deference to Attorney Sherman's explanation of the strategic disadvantages to presenting such testimony in this case. See *Harrington*, 131 S.Ct. at 788-89. Although the petitioner attempts to dismiss this argument with the trite assertion that "[u]ninformed and unreasonable decisions . . . are not entitled to any deference by a reviewing court;" PB: 160; he utterly failed to demonstrate that trial counsel's strategic justifications for choosing

⁵² Further, petitioner overlooks the fact that trial counsel questioned both Higgins and Coleman extensively on exactly these discrepancies. See CT 5/16: 210-11, 223-24; CT 5/17: 159-60. Counsel thus dealt with these discrepancies as reasonably competent defense attorneys do, i.e., through cross examination. To present an expert to explain a point to the jury that it could not have missed in light of Sherman's extensive cross – that certain details remembered by Higgins and Coleman did not coincide with other evidence -- was entirely unnecessary.

not to secure Ofshe's testimony was either uninformed or unreasonable and, in fact, the record clearly demonstrates to the contrary. A strategy is not unreasonable simply because, in retrospect, subsequent counsel, or even the habeas court itself, believes counsel should have chosen a different strategy.

a. Opening the door

Reasonably competent counsel rightly would have been concerned that presenting expert testimony on the possible psychological reasons for the petitioner's statements at Elan might open the door to other information about the petitioner's psychological issues that could be detrimental to the defense, including the petitioner's anti-social personality disorder, as Attorney Sherman testified. HT 4/17: 163. In rebuttal, the petitioner erroneously asserts that Sherman never actually testified to this concern. PB: 169-70. This assertion is clearly belied by the record.⁵³ Moreover, although present counsel confidently now avers, in hindsight, that proffering expert testimony on this subject carried no possible risk of opening the door to such damaging information; PB: 170; Sherman's concerns were far from unfounded at the time he had to make a judgment call as to the potential risks of calling any expert to address the petitioner's mental state. The doctrine of "opening the door" rarely involves bright lines and is, instead, a matter for the trial court's

⁵³ The petitioner accuses the respondent of "mischaracteriz[ing]" Attorney Sherman's habeas testimony, positing that his testimony regarding his concerns about proffering any expert testimony as to the petitioner's mental health was not part of his rationale in deciding not to present expert testimony in an effort to explain why the petitioner made the Elan statements. PB: 170. However, the record reflects that Sherman's testimony about his concerns for presenting any testimony relating to the petitioner's state of mind was made during the course of his response to the following question from respondent's counsel: "And did you also consult with experts, many of whom were familiar with Mr. Skakel, your client, to see mental health experts, therapists and so forth, who had treated your client to see if they could provide you with any helpful, useful information to explain the statements and the evidence coming out of Elan?" (Emphasis added.) HT 4/17: 161. It was as part of Sherman's lengthy response on this topic that he voiced his concern with whether any such evidence might carry a risk of opening the door to detrimental testimony about the petitioner's anti-social personality disorder. *Id.* at 163 ("there may have been other aspects of his history and behavior pattern that would be testified to that would not be helpful . . . like anti-personality disorder [sic]").

broad discretion. *State v. Brown*, 309 Conn. 469, 479-80 (2013). At the criminal trial, the state might well have argued – and the trial court might well have agreed -- that, by presenting Ofshe's testimony to the jury on the subject of particular psychological factors the petitioner was dealing with at the time he made the statements at Elan, the petitioner opened the door to *particular psychological issues the petitioner was dealing at that time*. In short, the unbridled optimism by new counsel that the defense unquestionably would have persuaded the trial court to let only those psychological issues favorable to the defense in, while precluding the state from fully exploring unfavorable psychological issues, either on cross examination or with rebuttal evidence, rightly was not shared by Attorney Sherman and his defense team. Moreover, once again, the issue is not whether this Court can decide whether present counsel or Attorney Sherman was more "correct" in this regard. The issue is whether Sherman's strategic concern was one that competent counsel reasonably could harbor. Clearly, it was.

b. Inconsistent theories

Although the petitioner purports to dispute the defense team's concern for arguing inconsistent theories to the jury; PB: 161-64; the basis for that dispute is unclear. He does not appear to disagree with the proposition that it is reasonable for an attorney to be concerned with pursuing inconsistent defenses. Instead, he simply argues at length as to why he believes that his alternative strategy of presenting Ofshe's testimony about coerced "confessions" would have been better, even though it would have been inconsistent with the defense teams efforts to convince the jury that the petitioner *didn't* "confess". However, once again, the issue before this Court is not which of two strategies that counsel may have chosen might be characterized as better, but rather simply whether the strategy that counsel actually did choose was reasonable. Nothing in the evidence presented at the habeas trial established, under proper application of *Strickland*, that counsel's chosen strategy was unreasonable, even if it was not the one that the petitioner or the habeas court would have chosen with the benefit of hindsight. Moreover, having reasonably chosen the

strategy of attempting to persuade the jury that the petitioner never actually admitted responsibility for Martha's murder, even when pressured to do so through intense physical and psychological abuse, it was equally reasonable for Sherman to have been concerned with presenting evidence in support of the contradictory theory that the petitioner *did* admit responsibility for Martha's murder, but that such admissions were not reliable.⁵⁴

c. War of experts

The petitioner likewise fails to address directly Attorney Sherman's legitimate concern about turning his defense "into a war of experts" and suggesting to the jury that the affluent petitioner was trying to obtain "a rich man's justice" by "buy[ing] experts" to get himself acquitted. HT 4/16: 105. Once again, even the United States Supreme Court has observed that reasonably competent counsel rightly may be concerned with "transform[ing] the case into a battle of the experts;" *see Harrington*, 131 S. Ct. at 790; and once again, the petitioner, ignoring *Strickland*, argues that trial actions should be found unreasonable merely because some other attorneys might have chosen to overlook this concern and call an expert anyway.⁵⁵

B. The Habeas Court Correctly Found No Prejudice

The habeas court found no prejudice because, for the reasons already discussed *supra*, the court properly found that Ofshe's testimony about admissions made in response

⁵⁴ Indeed, if trial counsel had chosen to take the inconsistent approaches now urged by the petitioner, and still lost, the petitioner undoubtedly would have alleged that counsel was ineffective for having taken such contradictory positions before the jury.

⁵⁵ Sherman's concerns were particularly appropriate here, given the risks of presenting Ofshe's testimony, and its extremely limited utility in any event. Further, petitioner seems to assume jurors are uniformly impressed with expert testimony. That assumption has no foundation. In fact, such an assumption may be patently unwarranted when dealing with an expert such as Ofshe who is not offering an opinion based on science or some area of expertise unfamiliar to the jurors. Ofshe's testimony was basically aimed at informing the jury about human nature and common sense, i.e. persons may say things under extreme duress that they don't mean or are untrue. Given that this is something the jurors would be fully capable of discerning on their own, presenting an expert may have actually alienated the jurors by insinuating that the defense thought they needed help understanding matters well within their understanding and collective knowledge.

to beatings and other coercive techniques would not have assisted the defense in explaining the volunteered and highly inculpatory admissions the petitioner made to Coleman and Higgins when he was *not* exposed to such compulsion. MOD: 87-88.

Moreover, as already discussed at length, the testimony of Ofshe, a man who admittedly had no firsthand knowledge of Elan, would have added little to nothing to the defense's evidence from the residents who had firsthand knowledge of Elan's coercive atmosphere, evidence that, by itself, was so successful in undermining any reliance on statements made during the general meetings that even the state was forced to concede to the jury that statements made in response to coercive tactics were worthless. CT 6/3/02: 17, 19, 122-23. Furthermore, as also discussed *supra*, the proposition that a jury would be so clueless as to need expert testimony to understand that an "admission" elicited only after beatings and other extreme forms of coercion is not trustworthy borders on the absurd.⁵⁶

⁵⁶ The petitioner concedes that he failed to secure a ruling by the habeas court on his claim that trial counsel also was ineffective for failing to move to suppress his Elan statements on the ground that they were coerced. PB: 149 n.171. Despite stressing that he "is not seeking this Court's review of this subject," PB: 161 n.179; the petitioner uses no fewer than three footnotes to engage in the equivalent of a drive-by shooting of trial counsel's conduct in this regard. PB: 149 n.171; 161 n.179; 166 n.180. Notwithstanding the petitioner's vacillation, his failure to secure a ruling from the habeas court with respect to this claim, and his failure to cross appeal any adverse ruling that might have resulted, should bar any consideration of this issue by this Court. See *State v. Mullins*, 288 Conn. 345, 357 (2008), abrogated on other grounds by *State v. Polanco*, 308 Conn. 242 (2013).

Just as importantly, the petitioner, by making statements in support of the merits of a claim that he purportedly is not pursuing in this appeal, places the respondent in the unfair position of either allowing those statements to go unresponded to or, in the alternative, addressing them directly and then being deemed by this Court to have implicitly acceded to review of an issue that the petitioner claims to be abandoning. It is the respondent's hope that, by choosing merely to correct the petitioner's passing misstatements of the law in his footnotes, the respondent will not be found by this Court to have forgone his entitlement to the more extensive briefing he would have undertaken had the petitioner squarely and properly raised and briefed this issue before this Court.

With this understanding, the petitioner's argument that any reasonably competent attorney would have and should have sought suppression of the statements elicited at the private institution finds no support in the facts or the law. First of all, as demonstrated throughout, the statements that were made under duress were not offered by the state as

VIII. THE HABEAS COURT ERRED IN FINDING THAT COUNSEL'S DECISION TO ACCEPT B.W. AS A JUROR FELL BELOW THE STANDARD OF REASONABLE COMPETENCE BUT PROPERLY FOUND NO PREJUDICE

A. The Habeas Court Erred In Finding Trial Counsel Incompetent On The Basis Of His Decision To Accept B.W. As A Juror

The petitioner and the habeas court came up with several reasons why a reasonably competent attorney might have decided to exercise a peremptory challenge to excuse B.W. as a juror. PB: 176. The respondent does not dispute that those are, in fact, potential concerns that might cause a reasonably competent attorney to choose to excuse B.W. Unfortunately for the petitioner, however, that was not the issue to be decided by the habeas court, nor is it the issue before this Court. The issue is whether a reasonably competent attorney could have made a *different* decision -- as *Strickland* expressly recognizes is commonplace and consistent with the standard it was announcing⁵⁷ -- and

admissions, but rather by the defense as evidence of the fact petitioner did not confess. Obviously, there would be no reason for trial counsel to move to suppress evidence he offered. Further, there would be no factual predicate on which to attempt to suppress the evidence offered by the state because each of those statements occurred under noncoercive circumstances.

As to the supposed legal underpinnings of such a claim, there is no settled law supporting the suppression of statements on the ground that they were coerced by non-state actors. Although the petitioner asserts that *State v. Smith*, 200 Conn. 465 (1986) and *State v. Medina*, 228 Conn. 281 (1994) "suggest" that state action is not necessary in order to suppress a coerced admission; PB: 149; he engages in no analysis of those cases demonstrating that they actually support that proposition. On the contrary, in *Smith*, which predated *Colorado v. Connelly*, 479 U.S. 157 (1986) by approximately six months, this Court erroneously assumed that state action was not necessary in order to demonstrate a federal constitutional violation warranting suppression of a confession on the ground that it was coerced. *Smith*, 200 Conn. at 476. In *Connelly*, the United States Supreme Court effectively overruled *Smith* in this regard, holding that state action *is* necessary. *Connelly*, 479 U.S. at 166. Subsequently, in *Medina*, this Court expressly recognized that *Connelly* forecloses any suppression under the federal constitution in the absence of state action and this Court also refused to dispense with the state action requirement under our state constitution because such a claim was not properly preserved in that case. *Medina*, 228 Conn. at 294-95. At bottom, the petitioner's argument that these cases even "suggest" there is merit to his claim that state action need not be shown is wholly meritless.

⁵⁷ See *Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case."); *id.* ("Even the best criminal defense attorneys would not

have chosen, instead, to *accept* B.W., as trial counsel did here. For the reasons already fully set forth in the Respondent's Initial Brief, Sherman's decision to accept B.W. fell within the wide range of reasonable strategic choices that competent counsel could have made.⁵⁸

The petitioner's and the habeas court's reevaluation of counsel's decisions from the cold-printed record, based on theoretical justifications for choosing to exclude a juror, contravenes the principles of *Strickland*. Such error is even more egregious in this case. There is no evidence that the petitioner's expert, Attorney Fitzpatrick, purported to have any personal knowledge of B.W. or that he was present during voir dire to evaluate his

defend a particular client in the same way"); *id.* at 693 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.").

⁵⁸ The petitioner refuses to acknowledge most of Attorney Sherman's explanations as to why he chose to accept B.W. and refers only to Sherman's agreement, on cross examination, that he "may have" told the petitioner at some point that having a cop on the jury would render his acquittal irrefutable. PB: 175. See HT 4/16: 178. The petitioner erroneously suggests that this was Sherman's sole justification when it is clear from a more accurate reading of his testimony that this simply was an additional point he made to the petitioner in order to put the petitioner more at ease with Sherman's other reasons for accepting B.W. In fact, when directly asked by petitioner's counsel whether this was the sole reason he chose to accept B.W., Sherman responded,

No. I was boosting Michael's --trying to boost Michael's confidence by telling him what-- what you had just said. *I picked these people 'cause I thought they were not just competent jurors, but I thought they would be good jurors. They seemed fair minded. And I put policemen on juries -- on juries before, I put lawyers on juries before and you can't use a broad brush on all these people.*

(Emphasis added.) HT 4/16: 178. Sherman also testified that the petitioner had no objection to Sherman's decision to accept B.W. *Id.* at 177.

Furthermore, contrary to the petitioner's assertion, there is nothing "odd" about the respondent's reference to Attorney Sherman's strategic decision to accept that jurors would be inclined to recognize Dr. Lee's expertise in the field of forensic science. See PB: 177 n.188. As discussed more fully in the Respondent's Initial Brief, notwithstanding present counsel's apparent belief that Dr. Lee's credentials successfully could have been undermined, Attorney Sherman's contrary belief that the best approach was to recognize the obvious, particularly given that some aspects of Lee's evidence actually *helped* the defense; see RB: 193-94; certainly was sound and one that any reasonably competent counsel could have held.

demeanor while responding to questions. There is no evidence that the petitioner's habeas counsel had any personal knowledge of B.W. or was present during the voir dire to evaluate his demeanor. The habeas court likewise did not claim to have any personal knowledge of B.W. and presumably was not present during the voir dire to evaluate his demeanor. Nevertheless, all three purport to have superior knowledge of B.W. and the factors that allegedly should have compelled Attorney Sherman – who *did* personally know B.W. and who *was* present during voir dire to evaluate his demeanor – to make a different decision. This is precisely the type of second-guessing that *Strickland* condemns.

As noted in the respondent's brief, the habeas court itself acknowledged that jury selection, "to be successful, requires more of a sixth sense and the use of intuition than perhaps any other part of trial conduct." MOD: 91. However, it is not sufficient for a habeas court to recite these principles and then ignore them in the application, as it did so frequently throughout its ruling.⁵⁹ The petitioner failed to overcome the strong presumption that Attorney Sherman made a reasonably competent strategic decision to accept B.W., based on his firsthand knowledge of B.W. and his evaluation of B.W.'s responses.

B. The Petitioner Failed To Demonstrate Prejudice

Applying an internally inconsistent rationale, the habeas court concluded that it was manifestly unreasonable for Attorney Sherman not to see that B.W. would be biased against the petitioner; MOD: 91-92; but that the petitioner failed to demonstrate prejudice because the trial court record "does not reveal that [B.W.] was actually prejudiced against the petitioner" and B.W. "stated his belief that he could be fair and suggested that even

⁵⁹ Indeed, the habeas court recognized the role of counsel's "sixth sense" and "intuition"; MOD: 91; while simultaneously chiding Attorney Sherman's alleged use of "whim or hubris." MOD: 92. Even assuming that characterizing counsel's actions as the former rather than the latter is not entirely dependent upon whether the habeas court agrees or disagrees with counsel's choice – a rationale condemned by *Strickland* – Attorney Sherman's personal knowledge of B.W. and his reputation for fairness provided a far more solid foundation for his reasonable judgment than the reliance on a "sixth sense" or intuition that the habeas court deemed perfectly acceptable.

though he would likely not pick himself as a juror if in Attorney Sherman's shoes because of the presumed bias against police officers in criminal cases, he believed he could act independently of those influences." MOD: 93. Put another way, the habeas court criticized Attorney Sherman for forming the opinion, from firsthand knowledge and observation of B.W., that B.W. could be fair, but found that no prejudice ensued because it was the *habeas court's* opinion, from reading a transcript of B.W.'s voir dire, that B.W. could be fair. On this basis, the habeas court not only properly found no prejudice, but also should have found that Sherman acted reasonably in reaching the same conclusion.

Notwithstanding the perplexing reasoning of the habeas court in this regard, it was indisputably correct that the record in this case fully supports the conclusion that the petitioner failed to meet his burden of showing prejudice. The voir dire transcript from the criminal trial fully supports the habeas court's finding the B.W. could be impartial. See RB: 183-85. The petitioner made no effort to call B.W. as a witness at the habeas trial in an effort to prove otherwise. The only testimony at the habeas trial from any witness with firsthand knowledge of B.W. was that of Attorney Sherman, whose testimony only corroborated the opinion, held by both Sherman and the habeas court, that B.W. would be impartial. See RB: 185.

The petitioner argues that, assuming this Court were to agree with the habeas court's finding of incompetence by Sherman in this regard, he should be excused from demonstrating *Strickland* prejudice. PB: 178. However, none of the cases the petitioner relies upon involve claims of ineffective assistance of counsel. Thus, none of them stand for the proposition that a petitioner is excused from demonstrating prejudice, under the *Strickland/Harrington* standard, when he challenges counsel's juror selection.⁶⁰

⁶⁰ Although the petitioner cites *United States v. Torres*, 128 F.3d 38, 45 (2d Cir. 1997), *cert. denied*, 523 U.S. 1065 (1998), for the proposition that "under certain circumstances, juror bias could be conclusively presumed as a matter of law," PB: 178; he fails to point out that the *Torres* court nevertheless reaffirmed that the court "*has consistently refused to create a set of unreasonably constricting presumptions that jurors*

Accordingly, the habeas court did not err in finding that the petitioner failed to demonstrate prejudice from counsel's decision to accept B.W. as a juror.

IX. THE HABEAS COURT ERRED IN FINDING THAT COUNSEL'S CLOSING ARGUMENT FELL BELOW THE STANDARD OF REASONABLE COMPETENCE BUT CORRECTLY FOUND NO PREJUDICE

A. The Habeas Court Erred In Finding Trial Counsel Incompetent With Respect To Closing Argument

At no point in the "General Principles of Law" that the petitioner claims controls the issue of ineffective assistance of counsel relative to closing argument; PB: 184-85; does the petitioner acknowledge the United States Supreme Court's dictates that "deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage;" that "which issues to sharpen and how best to clarify them are questions with many reasonable answers;" and that the mere fact that counsel chose not to, or even inadvertently failed to, make arguments that could have been made does not render him incompetent. *Yarborough*, 540 U.S. at 5-6, 7-8. Presumably, the petitioner does not acknowledge these principles because the habeas court so thoroughly ignored them when critiquing Attorney Sherman's closing argument. Had the habeas court properly applied the correct standard, it would have rejected the petitioner's claims relative to Attorney Sherman's closing.

be excused for cause due to certain occupational or other special relationships which might bear directly or indirectly on the circumstances of a given case, where ... there is no showing of actual bias or prejudice. United States v. Brown, 644 F.2d 101, 104-05, cert. denied, 454 U.S. 881 (1981) (quoting *Mikus v. United States*, 433 F.2d 719, 724 (2d Cir. 1970))." (Emphasis added.) (Internal quotation marks omitted.) *Torres*, 128 F.3d at 46.

Just as importantly, the *Torres* court recognized that whether or not to allow such jurors to sit is a matter of *discretion*, to be exercised in accordance with the sound judgment of the decisionmaker, whether that be the trial judge, as under the federal procedures at issue in *Torres*, or the attorneys, as under our state procedures here. *Torres*, 128 F.3d at 48 ("We do not today hold that . . . the district court would have erred had it kept Juror No. 7 on the jury. But we do hold that the court acted within its discretion in excusing her from the jury."). Thus, if anything, *Torres* only further demonstrates that it was improper for the habeas court to readily second-guess Attorney Sherman's exercise of discretion in accepting B.W.

Just as importantly, the petitioner, like the habeas court, fails to indicate which particular issues actually discussed by Attorney Sherman should have gone unaddressed in favor of the issues new counsel now urges in hindsight. Closing argument had a time restriction. CT 6/3: 86. As discussed in the Respondent's Initial Brief, Sherman addressed a host of important points within the time allotted. RB: 195-99. While the petitioner and the habeas court readily criticize Sherman's failure to discuss certain topics, such criticism rings hollow in the absence of any suggestion as to which portions of Sherman's argument should have been eliminated and, more importantly, in the absence of any assurance that, if Sherman had done so, the petitioner would not simply have claimed that Sherman was ineffective for those omissions instead.

1. Reasonable doubt

The petitioner argues that, because Attorney Sherman initially requested to use a demonstrative aid to explain the concept of reasonable doubt, but was denied permission to do so by the trial court, the "only" explanation for his failure to discuss reasonable doubt in his closing argument must be "inattention and neglect." PB: 186. This argument is legally and logically flawed. As noted in the Respondent's Initial Brief, the state already had *talked* to the jury about reasonable doubt and Attorney Sherman was well aware that the trial court also was going to fully *talk* to the jury about that concept as well in its final charge. RB: 205. Thus, while trial counsel thought it might have helped the defense to attempt to *show* the jury examples of reasonable doubt through a creative demonstrative aid that might capture the jury's attention in a manner favorable to the petitioner, once that opportunity was denied by the court, there was little additional benefit to be gained wasting the defense's limited argument time by yet again merely *talking* to the jury about that general legal principle, rather than addressing the far more important arguments as to why, specifically, the jury should have found reasonable doubt in *this* case. Once again, the fact that the petitioner, Attorney Fitzpatrick and the habeas court, with the benefit of hindsight, would have preferred it if Attorney Sherman also had spent his time repeating these

general principles to the jury, their preferences are not the benchmark for determining whether Attorney Sherman's experienced judgment to the contrary was incompetent. *Yarborough*, 540 U.S. at 5-6.

2. Third party culpability

The petitioner's overly simplistic reading of Attorney Sherman's discussion of the Littleton evidence, including the petitioner's isolation of Sherman's comment that he did not know whether Littleton was, in fact, the murderer, ignores the wisdom of the High Court in *Yarborough*, which aptly recognized that "there is nothing wrong with a rhetorical device that personalizes the doubts anyone but an eyewitness must necessarily have." *Yarborough*, 540 U.S. at 10-11.

Knowing full well that the evidence of Littleton's potential culpability that the defense presented had its weaknesses, Attorney Sherman wisely chose to maintain credibility with the jury by admitting those weaknesses while at the same time repeatedly reminding the jurors that (1) the evidence that the state attempted to gather against Littleton, including his arguable "admissions", was at least as strong as the evidence against the petitioner and (2) if the jurors understandably had concerns about the reliability of the evidence implicating Littleton – which the state itself was arguing they should – they should also have at least the same doubts about the weight and reliability of the evidence against the petitioner. RB: 205-210. This was not only a reasonably competent approach but, indeed, a shrewd and creative way of dealing with the imperfect nature of the evidence against Littleton while also inviting the jury to conclude that the state's approach to gathering inculpatory evidence against Littleton was questionable and, therefore, its subsequent investigation of the petitioner was likely just as questionable. See *Strickland*, 466 U.S. at 693 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.").⁶¹

⁶¹ The duplicitous nature of the petitioner's position on the Littleton evidence should

3. The tree masturbation stories

The most perplexing thing about both the petitioner's and the habeas court's criticisms of Attorney Sherman's argument relative to the "tree masturbation" stories is their refusal to acknowledge the portions of Sherman's arguments that clearly undermine those criticisms. As noted in the Respondent's Initial Brief, the habeas court repeatedly, and wrongly, asserted that both the trial prosecutor and Sherman "ignored" or "missed" the evidence indicating that the petitioner purportedly had told a similar masturbation story to Meredith in 1987. See RB: 211-12. As the numerous citations to the record set forth in the Respondent's Initial Brief indisputably demonstrate, neither the trial prosecutor nor Attorney Sherman either ignored or missed the evidence relative to the 1987 version given to Meredith. In fact, Sherman directly addressed and rebutted any suggestion that the petitioner did not tell anyone about allegedly masturbating until he told Pugh in 1992, arguing, "The bottom line is he gave the same story to Michael Meredith, my new best friend. He gave the same story to Andy Pugh, and he gave the same story to Richard Hoffman" and "Michael Meredith embellishes the story but he still says [the petitioner] told him the same story." CT 6/3: 88.

Furthermore, the petitioner continues to mischaracterize the real point of the state's "fabrication" argument, which Attorney Sherman, in contrast, deftly picked up on and attempted to rebut. The state's point was not that the *entire* masturbation story did not arise until after Dr. Lee became involved. Rather, it was that the petitioner *changed the*

not go unnoticed. On the one hand, the petitioner has criticized Sherman for allegedly failing to recognize that the evidence against Littleton was so weak that the defense team was incompetent for proffering him as a third party suspect over Tommy Skakel or Hasbrouck and Tinsley. On the other hand, the petitioner criticizes Sherman for failing to pretend, during his argument to the jury, that the evidence against Littleton was unimpeachable. Rather than limiting himself to the simplistic "all or nothing" approach that new counsel envisions, Attorney Sherman astutely strategized that both the potential strengths of the evidence against Littleton and the weaknesses exposed by the manner in which the state obtained such evidence could be used simultaneously to plant reasonable doubt in the jurors' minds as to the state's case against the petitioner.

details of the story in his 1992 version to Pugh, moving his actions to a different tree that was closer to where the victim's body was found, in an effort to explain any of his DNA that might be found on the body. In this regard, it is difficult to fathom how the petitioner could have read Sherman's closing argument and still be claiming that Sherman failed to "highlight" that Pugh's testimony about it being a different tree "was not based in fact, but rather speculation" PB: 188. As noted in Respondent's Initial Brief, Sherman expressly argued to the jury:

I mean, if you believe Michael Meredith, Michael Meredith says that [the petitioner] was next to the house looking at [the victim] in the shower, undress. That couldn't be under the tree where she was found. The testimony is very clear, that tree is so far away. Michael Meredith embellishes the story but he still says [the petitioner] told him the same story. Andy Pugh, same thing, he went out there, never confessed but he was in the tree. **Andy Pugh says, I am assuming it was the same tree. I assume it was the tree where her body was found. No evidence to suggest that at all.**

(Emphasis added.) CT 6/3:88-89. It is impossible to reconcile this portion of Sherman's argument with the petitioner's false charge that Sherman failed to "highlight" the speculative nature of Pugh's testimony. Furthermore, shortly after making this point, Sherman again attempted to undermine Pugh's assumption by arguing to the jury that "it doesn't make sense that [the petitioner] would tell everyone he went to look in her house by climbing the tree under which she was found. It is too far away." *Id.* at 89.⁶²

⁶² The petitioner attempts, as he frequently does, to shift the focus of his argument away from the claim actually decided by the habeas court by criticizing Sherman's decision not to cross examine Pugh regarding his "assumption." PB: 188 & n.196. Of course, the specific claim before the court related to Sherman's closing argument, not cross examination, and it is improper for the petitioner to attempt to pursue a different claim here. See *Safford v. Warden*, 223 Conn. 180, 189 (1992). In any event, it is far from clear that no competent counsel reasonably would have decided that it was better simply to leave Pugh's testimony alone, insofar as Pugh already stated on direct examination that he merely "assumed" it was the tree. The purely speculative nature of the petitioner's assertion that cross examination of Pugh would have "debunk[ed]" Pugh's assumption; PB: 188; rather than caused Pugh to express more certainty in his knowledge as to which tree the petitioner meant, to the defense's detriment, is evident from the petitioner's failure to call Pugh to testify at the habeas trial in order to establish what he actually would have said.

As repeatedly stressed by the United States Supreme Court in *Yarborough*, even if defense counsel had chosen to forgo addressing the masturbation stories entirely, a strategic choice as to "which issues to sharpen" is a decision as to which even greater deference is owed counsel than the substantial deference already mandated by *Strickland*. *Yarborough*, 540 U.S. at 5-6. In this instance, however, the accusation by the petitioner and the habeas court that Sherman did not pointedly address the state's arguments regarding the masturbation stories is not even true, as the record clearly demonstrates. Accordingly, the habeas court erred in finding Sherman incompetent on this basis.

4. Reasons why petitioner was sent to Elan

The petitioner's criticism of Sherman relative to the issue of why he was sent to Elan rests entirely on his assumption that the unexplained hearsay statements contained in the Greenwich police reports conclusively established the one true reason why he was sent there and that, had Sherman successfully presented such evidence to the jury, he could have so argued. For the reasons argued in the Respondent's Initial Brief at 163-64, as well as in Issue VII, *supra*, the habeas court's theory as to the conclusive nature of the police report is flawed. Further, for reasons also previously discussed, trial counsel would have had good reason for not highlighting either the DUI arrest or the numerous other reasons as to why the petitioner's family may have decided to send him to Elan, insofar as this evidence also would have been highly prejudicial. In addition, by attempting to make such an argument solely on the basis of the inconclusive hearsay statements contained in that report, Sherman only would have focused the jury once again on the contrary explanations provided to Rogers and Coleman by the petitioner himself and invited the state, in rebuttal, to remind the jury of their testimony regarding the petitioner's inculpatory statements. Competent counsel reasonably could have chosen not to go down that road.

5. Comments objected to by the state and/or stricken by the court

In resting part of its finding of incompetence on the objectionable nature of a few of defense counsel's comments in his closing argument, to the detriment of the state, the

habeas court once again lost sight of the issue before it. Whatever legal errors were committed by Attorney Sherman during his closing argument, they were not errors grounded in the petitioner's Sixth Amendment right to counsel. Tellingly, the petitioner cites not a single case, from any jurisdiction, in which a court has concluded that arguments by defense counsel that are legally objectionable and prejudicial to the *state*, can serve as the basis for a claim that the *accused* was thereby denied his Sixth Amendment right to the effective assistance of counsel.

Forceful advocacy, whether it be by the state or the defense, carries with it the possibility that certain arguments may go unchallenged by opposing counsel, and thereby ultimately persuade the jury on significant points, as well as the risk that some arguments might be objected to and stricken. Attorney Sherman argued hard for his client and, in so doing, he found himself corrected by the court a few times in the course of a lengthy argument. Contrary to the habeas court's mischaracterization, such instances hardly are "remarkable", given this Court's recognition that "the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." *State v. Reynolds*, 264 Conn. 1, 162 (2003), *cert. denied*, 541 U.S. 908 (2004). Just as importantly, such actions most assuredly did not reflect a lack of effort by Sherman on his client's behalf such that they implicated the petitioner's Sixth Amendment right to counsel. The habeas court erred in reasoning otherwise.

B. Although The Habeas Court's Reasoning Is Suspect, Its Conclusion That The Petitioner Failed To Demonstrate Prejudice Is Correct

The respondent acknowledges that, consistent with its flawed reasoning throughout its opinion, the habeas court's rationale in support of its finding of no prejudice from counsel's allegedly incompetent argument is questionable. The respondent certainly agrees with the proposition that, under appropriate circumstances, a court's instruction to the jury that the arguments of counsel are not evidence can mitigate, and even potentially eliminate, any concern for prejudice flowing from an argument by counsel that misstates

facts or invites the jury to speculate on arguments unsupported by the evidence, the sole articulated reason for the habeas court's finding of no prejudice. MOD: 108. Thus, for example, insofar as the petitioner based his claim of ineffective argument, in part, on improper remarks made by Attorney Sherman that spoke to facts not in evidence; see RB: 215-16; the trial court's instruction that arguments of counsel are not evidence properly may be considered to have cured any potential harm or prejudice flowing from trial counsel's arguments that discussed "facts" that arguably were beyond the record before the jurors. *State v. Ancona*, 270 Conn. 568, 616 (2004), *cert. denied*, 543 U.S. 1055 (2005). However, the petitioner's challenges to trial counsel's closing argument, discussed *supra*, are more numerous than mere comments by counsel suggesting facts not in evidence. Indeed, the majority of his complaints have nothing to do with that concern. Consequently, the respondent must agree that the habeas court erred in basing its finding of no prejudice solely upon the fact that the criminal trial court gave an instruction that arguments of counsel are not evidence.

Nevertheless, while the habeas court's reasoning in support of its conclusion that prejudice was lacking is suspect, its conclusion that the petitioner failed to demonstrate prejudice was correct, as a matter of law, for different reasons. With respect to counsel's failure to specifically discuss the concept of reasonable doubt, the jury was instructed extensively on reasonable doubt, as Sherman undoubtedly was aware it would be; CT 6/3: 144-47, 152-53, 167, 168, 170, 171, 173, 174-79, 182; and the petitioner has failed to demonstrate that Sherman's decision not to also address this principle is likely to have affected the deliberations at all. Likewise, the weaknesses in the evidence implicating Littleton was emphasized to the jury by the state and, thus, the jury undoubtedly was aware of those weaknesses, whether they were expressly acknowledged by trial counsel or, consistent with present counsel's preferred strategy, completely ignored.

Furthermore, the claim that Sherman failed to address Michael Meredith's earlier account of the tree masturbation story is so utterly meritless and contradicted by the record

of the closing argument that prejudice should be a moot point. Nevertheless, even assuming Sherman actually had failed in the manner alleged by the petitioner and the habeas court, the issue of exactly when the petitioner first conveyed the “tree masturbation” story to witnesses was a relatively minor issue in the case.

With respect to the Greenwich police report, that claim, too, is so lacking in evidentiary support as to seriously call into question whether Sherman even would have been *allowed* to argue that the report’s hearsay statements reliably established that the DUI incident was the single reason why petitioner was sent to Elan and that no possible consideration could have been given to his suspected involvement in Martha’s murder. Nevertheless, even if Sherman had attempted to do so, such an argument certainly, and easily, would have been defeated by the state in its rebuttal argument, which undoubtedly would have emphasized the speculative and unreliable nature of the vague and unsubstantiated references from a police report, particularly when contrasted with the other explanations offered by the petitioner himself, through Roger and Coleman, and corroborated by Ix, as well as through the testimony of the petitioner’s sister, who confirmed that there were many explanations for why the petitioner’s family sent him to Elan. This trove of evidence undoubtedly would have put the lie to any suggestion that the petitioner’s drunk driving offense was the only possible explanation for why he was sent there. Moreover, as the habeas court recognized, the question of exactly why the petitioner was sent to Elan was “tangential to the main issues in the case.” MOD: 81.

Finally, trial counsel’s improper remarks, even assuming they properly served as a basis for a claim of ineffectiveness at all, were immediately addressed and the criminal trial court instructed the jury to disregard them. Insofar as the jury is presumed to have followed these instructions; *Ancona*, 270 Conn. at 616; no prejudice would have flowed to either party.

X. THE HABEAS COURT ERRED IN FINDING TRIAL COUNSEL DEFICIENT IN FAILING TO MOVE TO SUPPRESS THE HOFFMAN TAPES BUT PROPERLY FOUND NO PREJUDICE

A. The Habeas Court Clearly Erred In Finding That “It Did Not Even Occur To” Counsel To Move To Suppress The Tapes

The respondent has claimed that the habeas court’s findings that “it did not even occur to” Sherman to attempt to suppress the tapes and that he “made no effort to learn whether he had a basis” for doing so, were not only findings that were unsupported by any evidence but were contrary to the *only* evidence before the court relative to Sherman’s efforts. RB: 221-24. Not surprisingly, the petitioner makes no effort to cite to any evidence that might support these clearly erroneous findings. Instead, he invites this Court to ignore the habeas court’s actual findings and instead interpret the habeas court’s decision to say something entirely different. The petitioner argues that what the habeas court must have meant was simply that trial counsel was incompetent due to his “alleged unawareness of the written agreements between Hoffman and Mr. Skakel” PB: 195.

It is the petitioner, not the respondent, who takes the court’s findings “completely out of context.” See PB: 195. In context, the habeas court’s written decision clearly states that “it did not even occur to [Sherman] *to attempt to suppress the utilization of the seized materials at trial;*” (emphasis added) MOD: 103; and that “Sherman made no effort to learn *whether he had a basis for seeking to suppress the materials seized from Hoffman by Garr.*” (Emphasis added.) *Id.* The reference to “seized materials” clearly does not refer to the written agreement between the petitioner and Hoffman; it clearly refers to the tapes seized by Garr. The fact that the habeas court refused to acknowledge even the existence of the substantial evidence of Sherman’s efforts to “learn whether he had a basis” for attempting to suppress the tapes, which obviously *had* “occurr[ed] to” him; see RB: 219-20; only further demonstrates that the habeas court intended to condemn Sherman for not investigating the possibility of seeking suppression of the tapes *at all*, a finding that is

completely unsupported by any evidence.⁶³

The error in the habeas court's findings in this regard is important. By wrongly asserting that "it did not even occur" to Sherman to attempt to suppress the tapes and that he "made no effort to learn whether he had a basis for doing so," the habeas court not only failed to apply a presumption of competence to Sherman's actions, but also inaccurately portrayed Sherman as having completely overlooked the possibility of suppression, despite the wealth of evidence demonstrating his extensive investigation of that issue. While the habeas court's misapplication of the *Strickland* legal principles when evaluating Sherman's efforts is troubling enough, it should not be permitted to compound that error by also making erroneous factual findings, out of whole cloth, falsely suggesting that Sherman "made no effort to learn" whether a motion to suppress was likely to be fruitful.

B. In This Appeal, The Petitioner Improperly Changes His Theory Of Ineffectiveness Relative To The Grounds Upon Which Trial Counsel Should Have Sought Suppression, Grounds That Should Not Be Considered By This Court But, In Any Event, Are Equally Meritless

The habeas court concluded that Inspector Garr unlawfully seized the tapes from Hoffman. MOD: 103. This legal conclusion was based *entirely* upon the court's finding that Hoffman did not freely and voluntarily consent to turning the tapes over to Garr because Hoffman felt intimidated by the words and actions of Garr and an unnamed "beefy" police officer who accompanied Garr. *Id.* The habeas court further reasoned that, if Sherman had chosen to move to suppress the tapes on the basis of this intimidation, he could have established the petitioner's standing by relying upon the written agreement which vested ownership rights of the tapes in the petitioner, not Hoffman. *Id.* The habeas court then used these underlying findings and conclusions as the bases for its further conclusion that

⁶³ Once again, while the habeas court theoretically was entitled to discredit the undisputed testimony as to Sherman's efforts to find a basis for challenging the tapes; see RB: 219-20; it was *not* entitled to infer the opposite, i.e., that the defense team made *no* effort to find such a basis, simply from its rejection of that testimony. *State v. Hart*, 221 Conn. 595, 605 (1992).

Sherman was incompetent for failing to file a motion to suppress. *Id.*

As fully discussed in the Respondent's Initial Brief, the *only* evidence presented at the habeas trial established that (1) Sherman *did* investigate the circumstances surrounding Hoffman's surrender of the tapes and (2) during that investigation, Hoffman told Sherman that the surrender of the tapes was voluntary. RB: 219-20, 224-26. Thus, once again, the habeas court based its ruling on a critical fact that was not only unsupported by any evidence, but directly contradicted by the only evidence addressing the subject. See fn. 64, *supra*. Attorney Sherman cannot be deemed unreasonable for not having been clairvoyant enough to know that the version of events that Hoffman was giving him during his preparation for the 2002 criminal trial would be considerably different from the version of events that Hoffman would testify to before the habeas court eleven years later.⁶⁴

Apparently recognizing that there is no evidence that Attorney Sherman had any reason to believe that Hoffman was lying to him when Hoffman said the surrender of the tapes was totally voluntary, the petitioner makes no effort to defend the habeas court's ruling that Sherman was deficient for failing to move to suppress the tapes on the basis of Garr's alleged intimidation of Hoffman. Instead, the petitioner now radically changes the nature of his claim, arguing, for the first time, that "it was not necessary that trial counsel be aware of the coercive or intimidating nature of Garr's interaction with Hoffman. . . . Indeed, the voluntariness, or lack thereof, of Hoffman's production of the items is immaterial to the analysis since the articles were not his property and he lacked the capacity to consent to their seizure." PB: 199. The theory of suppression that the petitioner now suggests

⁶⁴ Significantly, Hoffman chose *not* to contest the subpoena and instead voluntarily appeared before the grand jury at the designated time. The fact that Hoffman did not bother to contest the subpoena relative to his *own* appearance before the grand jury rendered it all the more reasonable for Attorney Sherman to have accepted Hoffman's representation that he likewise handed the tapes over to Garr voluntarily and saw no reason to do it "the hard way," i.e., by attempting to contest the subpoena.

Sherman should have pursued should not be considered because it was never raised below. Furthermore, such a theory would have failed because the petitioner failed to establish: (1) as a matter of fact, that Garr or the grand jury knew, or reasonably should have known, that Hoffman lacked authority to consent to the release of the materials; and (2) as a matter of law, that Attorney Sherman could have established that the private business agreement between Hoffman and the petitioner superceded the authority of the grand jury subpoena, thereby relieving Hoffman of his obligation to surrender the tapes to the grand jury.

1. The petitioner's newly-crafted claim of ineffectiveness is based on a theory of suppression never argued below

Nowhere in either the petitioner's initial post-trial brief or his reply brief did he urge the habeas court to find Attorney Sherman ineffective for failing to argue that, because of the written agreements between the petitioner and Hoffman, *any* seizure of the tapes from Hoffman – even a consensual one – was unlawful because Hoffman had no authority to turn the tapes over. See Petitioner's Post-Trial Memorandum at 28-31; Petitioner's Post-Trial Reply Brief at 19. On the contrary, in his briefs below, the petitioner, like the habeas court, relied solely upon Garr's allegedly intimidating tactics as the basis for the motion to suppress he claimed should have been pursued by Sherman. Petitioner's Post-Trial Memorandum at 28-31. The petitioner referred to the written agreements *only* in his reply brief and *only* to rebut the respondent's argument that Sherman reasonably believed he may not have had standing. See Petitioner's Post-Trial Reply Brief at 19.

This Court should reject the petitioner's effort to shift his theory on appeal, apparently unable to rebut the respondent's argument that the theory of ineffectiveness he pursued below – and the one adopted by the habeas court – was fatally flawed because the only evidence presented below is that trial counsel was informed by Hoffman that the surrender of the tapes was voluntary. See *Safford*, 223 Conn. at 189 (criticizing petitioner's practice of "shifting the grounds of his claim on appeal when the grounds he had asserted in the trial court proved unavailing").

2. The petitioner failed to establish that either Garr or the grand jury knew, or reasonably should have known, of the written agreement between Hoffman and the petitioner that allegedly would have made it unlawful for Hoffman to have surrendered the tapes

It appears to be the petitioner's position that even if evidence is voluntarily turned over to authorities by a person, like Hoffman, who is in sole possession of the evidence and who has apparent authority to surrender it, the evidence nevertheless must be suppressed if the defendant/petitioner could later establish that he had a confidentiality and retention of ownership agreement with that person relative to that evidence. PB: 199. In so arguing, petitioner overlooks clear authority from both the United States Supreme Court and this Court holding that a consensual surrender of evidence is not an unlawful "seizure" if the consenting party had the apparent authority to give such consent, even if it is later established that such authority was lacking. See *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990) (recognizing doctrine of "apparent authority" under federal constitution); *State v. Buie*, 312 Conn. 574 (2014) (recognizing same under state constitution).

In the habeas proceeding below, the petitioner presented *no* evidence establishing that either Garr, or the grand jury issuing the subpoena Garr was serving, had any reason to believe that Hoffman and the petitioner had entered into any sort of an agreement setting forth their rights relative to the materials that Hoffman had in his possession.⁶⁵ In the absence of such evidence, the petitioner failed to establish that Attorney Sherman would have been able to convince the criminal trial court that the authorities acted unreasonably in relying on Hoffman's apparent authority to surrender tapes that were in his sole possession at the time.

Significantly, the petitioner cites no case supporting the proposition that the lawfulness of a seizure under the Fourth Amendment may depend upon whether the

⁶⁵ Moreover, even if such evidence had been presented – which it was not – the habeas court certainly made no *finding* that Garr should have been aware of that agreement. This is because, once again, the habeas court did not even address this alternative theory of suppression.

defendant can later establish, in court, the existence of an agreement giving the defendant ownership rights in the property, even if the defendant presents no evidence that the authorities reasonably knew, or should have known, about the existence of such an agreement at the time of the seizure. Consequently, there is no merit to his argument that a defendant's ownership rights alone render a search or seizure of evidence unlawful even if a third party, who possesses the evidence and gives no reason to suggest that he lacks authority to consent, gives the authorities such consent. On the contrary, such a holding would do nothing to further the goals of the Fourth Amendment, which turns on the reasonableness of the search and/or seizure in light of the circumstances known to the police at the time. Instead, it would needlessly frustrate – and perhaps even paralyze – legitimate criminal investigations by interjecting the possibility that, at some unknown point in the future, evidence might retroactively be deemed suppressible if the defendant can establish facts unknown to the police at the time of their earlier actions.

3. The petitioner failed to demonstrate that trial counsel would have succeeded on a motion to suppress by claiming that the private business agreement he and Hoffman had superceded the authority of the grand jury subpoena

Notwithstanding the sinister gloss that the habeas court chose to place on Garr's comment that the tapes could be surrendered "the easy way . . . or the hard way," Garr was, in fact, correct: Hoffman could choose to turn the tapes over in response to the subpoena "the easy way," i.e., by just giving them to Garr, or "the hard way," i.e., by choosing to contest the subpoena in a Massachusetts court (most likely incurring the cost of an attorney) in the dim hope that the court would excuse him from complying for some unexplained reason. Regardless of how they were turned over, however, the petitioner utterly failed to demonstrate that those tapes ultimately would not have been obtained by the grand jury, as both trial counsel and the habeas court correctly reasoned.

The petitioner argues at length that his ownership of the tapes and his confidentiality agreement with Hoffman deprived Hoffman of authority to consent to Garr taking the tapes

pursuant to the grand jury subpoena. On the basis of that theory, the petitioner further argues that suppression of the tapes would have been required because “[t]he exclusionary rule **requires** that the evidence obtained from prior illegal police activity **must be** suppressed if such evidence is found to be the fruit of that prior police illegality.” (Emphasis in original.) PB: 205, citing *State v. Anderson*, 67 Conn. App. 436, 442 (2001). However, as the habeas court correctly reasoned, the grand jury already had exerted its power over the tapes and ordered Hoffman to bring them to the investigating authority, a power not dependent upon the consent of either Hoffman or the petitioner.

In the absence of any showing by the petitioner that he and/or Hoffman had a legal basis upon which to withhold this evidence from the grand jury – a showing the petitioner never made below – he failed to establish that the state obtained the tapes solely as the result of “prior illegal police activity” and that the tapes were the “fruit of that prior police illegality,” rather than the result of the lawful issuance of the grand jury subpoena. Put another way, the petitioner made no attempt to demonstrate how the allegedly “unlawful” securing of the tapes – whether unlawful due to Garr’s allegedly intimidating tactics or, instead, due to the existence of the ownership and confidentiality agreement -- would have negated the overriding authority of the grand jury *subpoena*, pursuant to which Hoffman inevitably would have been legally required to appear with the tapes, with or without the consent of Hoffman *or* the petitioner. The petitioner fails to cite a single case that supports his theory that illegal conduct by an officer during the course of serving a subpoena automatically requires suppression of the evidence to which that subpoena was directed. On the contrary, the United States Supreme Court has expressly rejected such broad reasoning in the Fourth Amendment context. *Hudson v. Michigan*, 547 U.S. 586, 591-92 (2006).

Here, as the habeas court correctly concluded, given the undisputed fact that the grand jury already had exerted its power over the tapes and ordered Hoffman to bring them to the investigating authority – a power not dependent upon the consent of either Hoffman

or the petitioner – it is readily apparent that, pursuant to the subpoena, the tapes inevitably would have been turned over to the state as part of its criminal investigation, regardless of Garr’s alleged actions or any private agreement between the petitioner and Hoffman to keep such tapes confidential. The petitioner never established otherwise, as it was his burden to do, and, consequently, he failed to demonstrate *either* that trial counsel was incompetent for failing to pursue a futile motion to suppress the tapes *or* that he was prejudiced thereby.

C. Even If Trial Counsel Could Have Successfully Suppressed The Tapes Under Either Theory, The Petitioner Nevertheless Has Failed To Demonstrate That The Outcome Of The Criminal Trial Would Have Been Different

Finally, even if the tapes themselves had been suppressed, under either the habeas court’s theory or the petitioner’s alternate theory in this appeal, the petitioner also failed to demonstrate that the outcome of the criminal trial is reasonably likely to have been different. Petitioner’s statements to Hoffman were clearly admissible and would have been heard by the jury, whether on the tape or through Hoffman’s testimony. Therefore, the jury would have heard this evidence, regardless of any effort by trial counsel to suppress the tapes.

Petitioner claims, nevertheless, that the jury was more influenced by hearing the petitioner’s version given in the tapes than it would have been had it heard these same statements through Hoffman’s testimony. PB: 206. In so arguing, the petitioner relies upon nothing more than rank speculation. Further, the defense team came to the opposite conclusion, reasoning that since the jury inevitably was going to hear the masturbation story through Hoffman, as well as Pugh, Meredith and Ridge, it was better for the jury to hear it directly from the petitioner. Given that it is purely a matter of conjecture whether hearing the petitioner’s own version through the tapes, instead of solely through the testimony of the state’s witnesses, ultimately helped or hurt the defense, the petitioner failed to meet his burden of demonstrating that it is almost more probable than not that the

verdict would have been different if trial counsel had been able to succeed in suppressing the tapes. *Harrington*, 131 S.Ct. at 112.⁶⁶

XI. THE PETITIONER IS NOT ENTITLED TO RELIEF UNDER A "CUMULATIVE ERROR" THEORY OF PREJUDICE

The petitioner purports to agree with the respondent's argument that a court cannot find *Strickland* prejudice by aggregating errors by trial counsel that do not, individually, result in the necessary degree of prejudice. PB: 206-07. He nevertheless disagrees with the respondent's contention that errors must be interrelated or connected in order to be evaluated together for purposes of determining prejudice. PB: 207. If so, the respondent fails to see what logic – if any – motivates the theory of accumulation proffered by the petitioner. If the errors do not have to be interrelated, then the only possible rationale for considering them cumulatively would be to aggregate them solely for the sake of aggregation. Indeed, the duplicitous nature of the petitioner's argument is evident from his invitation to this Court to "imagine the landscape of a trial" in which the total of the alleged errors by trial counsel did not occur. PB: 213-15. Put another way, the petitioner essentially urges this Court to infer prejudice from the "sheer number of counsel's errors," the very analysis that he concedes is improper. PB: 206-07.

The "aggregated error" theory of cumulative prejudice is not consistent with the principles set forth in *Strickland* and its progeny because it relieves the petitioner of his burden to *prove* actual prejudice under the second prong of *Strickland* and, instead, permits

⁶⁶ In his brief, petitioner attempts to demonstrate prejudice by asserting that the state somehow edited the tapes in such a way as to mislead the jury. PB: 193. This argument was rejected by this Court in the direct appeal from the conviction. *State v. Skakel*, 276 Conn. at 764-69 ("[T]he defendant asserts that the state manipulated the defendant's tape recorded comments about masturbating in a tree to make it seem as if he were confessing to murder. The defendant claims that the state did this by splicing together a 'deceptively edited version' of his tape recorded interview and then using it as a voice-over to photographs of the murder scene. . . . After viewing the audiovisual presentation, we are not persuaded that there is any reasonable likelihood that the state's presentation confused the jury or prejudiced the defendant in any way. Contrary to the defendant's claim, the presentation itself was not deceptive.") (Emphasis added.)

him to establish a Sixth Amendment violation merely by satisfying the first prong multiple times. This is wholly inadequate. See *Strickland*, 466 U.S. at 693 ("Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant *affirmatively prove prejudice.*") (Emphasis added). See also *id.* at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."). In the petitioner's view, even though a court cannot articulate any logical theory by which an error is reasonably likely to have led to an incorrect verdict, he nevertheless should prevail because it is "conceivable" that he was prejudiced by the mere fact that counsel made multiple errors. This view cannot be reconciled with the plain language of *Strickland*. *Strickland*, 466 U.S. at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.").

The petitioner purports to find support for his argument that unrelated errors nevertheless may be considered in the aggregate when analyzing prejudice, in *Strickland's* assertions that, "while some errors may be trivial and have little impact on the verdict, other errors will have a devastating impact on the case, thus `altering the entire evidentiary picture.'" PB: 212, citing *Strickland*, 466 U.S. at 695-96. Far from supporting the petitioner's claim, this passage undermines it. There would have been no need for the High Court to have identified two types of errors by counsel – those which did not affect the verdict by "altering the entire evidentiary picture" and those which did – if the High Court intended *all* of the errors to be considered *collectively* before the prejudice analysis is undertaken. Thus, the High Court is not saying what the petitioner reads it to say, i.e., that "trivial errors" (or, better put, errors that, individually, do not meet the "almost-more-probable-than-not" standard for prejudice) can be aggregated to satisfy the prejudice

standard.⁶⁷ On the contrary, the Court is merely reaffirming that courts have an obligation to analyze *each* claim of attorney error, to determine whether it falls within the category of lesser errors that had no impact on the verdict or, conversely, falls within the category of “devastating” errors that “alter[ed] the entire evidentiary picture,” thereby warranting relief. Because the petitioner’s theory of cumulative prejudice obviates that exercise, it cannot be reconciled with *Strickland*.

For these reasons this Court should decline the petitioner’s invitation to find counsel’s alleged errors prejudicial on the basis of an “imaginary scenario;” PB: 215; rather than hard facts and cogent argument.

Nevertheless, if this Court were to entertain this imaginary landscape, the Court should not view it through the petitioner’s rose-colored glasses. Thus, for example, this Court likewise must imagine a trial in which trial counsel uses the Morganti sketch to try to convince the jury that Kenneth Littleton murdered Martha, while nevertheless also using the speculative, hearsay evidence relied on by the petitioner here to try to convince the jury that Tommy Skakel murdered Martha, while nevertheless also using the speculative hearsay evidence relied on by the petitioner here to try to convince the jury that Hasbrouck and Tinsly murdered Martha – all the while trying to maintain credibility with the jury in his efforts to rebut the state’s strong evidence implicating only *one* guilty party: his client. This Court must imagine a trial in which trial counsel produces Denis Ossorio – notwithstanding the assurances from his client and his client’s family members that no one else would have seen the petitioner at Terrien’s house that evening – who affords the defense a non-family alibi witness but whose testimony nevertheless is inconsistent with the testimony of the others as to who was present and is vulnerable to impeachment by virtue of his allegedly

⁶⁷ Of course, it makes no sense to speak of aggregating “trivial” errors with what the petitioner refers to as “devastating” errors to determine whether relief is warranted. Given that, by definition, a “devastating” error, by itself, is one that “altered the entire evidentiary picture,” relief would be warranted on such a claim alone, even *without* the need to consider the effect of other so-called “trivial” errors.

impeccable recall of details of his then-meaningless encounter with the petitioner one evening decades earlier. Imagine a trial in which trial counsel needlessly urges the jury to disregard the sympathetic testimony of the petitioner's own sister as to the multiple reasons for the petitioner's stay at Elan and infer instead, from ambiguous, hearsay statements in a police report, that it was only the result of a DUI in which the petitioner tried to run down a police officer. Imagine a trial in which Attorney Sherman exercises a challenge to B.W. – a juror Sherman believed could be fair, based not only on his voir dire responses but on Sherman's personal interactions with him – only to have B.W. replaced by another juror whose ability to be impartial, and whose possible motive to serve on this high profile case, would have to be discerned primarily through guesswork. Imagine a trial in which trial counsel was mandated to make all of the closing arguments now proposed by new counsel – only to be forced, due to time restrictions, to eliminate a host of other compelling arguments that trial counsel *did* make in the time allotted. Imagine a trial in which the jurors see that the well-to-do petitioner has hired an expert to “educate” them that coerced confessions are suspect – even though none of the inculpatory statements relied upon by the state were made under coercive circumstances and any claim of a coerced “confession” would have nullified the defense's strategy in focusing the jury on the coercive environment of Elan in the first place, i.e., to show that the petitioner never *did* confess, despite the coercive tactics utilized at Elan. Imagine a trial in which trial counsel expends time and resources pursuing a motion to suppress the Hoffman tapes, only to fail because the tapes were lawfully subpoenaed by the grand jury or, even if successful, results in the “masturbation” story coming in only through the words of the state's witnesses.

Just as importantly, this Court should imagine the landscape of a Sixth Amendment jurisprudence consistent with that urged by the petitioner, in which relief is granted on the basis of the “imaginary” adverse cumulative effect of errors by counsel that a court has found, in *reality*, are not reasonably likely to have affected the outcome of the trial. At bottom, the petitioner's “imaginary scenario” succeeds in proving only one thing: That the

aggregated error theory of cumulative prejudice he proposes will open the door to relief based on speculative prejudice that has no foundation in the actual dynamics of the case, requires no articulated rationale and is bounded only by the limits of the creative imaginations of habeas attorneys. Such an unprincipled approach to the prejudice analysis is inconsistent with the dictates of *Strickland* and its progeny.

Finally, as the petitioner notes, “[w]hat is good for the goose is good for the gander. . . .” PB: 61. If this Court properly were to consider the cumulative effect of errors in this case, it also should do so in the context of questioning whether the habeas court’s consistent misapplication of basic *Strickland* principles to erroneously find Attorney Sherman incompetent in almost every respect asserted by the petitioner -- and even in some that never were -- calls into question the soundness of the habeas court’s decision in its entirety. Although the respondent fervently disagrees with the proposition that Attorney Sherman’s conduct fell below the standard of reasonable competence in any respect, the extent to which the habeas court so readily concurred with petitioner’s claims of attorney incompetence in almost every respect, frequently based upon strained and otherwise questionable logic, should call into question whether the habeas court reviewed *any* of Sherman’s actions with the proper deference demanded by *Strickland* and with fidelity to its principles in application, rather than with mere reference to them in theory. The idea that an attorney of Mr. Sherman’s considerable experience in criminal defense work would make, not merely one or two, but the host of allegedly incompetent decisions on which the habeas court second-guessed him should give this Court pause to consider whether the cumulative effect of the habeas court’s copious findings of incompetence reflects more on the habeas court’s misapplication of the proper Sixth Amendment standard than on Attorney Sherman’s alleged failure to meet it.

It is essential that a court evaluating counsel’s assistance not lose sight of the forest for the trees, as the habeas court so readily did in this case. Indisputably, even the most experienced and knowledgeable attorneys can take, or fail to take, certain steps that render

them subject to criticism and which even they themselves may view with regret, upon Monday morning assessment. However, *Strickland* does not require perfection. *Michael T. v. COC*, 307 Conn. 84, 101 (2012). Moreover, in so eagerly micromanaging, in hindsight, each and every one of Attorney Sherman's decisions and actions, the habeas court not only grossly misapplied *Strickland*, but also distracts from the absurdity of its ultimate conclusion, i.e., that the state failed to afford the petitioner even minimally competent representation by allowing him to proceed with one of the most experienced and sought-after private criminal defense attorneys in the state, who put in extraordinary efforts in defending this petitioner. Whatever the Founding Fathers and the *Strickland* Court intended when declaring that a defendant shall not be deprived of his right to the assistance of competent counsel, they surely could not have intended the outcome reached by the habeas court in this case.

CROSS APPEAL

XII. PETITIONER FAILED TO CARRY HIS BURDEN OF PROVING EITHER AN ACTUAL CONFLICT OR PREJUDICE AS A RESULT OF THE FEE ARRANGEMENT HE NEGOTIATED, THROUGH COUNSEL, WITH HIS DEFENSE TEAM

The habeas court found that the fee arrangement petitioner entered into with his defense team in December of 2001 "created, at least, a substantial risk of a conflict of interest". MOD: 120. The court premised this determination not on the fact that it was structured as a "flat fee" but because, according to the court, Sherman should have informed his client that he was in arrears on his federal income tax. MOD: 120. The habeas court determined that the possibility the IRS would seize money in the firm's operating account, and the possibility Sherman would hoard money in order to pay his debts, created a potential conflict that required his client's waiver or "informed consent." Nevertheless, the court acknowledged that petitioner had failed to adduce any evidence indicating the alleged conflict adversely affected the representation petitioner received. MOD: 120-21.

In his cross appeal, petitioner claims that "[b]ecause of trial counsel's personal

financial burdens at the time of the execution of the agreement and the manner in which he treated the fee, as earned upon receipt, an actual conflict of interest encumbered the relationship of the parties. Additionally, because the agreement created financial disincentives for trial counsel to adequately investigate and prepare Mr. Skakel's case for trial, a potential conflict of interest formed from the new fee agreement." PB: 216. Petitioner also takes issue with the habeas court's determination that he failed to establish any alleged conflict adversely affected counsel's representation. See PB: 228-9, 230-31.

Petitioner's claim fails for several reasons. First, the habeas court erred in refusing to accord significance to the fact that Attorney Thomas Reynolds represented petitioner in his fee negotiations. The presence of independent counsel for the petitioner means that any agreement made was an "arm's length" agreement whose propriety must be presumed. In addition, the petitioner failed to prove, and hence the habeas court erred in finding, that his attorney's indebtedness coupled with a lump sum fee agreement created a conflict or potential conflict cognizable under the Sixth Amendment. Even if it could theoretically create such a conflict, however, the court erred in determining that it created a potential conflict requiring petitioner's "informed consent." Nevertheless, even if the habeas court correctly found a potential conflict on these facts, it never ripened into an actual conflict and hence the court erred in finding it had any significance under the Sixth Amendment. Finally, although the court erred in relieving petitioner of his burden of proving prejudice under *Strickland*, the court correctly determined that petitioner failed to prove an adverse effect on his representation arising from the alleged conflict.

A. Facts Pertaining To This Claim

1. Habeas testimony of Attorneys Sherman and Throne

During the habeas trial, Attorney Sherman testified that he began representing the petitioner in July 1998. HT 4/17: 49-50. At that time, they entered into a fee agreement that provided for a \$25,000 retainer against which Sherman's time and the time of his associates would be billed at an hourly rate of pay, plus expenses. See PE 98 (original fee

agreement dated 7/20/98). Sherman stated that during the pre-arrest period (July 1998-January 2000) he devoted approximately 75% of his practice to representing the petitioner. HT 4/17:58. From arrest until sentencing in August 2002, Sherman estimated that he spent 80-85% percent of his professional time on this case. *Id.*: 58-59. In addition, Attorney Jason Throne worked almost exclusively on petitioner's defense from late 1999 through to the sentencing in August 2002. *Id.*: 59; HT 4/23: 3-4. Attorney Stephan Seeger joined the defense team at or around the same time. About a year prior to the 2002 trial, Attorney Mark Sherman also began representing petitioner. HT 4/17: 59-60; HT 4/23: 4-6. Sherman billed his associates' time at a lesser rate than his own. PE 98.

The 1998 agreement remained in effect until after petitioner's arrest in January 2000. At that point, Sherman proposed a \$500,000 retainer with \$250,000 earned upon receipt and \$250,000 available to draw upon as hourly fees and expenses were incurred. HT 4/18:20-22; PE 99 (January 23, 2000 letter). Petitioner, through counsel, rejected Sherman's proposal.

As Sherman explained during his habeas testimony, Attorney Thomas Reynolds, III from the Chicago law firm of Winston and Strawn represented Skakel for purposes of fee negotiations. HT 4/18: 24-30. Attorney Reynolds re-drafted Sherman's January 23 letter and sent it to Sherman with a counter proposal. *Id.*: 27; PE 101. This redrafted letter embodied the terms of their new fee agreement, which contained the same hourly fees for Sherman's time and that of his associates, and an agreed upon \$250,000 minimum retainer. This exchange of correspondence also makes explicit that Attorney Reynolds would be representing Skakel on matters pertaining to legal fees. *Id.*:30.

About ten months later, Sherman sent a letter to Attorney Reynolds enclosing his billing records for April through October of that year and advising him that, if the prosecution were transferred out of the Juvenile Division of Superior Court, Sherman would probably bring an appeal, which would mean hiring an appellate specialist. He also advised petitioner's counsel that the retainer would most likely be exhausted by year's end,

adding that "I think you will agree we have kept the costs down." HT 4/18: 30; PE 100 (November 26, 2000 letter).

More than a year later, on December 5, 2001, petitioner's fee arrangement with his defense team changed. As Sherman explained, petitioner wanted to change the fee from an hourly rate plus expenses, which it had been for more than three years, to a flat fee arrangement. Sherman stated he would have preferred to continue with the billing arrangement they had at that point. Nevertheless, his client was concerned with the cost of the litigation. In fact, Sherman stated that although his client had been supportive of all his efforts, and had never voiced complaints about how Sherman had billed or what he had spent money on up to that point, the client indicated he was "running out of money" and "did not want to pour unlimited money into this case." HT 4/18: 32-36. Sherman acceded to his client's preference and agreed to the flat fee arrangement. *Id.*:36.⁶⁸

According to the terms of the 2001 agreement negotiated on Skakel's behalf by Attorney Reynolds, Sherman agreed, in consideration of his client's "limited resources", to accept a lump sum fee of \$450,000 to cover all monies then owed and all future fees and expenses for legal representation. HT 4/26:125-26; see PE 101(December 5, 2001 letter).⁶⁹ At the time of this agreement, petitioner was about \$100,000 in arrears in payments owed

⁶⁸ Although it is not crucial to the analysis of this claim, the habeas court's finding that Sherman requested to change their fee arrangement to a "flat fee"; MOD: 116: App. Pt. I: 1054; is clearly erroneous. The court had no evidence before it that would support this assertion. Sherman's testimony that it was the petitioner who insisted on the change was undisputed at trial. Indeed, in his brief to this Court, the petitioner acknowledges as much, stating the new "flat fee" arrangement "was an arrangement that counsel did not want to enter because he wanted to continue billing at an hourly rate and separately for expenses." PB at 218 (footnote omitted).

⁶⁹ As Sherman explained, Skakel was also assisted by Ann Hannon, who was a "friend of the family and . . . either a lawyer or very close to being a lawyer and she was assisting and reviewing my bills and helping us get paid when we were owed money and she kind of brokered the contract with myself and Mr. Reynolds and came up with the agreed lump sum fee agreement." HT 4/26: 126.

to Sherman and the defense team.⁷⁰ Sherman agreed that the \$100,000 then owing would be taken out of the \$450,000 fee. See PE 101.

In fact, as a review of Sherman's records show, and as Sherman explained on the stand, his client was consistently behind in paying the agreed upon fees.⁷¹ See HT 4/18: 38-41. Yet, as the billing records, the record of this case, and Sherman and Throne's testimony reveal, the defense team continued to use their best efforts and best professional judgment on behalf of their client. See HT 4/18: 41-66 (reviewing some of the work Sherman and others did on petitioner's behalf during periods of significant arrearage in payment). As Sherman explained, he never "skimped" on investigation or experts to keep more of the retainer. According to Sherman, who was corroborated by Throne, he did everything in his power to secure an acquittal for his client; money was never the object of the issue. HT 4/18: 66-68; HT 4/23:23-25.

After Sherman received the \$450,000 lump sum payment, he deposited it in his firm's operating account and used it for fees and expenses arising out of this particular case, as well as expenses arising from the general functioning of a law firm, such as his

⁷⁰ As indicated in PE101, by December 5, 2001, petitioner owed over \$61,000 in legal fees to Sherman (which did not include amounts owed for November 2001), about \$36,000 to Attorney David Grudberg for handling a pretrial appeal, and unspecified amounts for an investigator hired by Sherman. PE 101. The habeas court's determination that the total amount owed was approximately \$61,615 is contrary to the evidence and hence clearly erroneous. See MOD: 116.

⁷¹ Sherman's records are organized by year, and then by month. HT 4/18: 38. Following each month's itemized account of time spent on petitioner's defense is a summary of the amount expended that month for fees and other expenses, the amount, if any remaining on the retainer, and the amount owed by petitioner. *Id.* at 38-39. A review of the records for the year preceding the December 2001 fee negotiations reveals that the petitioner was consistently delinquent in his financial obligations to counsel. For example, Sherman's billing records, PE120, reveal a \$48,000 deficit in the amount owed to Sherman at the end of February 2001. By March 2001, petitioner's arrearage had grown to over \$94,000. By April 2001, the arrearage was approximately \$161,000. In May 2001 the amount Skakel owed was \$136,000. In June, the petitioner's delinquent amount was \$170,994. In July, there was a slight reduction in the amount of petitioner's debt, it stood at about \$103,000. By August, however, the arrearage had increased to nearly \$160,000. In September, the amount climbed to over \$213,000. HT 4/18: 38-41.

personal compensation, and the salaries of those he employed, malpractice insurance, rent and other business expenses. HT 4/26: 127-29, 165-72. The portion which represented his personal compensation naturally went to his living and personal expenses. HT 4/26:127-129, 148. From the lump sum, he also paid off the approximately \$100,000 outstanding at the time of the new agreement, and all costs and expenses incurred in connection with defending his client for another eight months, which included over 35 days of trial. *Id.*:127-28, 165-72.⁷²

Sherman admitted that during this time period he had failed to pay income taxes and that the federal government had placed liens on his personal property as a result. He testified that he never used any money earmarked for petitioner's defense to pay off his federal tax debt. Further, and more importantly, Sherman testified that his personal financial situation never influenced his representation of the petitioner.⁷³ HT 4/16: 236-45; 4/18: 68-72; 4/26: 165-70.

2. Expert testimony

Petitioner's expert, Attorney Ron Murphy, testified that the fee agreement petitioner negotiated in 2001, through counsel, created both a potential and an actual conflict of interest. HT 4/22: 124-31. He based this assessment on the fact that Sherman had considerable tax debt at the time, and by putting the money he received from his client in his firm's general operating fund, he put that money at risk of seizure by the federal government. According to Murphy, Sherman was obliged to tell his client about his tax situation and obtain his client's "informed consent" to the alleged conflict it posed. *Id.*:127-28.

The Commissioner's expert, Attorney Mark Dubois, disagreed with Murphy on each

⁷² Sherman stated that he paid all expenses incurred in connection with this case as he had agreed to do, although some were not fully paid until after the verdict. HT 4/26:127-28.

⁷³ Sherman stated that in 2010 he pleaded guilty in federal court to two misdemeanor counts of failure to pay taxes for the years 2001 and 2002. He further stated that he filed truthful and timely tax returns, he made restitution for the money owed, and took full responsibility for his actions. HT 4/18:68-72.

point.⁷⁴ Attorney Dubois stated that there was nothing improper with, and no conflict created by, the 2001 fee agreement. He noted first of all that all fee agreements have pros and cons from the client's perspective, and all fee agreements are subject to abuse if an attorney is of a mind to abuse them. HT 4/26: 15-16.⁷⁵

As for the particulars of the December agreement, Dubois stated that the agreement was "perfectly acceptable." HT 4/26:26. He further stated Sherman was not required to tell his client about his tax problems prior to entering into the agreement. HT 4/26: 29. This is especially so considering that Skakel was represented by independent counsel for purposes of fee negotiations. Dubois stated that Attorney Reynolds was required to protect Skakel's interests, and if there was any due diligence to be done, the responsibility fell on Reynolds. HT 4/26:30-31.

Dubois further explained that Attorney Murphy erred in applying present day principles of "informed consent" to an agreement negotiated in 2001. As Dubois noted, "informed consent" is a fairly new concept, added to Connecticut's Rules of Professional Responsibility in 2007. HT 4/26:29. Dubois explained that the concept of "informed consent" was borrowed from the medical field and

the rules now have a fairly nuanced and fairly developed understanding and discussion concerning what goes into a relationship between lawyer and client, and then reaching a point of informed agreement between them. At the time this happened, we didn't have any of that. . . . [U]nder the rules that were applicable at the time these agreements were done, the standard was whether the client in the case of a conflict consented after consultation. It was a much less well-defined understanding or analysis than we have in today's

⁷⁴ Attorney Dubois testified that he held the post of Chief Disciplinary Counsel for Connecticut for seven years. His responsibilities as the Chief Disciplinary Counsel included overseeing a team of lawyers involved in investigating and prosecuting lawyer misconduct, lawyer disciplinary complaints, and allegations of unauthorized practice of law. HT 4/26:12. At the time of his testimony, Dubois was engaged in private practice with an emphasis on legal ethics, malpractice and grievance defense. He was Vice President of the Connecticut Bar Association, was teaching at the University of Connecticut Law School, and was engaged in lecturing and writing on the subject of legal ethics. *Id.* 11-12.

⁷⁵ Dubois opined that Sherman's record of one client grievance complaint in 41 years of practicing criminal law was "excellent." HT 4/26:73.

jurisprudence.

HT 4/29:29-30.

Dubois further explained that even if "informed consent" principles were applied to this agreement: "The commentary is very clear that the presence of a lawyer for the client changes the entire power dynamics of the attorney/client negotiation and you presume both information because the client is represented by a professional and you presume consent that satisfies the informed consent aspect of the analysis." HT 4/26:38.

In response to a series of questions by the court, Dubois explained that the fact Attorney Reynolds apparently practiced out-of-state did not change the analysis. As Dubois explained, the jurisprudence surrounding fees and conflicts did not have anything "Connecticut specific" about it. He further noted that Connecticut's rules, especially in these respects, follow the model rules of professional responsibility which are "consistent nationally." HT 4/26: 60, *see also* 4/26:72.

As Attorney Dubois also explained, the fact Sherman deposited the money in his operating account was not improper under the norms prevailing at the time, and in fact, was in accord with how other attorneys were managing their law practices. HT 4/26:26-27. When asked to explain the professional norms or requirements in 2001 with regard to where money received as a result of a flat fee arrangement should be deposited, Dubois explained that the state of the law was "in flux":

Lawyers were in doubt as to [how] to handle advanced fees. Some believed they should go into the client's funds account, be drawn down as earned. On the other hand, if there was an aspect or a component of it which was guaranteed or was a minimum fee, or was quote earned upon receipt or was an availability retainer, well then you couldn't put that in clients' funds account because that would be the lawyer's own money and you would be commingling. And then some lawyers would put that directly into their operating accounts, other lawyers would put it into a third account which was called fees account. The bar was struggling during this period of time to get some idea of how to handle these issues. They were moving away from the use of just hourly or contingent. People were looking at different types of fee agreements, but nobody was quite sure what you could do and how you could do it.

HT4/26: 26. Dubois summarized this issue as one with no clear right or wrong answer.

Id.:26-27. Dubois added, however, that it would be improper for an attorney to put money in a client's fund account to avoid taxes. *Id.*: 27-28.

3. The habeas court's resolution of this claim

The habeas court concluded that the agreement reached between Attorney Sherman and Attorney Reynolds in late 2001

created, at least, a substantial risk of a conflict of interest, not because it was a flat fee arrangement, but because, at the time, Attorney Sherman was burdened with liens from the IRS which, if acted on, could have left him without funds for the petitioner's defense. Before making this arrangement, Attorney Sherman should have sought and obtained the petitioner's informed consent. In sum, if Attorney Sherman did not have an actual conflict of interest on the basis of the risk created by his obligations to the federal government that he would hoard funds in order to save himself from the ultimate prosecution, there existed at least the substantial potential for such a conflict which he should have discussed with petitioner.

MOD:119-120.

The habeas court was not convinced that the presence of independent counsel for petitioner, Attorney Thomas Reynolds, III, eliminated the issue of informed consent because "this court has not been provided with any written evidence of informed consent", and, also, because the court was not aware of "any basis for concluding that Attorney Reynolds was able to represent petitioner in Connecticut in regard to his fee arrangement with Attorney Sherman." MOD: 119. Nevertheless, despite these findings, the court concluded that the petitioner failed to prove that Attorney Sherman's representation was "adversely affected" due to the potential conflict. MOD:120-21.

B. Petitioner Failed To Establish Either A Conflict Of Interest Or Prejudice Resulting Therefrom

1. Petitioner failed to carry his burden of proving a conflict

Before discussing the jurisprudence governing fee arrangements and conflicts, it is important to identify the potential conflict found by the habeas court. Although the court's language is not entirely clear, it appears to have found a "substantial risk" of a conflict from two distinct circumstances. First, it believed the presence of federal tax liens on Sherman's

personal property posed a risk that the IRS would seize the firm's assets, specifically money in the firm's operating account, which, if such a seizure occurred, "could have left [Sherman] without funds for petitioner's defense." MOD:120. The court considered this a potential conflict requiring the client's "informed consent." *Id.* Second, the court considered the financial arrangement as posing a potential conflict because of the risk Sherman would "horde funds in order to save himself from ultimate prosecution." *Id.* Petitioner similarly divides the analysis. He argues that the risk of seizure posed an "actual conflict", while the incentive to retain money rather than spend it on defending the petitioner posed a "potential conflict." See PB at 227, 229.

Properly viewed, neither the alleged risk of seizure nor the alleged risk of "hoarding" created a conflict implicating petitioner's right to effective assistance of counsel. As the principles which follow demonstrate, in order to impugn a criminal conviction, a petitioner must establish an actual, rather than a potential conflict. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)("the possibility of conflict is insufficient to impugn a criminal conviction"). Because petitioner failed to prove that either risk materialized --that is he failed to prove either that funds were seized from the firm's operating account and or that the defense team improperly diverted funds-- he failed to prove an actual conflict. "To demonstrate an actual conflict of interest, the petitioner must be able to point to *specific instances* in the record which suggest impairment or compromise of his interests for the benefit of another party. . . . A mere "theoretical division of loyalties" is not enough. . . ." *Santiago v. COC*, 87 Conn. App. 568, 585, *cert. denied*, 273 Conn. 930 (2005)(citations omitted).

Nevertheless, in order to examine petitioner's claimed conflict under traditional conflict principles, it is important to consider first what type of conflict petitioner is alleging. Claimed conflicts fall into three general categories: "concurrent representation of clients with conflicting interests, successive representation of clients with conflicting interests, and conflicts that pit the attorney's personal interests against those of the defendant." Note, *Conflicts Of Interest Challenges Post Mickens v. Taylor: Redefining The Defendants'*

Burden In Concurrent, Successive, And Personal Interest Conflicts, 60 Washington & Lee L. Rev. 965, 971 (2003). The type of conflict alleged here falls into the third category: it is alleged that the fee agreement and attendant circumstances pitted the attorney's financial interests against the best interest of the client.

At the outset, it should be noted that:

“[A]most any fee arrangement between an attorney and client may give rise to a “conflict”. An attorney who received a flat fee in advance would have a “conflicting interest” to dispose of the case as quickly as possible, to the client's disadvantage; and an attorney employed at a daily or hourly rate would have a “conflicting interest” to drag the case on beyond the point of maximum benefit to the client. The contingent fee contract so common in civil litigation creates a “conflict” when either the attorney or the client needs a quick settlement while the other's interest would be better served by pressing on in the hope of a greater recovery. The variants of this kind of “conflict” are infinite. Fortunately most attorneys serve their clients honorably despite the opportunity to profit by neglecting or betraying their client's interest.”

People v. Doolin, 45 Cal. 4th 390, 416, *cert. denied*, 558 U.S. 863 (2009).

Turning first to a consideration of the significance, if any, of the presence of tax liens on Sherman's personal property, neither the habeas court nor the petitioner have explained how this fact pits Sherman's interests against his client's. In fact, because the financial risk fell on Sherman's personal assets, it is unclear that a client of his would have any interest in the matter one way or another.

Further, petitioner presented no evidence to substantiate his claim, and the habeas court's assumption, that Sherman's personal tax debt placed money deposited in his firms' operating account at risk of seizure. If anything, the fact the IRS placed liens on his personal property indicates its aim was to obtain payment from such property and not from the firm's assets. Even assuming some theoretical risk to the firm's operating account, petitioner produced no evidence from which to conclude whether that risk was minuscule and improbable or substantial. Therefore, there was no evidence before the habeas court to support its assumption that the funds in Sherman's operating account were at risk of

seizure by the IRS.⁷⁶

Even if they were, however, neither the petitioner nor the habeas court has cited any authority indicating that risk somehow constituted a "conflict." If the IRS had seized the assets, Sherman's responsibility to his client would not have been affected; he would still be obliged to provide competent representation. Sherman, rather than the client, bore the entirety of the risk. Therefore, because there was no evidence Sherman's tax liability conflicted with his client's interests, the habeas court's reliance on the supposed absence of "informed consent" puts the proverbial cart before the horse. "Informed consent" is a species of waiver; if there is no conflict, there is nothing to waive.⁷⁷

Moreover, as indicated previously, even if there was a risk that the fees paid to Sherman might have been seized by the IRS, it was at most, a potential conflict. Because

⁷⁶ Moreover, the fact that Sherman deposited the funds in his operating account did not transform the fee arrangement, which Dubois deemed "perfectly acceptable", into one creating a conflict of interest. As explained by Dubois, doing so was not improper, and indeed, was the course followed by other lawyers at the time. HT 4/26: 24-27. Further, although petitioner makes much of the fact that Sherman spent some of the money he received as legal fees on personal matters; see PB at 220-21: such expenditures are beyond the purview of the Sixth Amendment. Sherman was entitled to be compensated for his legal representation: petitioner has not suggested any basis under which the Sixth Amendment may legitimately impose restrictions on how an attorney spends the money he earns.

⁷⁷ Moreover, as Attorney Dubois also explained, the concept of "informed consent" did not become part of our Rules of Professional Responsibility until 2007. The habeas court erred, therefore, in imposing such a requirement on an agreement negotiated six years prior to the change in our rules. See *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009)(Judging counsel's conduct by professional guidelines enacted after time of representation was error). Even if the notion of "informed consent" were relevant, however, the habeas court erroneously dismissed the importance of independent counsel for Skakel. See HT 4/26: 30 (Dubois: The presence of counsel for client changes the power dynamics and creates a presumption that client knowingly consents to any conflict). The habeas court's determination that it had nothing before it from which to infer Reynolds was competent to represent Skakel on this matter, is clearly erroneous. Dubois' undisputed testimony that the principles governing the analysis of fee agreements and conflicts is consistent nationally; HT 4/26: 60, 72; coupled with the general presumption of competence accorded counsel, should have been enough to allay the court's concerns. Moreover, the petitioner, in furtherance of his burden of demonstrating a conflict, bore the burden of proving that Reynolds was *not* competent to protect petitioner's interests. The habeas court erroneously relieved petitioner of that burden.

it never materialized—the IRS did not seize the funds, and Sherman did not use the money to pay off his tax debt – it is insufficient to impugn a criminal conviction. *Sullivan*, 446 U.S. at 350. Petitioner failed, therefore, to establish either a potential or actual conflict due to the presence of tax liens on Sherman's personal property. The habeas court erred in determining otherwise.

As to the supposed inducement to "horde funds," courts analyzing similar claims have generally agreed that a potential inducement to stray from the duty owed one's client does not create a conflict. For instance, the Fifth Circuit Court of Appeals rejected a claim that the state trial court's refusal to grant defendant's requests for experts and funding for those experts created a conflict because his attorney was forced to choose whether to use his own money for these expenses or forgo them. *Yohey v. Collins*, 985 F. 2d 222, 227-28 (5th Cir. 1993). The court held that although Yohey called this a conflict, "it is not an attorney conflict of interest as the law recognizes." *Id.* at 227. The court found instead that it represented "a straight ineffective assistance of counsel claim concerning whether his counsel erroneously failed to use his own money to aid in funding Yohey's defense." *Id.* at 228. Similarly, in *Williams v. Calderon*, 52 F.3d 1465, 1472-73 (9th Cir. 1995), *cert. denied*, 516 U.S. 1124 (1996), the court could "discern no conflict of constitutional dimension" from the "fact that payment for any investigation or psychiatric services could have come from counsel's pocket" despite petitioner's contention that this forced counsel to choose between his client's interest and his own. *Id.* The court reasoned that all petitioner alleged was "the same theoretical conflict that exists between an attorney's personal fisc and his client's interest in any *pro bono* or underfunded appointment case. Such arrangements, without more, do not require Sixth Amendment scrutiny." *Id.* at 1473.

In a case alleging that petitioner's failure to pay legal fees created a financial conflict because his attorney had reason to be "concerned with his own financial interest throughout the trial" the Eleventh Circuit Court of Appeals held that such a claim raises the mere possibility of a conflict. Without more, it does not make out a Sixth Amendment claim

because "courts generally presume that counsel will subordinate his or her pecuniary interests and honor his or her professional responsibility to a client." *Caderno v. United States*, 256 F. 3d 1213, 1219 (11th Cir. 2001), *cert. denied*, 534 U.S. 1167 (2002).

Finally, the Supreme Court of California rejected a claimed conflict arising from a fee arrangement materially indistinguishable from that alleged here. *People v. Doolin, supra*. In *Doolin*, the defendant claimed that his attorney's compensation agreement "created an inherent and irreconcilable conflict of interest because both counsel's compensation and the costs for investigative and expert services were covered by a lump sum fee." 45 Cal 4th at 412. Doolin claimed the agreement "created a financial disincentive for counsel to adequately investigate and prepare his case." *Id.* California's High Court recognized that, under the agreement, Doolin's lawyer "could maximize his own compensation by cutting expenses for investigative and expert services." *Id.* at 416. The court nevertheless observed that "[t]his theoretical possibility . . . is qualitatively no different from other flat fee agreements that have been held acceptable." *Id.* Further, while "some attorneys might conceivably take advantage of the agreement's terms to increase their income at the expense of their client's interests . . ." the court would nevertheless "assume attorneys are not so unethical as to neglect their client's interests to advance their own." *Id.* In the present case, it was error for the habeas court to so readily assume the contrary.

Nevertheless, as argued throughout, even if the habeas court correctly found the flat fee arrangement coupled with Sherman's indebtedness created a potential conflict, the risk remained unrealized. Sherman did not take the money paid by petitioner and pay off his tax debt. Nor did he fail to take any steps necessary to the competent representation of petitioner due to his financial situation. As Sherman averred and Attorney Throne confirmed, all decisions were made based on the best interests of the client. HT 4/23:23-25. Thus, whatever risk or conflict the agreement posed to the client, it never materialized. As noted above, "the *possibility* of conflict is insufficient to impugn a criminal conviction." *Cuyler v. Sullivan*, 446 U.S. at 350. (Emphasis added). Petitioner's claim, therefore, is

insufficient to make out a Sixth Amendment violation.

2. Even if the fee agreement created a conflict, petitioner failed to establish prejudice under either *Strickland* or *Sullivan*

a. The Habeas Court erred in evaluating prejudice under the *Sullivan* standard rather than under *Strickland*

The habeas court framed the conflict allegations before it as imposing a two-pronged burden on the petitioner. The court determined that petitioner was obliged to establish (1) that counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance. MOD: 115; App. Pt 1: A-1053. Although the court correctly determined that petitioner failed to carry his burden on prejudice, the court erred in bestowing a more lenient standard of prejudice on petitioner than that required by *Strickland*.

In the vast majority of cases claiming ineffective assistance, the familiar standards of *Strickland v. Washington* govern. *Strickland's* second component requires a petitioner to prove "there exists a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mozell v. COC*, 51 Conn. App. 818, 822 (1999). *Strickland* recognized, however, two limited exceptions to the requirement that the type of prejudice described above be proven. The first is when there has been a total deprivation of counsel or its equivalent. If this occurs, prejudice is presumed. *Strickland*, 466 U.S. at 692. The second exception recognized in *Strickland* "warrants a similar, though more limited, presumption of prejudice." As explained by the Court in *Strickland*:

In *Cuyler v. Sullivan*, . . . the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, . . . it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel

"actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."

466 U.S. at 692 (citations omitted).

In the wake of *Strickland* and *Sullivan*⁷⁸, some courts applied *Sullivan*'s lesser showing of prejudice "unblinkingly" to all kinds of alleged ethical breaches. *Beets v. Scott*, 65 F. 3d 1258, 1266 (5th Cir. 1995), (en banc), *cert. denied*, 517 U.S. 1157 (1996). In 2002, however, the United States Supreme Court cautioned that such an expansive reading of *Sullivan* was not warranted. In *Mickens v. Taylor*, 535 U.S. 162, 174-76 (2002), the Court noted that although the Circuit Courts of Appeals have "invoked the *Sullivan* standard not only where (as here) there is a conflict rooted in obligations to *former* clients . . . but even when representation of the defendant somehow implicates counsel's personal or financial interests . . . the language of *Sullivan* itself does not clearly establish, or indeed even support, such an expansive application." *Id.* at 174-75.

Since *Mickens*, there has been a significant shift away from applying the *Sullivan* standard in any context other than that of multiple, concurrent representation. See Note, *Conflicts Of Interest Challenges Post Mickens v. Taylor: Redefining The Defendants' Burden In Concurrent, Successive, And Personal Interest Conflicts*, 60 Washington & Lee L. Rev. 965, 971 (2003) (hereinafter, *Conflicts Note*); see e.g. *Earp v. Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005), *cert. denied*, 547 U.S. 1159 (2006) ("The *Mickens* Court specifically and explicitly concluded that *Sullivan* was limited to joint representation."); *Moss v. United States*, 323 F.3d 445, 460 (6th Cir.), *cert. denied*, 540 U.S. 879 (2003) ("In the wake of *Mickens*, no court has applied the *Sullivan* presumption to a case of successive representation"); *Smith v. Hofbauer*, 312 F.3d 809, 817 (6th Cir. 2002), *cert. denied*, 540 U.S. 971 (2003) (refusing to extend *Sullivan* to ineffective assistance of counsel claims

⁷⁸ Some courts and commentators refer to *Cuyler v. Sullivan* as "*Cuyler*," others as "*Sullivan*." Because the United States Supreme Court refers to it as "*Sullivan*," and because *Sullivan* is the non-governmental party, the Commissioner will use *Sullivan* throughout this brief.

based on attorney's conflict of interest arising from anything other than joint representation); *Tueros v. Grenier*, 343 F.3d 587, 597 (2d Cir. 2003) (Sotomayer, J.), cert. denied, 541 U.S. 1047 (2004) ("Reserving *Sullivan's* limited presumption of prejudice to remedy the structural flaw that occurs when a lawyer is placed in the untenable situation of being required to serve two masters is a reasonable line to draw.").

One pre-*Mickens* case, *Beets v. Scott*, *supra*, which the Supreme Court cited in *Mickens*, has been particularly influential. As the Fifth Circuit explained, the issue that provoked an *en banc* rehearing in a capital murder case "is whether a habeas corpus petitioner was deprived of her Sixth Amendment right to effective assistance of counsel because her attorney committed arguable ethical violations when he obtained a contract for media rights to her story and failed to withdraw and testify as a witness." The *en banc* decision grapples with the issue of whether "these facts should be measured by the *Strickland* standard for an attorney's deficient performance . . . or by the [*Sullivan*] standard adopted for the special case of attorney conflicts in cases of multiple client representation. . . ." 65 F. 3d at 1260 (footnotes omitted). *Beets* held that "*Strickland* offers a superior framework for addressing attorney conflicts outside the multiple or serial client context." *Id.* at 1265 (footnote omitted).

Beets' observation of the differences between multiple representation cases, and cases involving an attorney's self-interest, is pertinent to petitioner's allegations:

When multiple representation exists, the source and consequences of the ethical problem are straightforward: 'counsel represents two clients with competing interests and is torn between two duties. Counsel can properly turn in no direction. He must fail one, or do nothing and fail both.' . . .

In stark contrast to multiple representation situations, there is little meaningful distinction between a lawyer who inadvertently fails to act and one who for selfish reasons decides not to act. The "conflict" between the lawyer's self-interest and that of his client is not a real conflict in the eyes of the law. Rather than being immobilized by conflicting ethical duties among clients, a lawyer who represents only one client is obliged to advance the client's best interest despite his own interest or desires.

Beets, 65 F.3d at 1271.

The test arising out of *Beets*, therefore, for determining whether *Strickland* or *Sullivan* controls the prejudice analysis of an alleged conflict claim is straightforward: did the attorney have a course of action open that would protect the interests of all clients involved? If so, *Strickland* controls, if not, *Sullivan*. As one commentator has explained:

The lower [*Sullivan*] burden should be limited to situations in which the attorney has no course of action that would protect all clients. These situations occur when the likelihood of prejudice is so high that the courts can presume prejudice. In concurrent representation conflicts, when an actual conflict surfaces, the attorney will not be able to act in a way that protects all clients. Thus, the [*Sullivan*] test is always appropriate here. When a conflict implicates the attorney's personal interests, however, the attorney still has the choice of acting in a way that protects the client, even if it harms the lawyer. Thus, the [*Sullivan*] test is never appropriate in these situations.

Conflicts Note at 1003 (footnotes omitted).⁷⁹

Beets also expressed concern that applying *Sullivan* in cases where an attorney's self-interest might be pitted against his client's ultimately undermines the uniformity and simplicity of *Strickland*. As the *Beets* Court reasoned:

if [*Sullivan's*] more rigid rule applies to attorney breaches of loyalty outside the multiple representation context, *Strickland's* desirable and necessary uniform standard of constitutional effectiveness will be challenged. Recharacterization of ineffectiveness claims to duty of loyalty claims will be tempting because of [*Sullivan's*] lesser standard of prejudice A blurring of the *Strickland* standard is highly undesirable. As a result of the uncertain boundary between [*Sullivan*] and *Strickland*, the focus of Sixth Amendment claims would tend to shift mischievously from the overall fairness of the criminal proceedings – the goal of 'prejudice' analysis – to slurs on counsel's integrity – the 'conflict' analysis. Confining [*Sullivan*] to multiple representation claims poses no similar threats to *Strickland*.

(Citation omitted.) *Beets*, 65 F.3d at 1272.

Before analyzing the evidence before this Court in light of either *Strickland* or *Sullivan*, it is important to note that petitioner has engaged in the precise "mischief" foretold

⁷⁹ Whether, in light of *Mickens* and *Beets*, *Sullivan* applies to the type of conflict alleged here is an open question in Connecticut. Significantly, *Phillips v. Warden*, 220 Conn. 112 (1991), Connecticut's leading case on an attorney's interests conflicting with his client's, was decided years before either *Mickens* or *Beets*.

by the *Beets* court. Rather than focus on the fairness of the trial, petitioner saturates his brief with irrelevant matters, such as arguments made by federal prosecutors in their sentencing memorandum in Sherman's tax case, and matters derived from a humorous talk Sherman gave to a bar association group prior to trial, in an attempt to impugn Sherman's character. See PB at 19-23; 219-21,224-25.

Petitioner apparently hopes this Court will allow itself to be swayed by such irrelevant matters. The Commissioner can conceive of no purpose for which petitioner included these matters in his brief other than the improper one of character assassination. These improper references and arguments should not figure into this Court's resolution of any of the issues before it.

b. Petitioner failed to prove prejudice under either *Strickland* or *Sullivan*

Applying the *Strickland* standard to the evidence in this case reveals that petitioner failed to carry his burden. Petitioner has failed to establish that had he not entered into this particular fee agreement and had Sherman not had debts at the time, the result of the proceeding would have been different. Nevertheless, even if prejudice is assessed under *Sullivan*, petitioner has failed to carry his burden of proof.

Under *Sullivan*, petitioner is entitled to a limited presumption of prejudice only if he demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan, supra*, 446 U.S., at 350, 348. (Footnote omitted). In order to carry his burden under *Sullivan*, petitioner must make the following showing:

"Once a defendant has established that there is an actual conflict, he must show that a lapse of representation ... resulted from the conflict... To prove a lapse of representation, a defendant must demonstrate that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."

State v. Vega, 259 Conn. 374, 387, *cert. denied*, 537 U.S. 836 (2002).

Proof of causation – that the alternative defense strategy was not undertaken *because* of the alleged conflict – is particularly important. If the alleged alternate strategy was eschewed for some other reason, such as a legitimate strategy decision, or even neglect or ignorance, it is no different than a run-of-the-mill ineffectiveness claim and is appropriately analyzed under *Strickland*. It is only where a petitioner establishes that his counsel's performance was adversely affected by an actual conflict (and not some other factor) that he is entitled to *Sullivan's* limited presumption of prejudice. See *Winkler v. Keane*, 7 F.3d 304, 309-10 (2d Cir. 1993), *cert. denied*, 511 U.S. 1022 (1994) (petitioner failed to establish that unethical contingency fee agreement caused actual lapse in representation where counsel had legitimate reasons, not occasioned by fee agreement, for his actions at trial).

Applying this framework to petitioner's conflict claim, it clearly fails. Petitioner has not proven a viable alternate defense strategy not undertaken due to the alleged conflict. As indicated earlier, Sherman's monthly statements prove that he continued to devote time, energy, and resources to petitioner's defense even during the many months in which his client was significantly in arrears. PE 120; HT 4/18: 36-68. During this time, he hired three sets of investigators, one in Connecticut, one in the Midwest, and one in the Boston area. HT 4/18: 58. He consulted with numerous experts, including Dr. Howard Zonana, Dr. Sharee Richards, and others with expertise in areas related to this case. HT 4/18: 63-66. He also consulted with Dr. Elizabeth Loftus, who, like petitioner's expert, Richard Ofshe, specialized in the area of "false" confessions. *Id.*: 63. Sherman's diligence and loyalty to his client never flagged, regardless of cost, and regardless of his own personal circumstances. As Sherman testified, and Throne confirmed, all decisions in this case were made in the best interest of the client. Personal financial concerns played no part. HT 4/23: 21-26; HT 4/18: 65-68; HT 4/26: 127-29, 131, 169-72.

Moreover, as Throne testified, the efforts of the defense team *increased* in the months following the December 2001 agreement. HT 4/23: 24-25. Petitioner presented no

evidence to the contrary. Therefore, petitioner failed to prove the agreement had any adverse effect on the representation he received.

Petitioner's particular claims of prejudice – that Sherman would have hired Ofshe or found Simpson, James and Grubin but for the fee arrangement – find no support in the evidence. See PB:228-29. As argued previously, Sherman made a reasonable strategic decision not to present expert testimony such as that offered by Ofshe. As for the three men offered to impeach Coleman, the evidence is undisputed that Sherman *did* attempt to find them – Sherman, Throne and Collucci all confirmed that Sherman directed his investigator to locate these persons. Petitioner presented no evidence indicating that Colucci would have succeeded had he been given additional funds. Therefore, petitioner failed to establish any way in which his representation was adversely affected due to the alleged conflict.⁸⁰

Although petitioner makes much of the fact that Sherman did not submit monthly billing statements after the flat fee arrangement was negotiated: PB: 224-25; it is apparent that there was no longer a need for such detailed statements. Sherman's lapse in reporting, however, does not mean that his efforts flagged or even that he failed to keep his client apprised of the work he was doing in his defense. Moreover, as the habeas court recognized, it would be purely speculative, not to mention contrary to both Sherman and Throne's testimony -- the only evidence on this point before the habeas court -- to assume the absence of detailed records means no work was done. See MOD:120; App. Pt. 1:A-

⁸⁰ In addition, petitioner's claim that the alleged conflict was responsible for Sherman's "failure to investigate" whether there was viable evidence to present a third party claim based on Tommy Skakel has no foundation in this record. PB: 230. As noted previously, the habeas court did not find a "failure to investigate" this defense. See *supra* n.1. Indeed, the testimony from Sherman and Throne confirmed that they *did* investigate the possibility of raising this defense and strategically decided against doing so. Nothing in this record suggests additional funds would have altered their decision. Similarly, petitioner's assertion that Sherman's failure to present Ossorio was due to a "failure to investigate" occasioned by the alleged conflict simply does not fit the evidence. There is not a shred of evidence to suggest that Sherman was aware of the existence of another potential alibi witness but decided not to expend the funds needed to find that person.

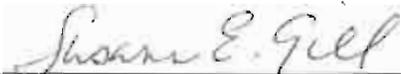
1058. This is especially so given that petitioner bore the burden of proof on this issue – Sherman did not have to prove his competence and diligence, petitioner had to prove the lack thereof.

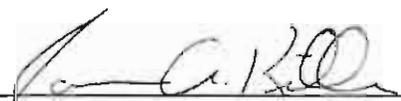
Therefore, although the habeas court erred in finding a potential conflict, and in according that alleged conflict any significance under the Sixth Amendment, the court correctly determined that petitioner failed to prove the alleged conflict adversely affected his representation.

CONCLUSION

For all of the foregoing reasons, the Commissioner of Correction/Appellant asks this Court to reverse the habeas court's judgment granting the petition for writ of habeas corpus.

Respectfully submitted,
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September, 2015

CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.



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REDACTED

SUPREME COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF TOLLAND

S.C. 19251

S.C. 19251 X01

MICHAEL SKAKEL

v.

COMMISSIONER OF CORRECTION

APPENDIX

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SUPERIOR COURT
JUDICIAL DISTRICT OF FAIRFIELD
AT BRIDGEPORT

GRAND JURY 98-01

MARCH 29, 1999

VOLUME XX

BEFORE THE HONORABLE GEORGE N. THIM

APPEARING FOR THE STATE:

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I N D E X

WITNESSES:

Willis Krebs.....page 4

1 THE COURT: This proceeding is back in
2 session. I would like all those in the room to
3 please identify themselves. All those except for
4 the court monitor.

5 MR. BLOCH: Norman Bloch, B-L-O-C-H, Grover
6 and Bloch, P.C., Three New York Plaza, New York,
7 New York, 10004, and I represent the witness
8 Willis Krebs, K-R-E-B-S.

9 THE WITNESS: Willis Krebs, 322 Young Street,
10 North Babylon, New York, 11703.

11 MR. BENEDICT: Jonathan Benedict, State's
12 Attorney.

13 MR. GALLUZZO: Domenick Galluzzo, Executive
14 Assistant State's Attorney.

15 MR. LOCKWOOD: Bruce Lockwood, Deputy
16 Assistant State's Attorney.

17 THE COURT: Thank you for waiting patiently.
18 I realize we said 11 o'clock, but we are fairly
19 close.

20 Mr. Krebs, you are still under oath from the
21 previous day.

22 THE WITNESS: Yes.

23 THE COURT: I think we left off with the
24 state requesting that the matter be referred.

25 Are there any other questions?

26 MR. GALLUZZO: At this time, your Honor, I
27 have two questions of Mr. Krebs.

1 EXAMINATION BY MR. GALLUZZO:

2 Q Mr. Krebs, did you ever speak to Michael Skakel
3 concerning the events of October the 30th, 1975, and
4 October the 31st, 1975, concerning the disappearance
5 and/or death of Martha Moxley?

6 A Yes.

7 Q Did you ever speak to Thomas Skakel concerning the
8 events of October the 30th, 1975, and October the 31st,
9 1975, concerning the disappearance and/or death of Martha
10 Moxley?

11 A Yes.

12 Q Did Michael Skakel give you any information
13 concerning the events of October the 30th, 1975, and
14 October the 31st, 1975, concerning the disappearance
15 and/or death of Martha Moxley?

16 A Upon the instructions of counsel for Michael and
17 Thomas Skakel, I am compelled to refuse to answer the
18 question because it would require me to reveal attorney
19 client privileged communications and/or attorney work
20 product and/or would violate Michael and Thomas Skakel's
21 rights to effective assistance of counsel under the State
22 and Federal Constitutions.

23 MR. BLOCH: In addition, your Honor, we would
24 like to supplement the basis for not answering the
25 question by referring the Grand Jury to
26 Connecticut. Practice Rule 40-31.

27 THE COURT: All right. And that was with

1 respect to Michael.

2 BY MR. GALLUZZO:

3 Q With respect to Thomas Skakel, did you ever
4 discuss the events concerning the disappearance and/or
5 death of Martha Moxley on the night of October the 30th,
6 1975, or October the 31st, 1975?

7 THE COURT: I gather you want to read into
8 the record the material you just read a few
9 moments ago?

10 THE WITNESS: Yes, your Honor.

11 THE COURT: Your claim for work product and
12 attorney client privilege is repeated for the
13 record.

14 MR. BLOCH: Thank you, Judge.

15 MR. GALLUZZO: I have no further questions
16 of this witness.

17 THE COURT: Now, where we left off the other
18 day was that there was a question to the effect to
19 Mr. Krebs asking him did he ever speak to anybody
20 who had personal knowledge of the events of
21 October 30th, 1975, and October 31st, 1975,
22 concerning the death of Martha Moxley at Belle
23 Haven in Greenwich. And after invoking the
24 privilege and then consultation with Mr. Bloch,
25 Mr. Krebs answered yes. Then the question was,
26 quote, And who was that, closed quote. The
27 response was, I invoke the privilege.

June 23, 2000

Spoke with Ms. Elizabeth (Liz) Arnold previously described in this investigation who reported that she had been thinking about incidents which occurred while she attended Elan. She reported that she remembered being in an encounter group, which was being run by either Jeff Gottlieb or Joe Ricci. She further reported that an individual by the name of Mitch was also in attendance. This group was called for Michael Skakel after he had run away from the facility.

Ms. Arnold reported that Mitch announced to those present, that the information which was to be discussed in the group was never to leave the room, and that if there was anyone who did not wish to comply, they should leave.

The focus of the group was Michael and during the group the subject of this murder was brought up. Michael announced that his brother had fucked his girlfriend. Ms. Arnold replied to Michael that she thought that that was an awful thing for his brother to do, which prompted Michael to say that he didn't actually fuck her but tried to steal her from him.

Ms. Arnold reported that Michael stated that they had been running around outside, that he was drunk, had blacked out and that the next morning he woke up and Martha was dead.

6

SUPERIOR COURT
J.D. OF STAMFORD/NORWALK
AT STAMFORD

CV 05 4006524

MICHAEL C. SKAKEL

VS.

STATE OF CONNECTICUT

OCTOBER 17, 2006

DEPOSITION OF CHARLES MORGANTI

A P P E A R A N C E S

REPRESENTING THE PLAINTIFF(S) :

HUBERT SANTOS, Esquire

REPRESENTING THE DEFENDANT(S) :

JONATHAN BENEDICT, Esquire

Lillian-Madelyn Perry, Court Reporter

1 C H A R L E S M O R G A N T I ,
2 having been first duly sworn by Jonathan Benedict and called
3 as a deponent, was examined and testified upon his oath as
4 follows:

5 **DIRECT EXAMINATION BY MR. BENEDICT**

6 Q You are here under subpoena, sir?

7 A Yes, I am.

8 MR. BENEDICT: Will a photocopy of the
9 subpoena suffice?

10 MR. SANTOS: Yes.

11 Q Do you have a copy of it? Do you have it?

12 A I have a copy of it.

13 MR. BENEDICT: Would you mark this Exhibit 1
14 for the hearing.

15 And while we're at it, mark that Exhibit 2.

16 (Whereupon Defendant's Exhibits 1 and 2 were
17 marked.)

18 Q Before I proceed, I have to advise you that under
19 Connecticut law you have the right to read and sign your
20 deposition and make any changes relative to misspellings and
21 things. You have a right to do that or you can simply waive
22 and rely on this court reporter's expertise, but it's your
23 call if you would prefer to have it presented to you for
24 your review prior to becoming an official document.

25 A Okay.

26 Q You want to waive or --

27 A I can waive that.

1 MR. BENEDICT: Usual stipulations?

2 MR. SANTOS: Yeah.

3 MS. SEELEY: Yes.

4 Q You're currently residing where?

5 A Schaumburg, Illinois.

6 Q And you've lived out there for how long?

7 A Since 1983.

8 Q And your employment is?

9 A Self-employed.

10 Q Okay.

11 A Well, that's changing today.

12 Q Changed how?

13 A I just accepted an offer this morning.

14 Q I hope it was an improvement.

15 A Substantially.

16 Q Congratulations on that.

17 A Thank you.

18 Q What was your employment back in the autumn of
19 1975?

20 A 1975, I was owner of video measurements. Video
21 measurements.

22 Q What kind of business was it?

23 A We did closed circuit television systems for
24 security applications and nondestructive testing. And I
25 also was with Greenwich P.D., special police.

26 Q You were a special policeman?

27 A Yes.

1 Q What's the difference between a special policeman
2 and --

3 A We are both sworn officers; however, the special
4 police officers were a volunteer organization to augment the
5 police department.

6 Q As such, you were an employee of the Town of
7 Greenwich; is that correct?

8 A Correct.

9 Q Okay. And for how long a period of time did you
10 serve as a special policeman for the Town of Greenwich?

11 A Seven, eight years; around there.

12 Q And that would include the year of 1975?

13 A Yeah.

14 Q Do you recall if you had occasion to be working as
15 a Greenwich special officer on the evening of October 30th,
16 1975?

17 A Yes, I was.

18 Q Okay. And do you recall what your assigned hours
19 were on that particular date?

20 A We were hired by Belle Haven to augment their
21 existing security force that night --

22 Q Okay.

23 A -- to cover for vandalism for the night prior to
24 Halloween.

25 Q How many special policemen were on duty -- let me
26 withdraw that.

27 The hours of your shifts were what?

1 A Approximately six to about close to midnight.

2 Q Okay. And how many special policemen were assigned
3 to the Belle Haven area that night?

4 A There was a regular Belle Haven officer --
5 actually, two: Charlie Bickel and Al Robbins. And then
6 there was Chris Gardner, myself, and Larry Santora.

7 Q Okay. So that's a total of five or six people?

8 A About five or six, yeah.

9 Q Was that the normal contingent that were assigned
10 to Belle Haven on any given day of the week?

11 A No, it was typically just one man, sometimes two.

12 Q What was the purpose of this augmented force on
13 October 30, 1975?

14 A Primarily to prevent vandalism on the premises of
15 Belle Haven.

16 Q Was it foot or vehicular?

17 A Vehicular.

18 Q And how many of you were assigned to vehicles?

19 A Trying to remember back, I know there was at least
20 two of us or three on the road. I think one of them was at
21 the guard shack.

22 Q Okay. And were these individual automobiles or --
23 or two persons to a car?

24 A Individual auto.

25 Q Okay. So you got down to Belle Haven at about what
26 time?

27 A Around 6 p.m.

1 Q All right. And in the course of that evening, did
2 you have occasion to see, observe, any children -- and by
3 that I mean persons from the age, let's say, six to the age
4 of 18 or 20 -- outside after dark in the neighborhood?

5 A Sometime between 6:00 and probably 7:30 p.m. there
6 was a large group of youths that were in and around the
7 Skakel premises near the end of Walsh Lane over there.

8 Q Okay. Young kids or --

9 A They were young. They were all young.

10 Q By that you mean?

11 A Ages between, say, 12 and 15; somewhere in there.

12 Q Young teenagers?

13 A Young teenagers.

14 Q And about how many?

15 A It was kind of hard to say. It was pretty dark out
16 there. I would say there was at least five or six out
17 there.

18 Q And it would have been prior to the hour of
19 8 o'clock?

20 A Yes.

21 Q All right. At any occasion while working that
22 night, did you notice any tall, young, black, teenage males?

23 A No.

24 Q Did you observe any black males in Belle Haven that
25 night?

26 A A Blake male in Belle Haven would have been very,
27 very obvious. There was none there.

1 Q Now, in the course of your duties that evening, did
2 you have occasion to encounter any individual in the
3 vicinity of Field Point Road and Walsh Lane?

4 A I was making a swing around Field Point Road on a
5 regular round patrol area. I observed an individual walking
6 northbound on Field Point. I looked at him and took a --
7 glanced at him, did not look like that he belonged in the
8 area at first observation. I turned around, came back down.
9 I stopped. I interviewed him. He stipulated he lived on
10 Walsh Lane. He was out for a walk for the evening.

11 Q Did he identify himself by name?

12 A He didn't identify himself by name. And,
13 obviously, I didn't work Belle Haven as a regular situation.

14 Q This confrontation occurred where?

15 A Near the intersection of Walsh Lane and Field Point
16 Drive.

17 Q Okay. And does Walsh Lane T into Field Point at
18 that intersection?

19 A Yeah, Walsh Lane basically comes through. Walsh
20 Lane is a dead end street off of Field Point Drive.

21 Q Okay. If you were to proceed up Walsh Lane away
22 from that intersection, what would be the next street you
23 would come to?

24 A Well, actually, it dead ends before it hits Otter
25 Rock Drive.

26 Q Okay. Okay. And how far away from what would be
27 an intersection with Otter Rock Drive is the dead end?

1 A Maybe 125, 150 yards.

2 Q Okay. And this individual, when the confrontation
3 was finished, which way did he head?

4 A He proceeded into Walsh Lane from Field Point Road
5 heading towards Otter Rock.

6 Q Heading towards Otter Rock?

7 A Yeah.

8 Q Okay. Would you describe that person as best as
9 you can recall today?

10 A Six foot, six foot two, 200 pounds, tan slacks,
11 green fatigue jacket, dark horn rimmed glasses, sandy hair.

12 Q Race?

13 A White male.

14 Q Approximate age?

15 A At that time 20s.

16 Q Okay. Approximately what time did this
17 confrontation occur?

18 A Time-wise it is difficult. It's hard to remember
19 the exact times on that. Maybe around 9:00 sometime. 9:30,
20 it could have been.

21 Q Okay. Do you recall whether or not you had
22 occasion to observe a person or a person who looked like
23 that at any subsequent point following your visit -- the
24 confrontation at Field Point and Walsh?

25 A Well, there was an incident where I was on Otter
26 Rock Drive picking up a road stanchion that had been knocked
27 over. I encountered Mr. Bjork who lived there on Otter Rock

1 Road at that time. When I looked north, it appeared to be
2 an individual that matched that same description walking
3 across the front, around the corner of a house just up the
4 street from there.

5 Q Okay.

6 A I couldn't be 100 percent sure.

7 Q About how far was that individual when you observed
8 him on this occasion?

9 A About a hundred yards maybe.

10 Q Was there any street lighting?

11 A No. The street lighting back there was pretty bad
12 back then, but there was some lights from the house there.

13 Q And what direction was that person heading when you
14 observed them?

15 A Northbound from Walsh to Otter Rock. There is a
16 couple houses up north from there. He was proceeding north
17 and going around the backside of the house.

18 Q Would that have been toward you or away from you?

19 A Away from me.

20 Q When you say he was going towards the backside of
21 the house, would he have been heading left or right looking
22 up Otter Rock Drive?

23 A Left.

24 Q Okay. Do you recall what, if any, residence was on
25 the other side of Otter Drive?

26 A Skakel residence is across the street.

27 Q When you last saw the person, it was approximately

1 across the street from the Skakel house?

2 A Correct.

3 Q But heading away from the Skakel house?

4 A Correct.

5 Q Did you subsequently have occasion to bring this
6 confrontation to the attention of the Greenwich Police?

7 A I was called the next morning when the body was
8 discovered. And I went up to headquarters, and we -- they
9 interviewed me basically about what had occurred the night
10 prior.

11 Q What you just testified about?

12 A Correct.

13 Q Did you engage in any other efforts to help the
14 Greenwich Police in their investigation of this case?

15 A They had me attend the funeral, at which case
16 looking for individuals that I may have seen that night.

17 Q All right. And did you at the funeral recognize
18 anybody that you had seen on the night?

19 A No, there was no one I recognized.

20 Q Anyway, beside this one confrontation with this
21 individual on October 30th, 1975, did you have any other
22 confrontations with any other individual at that location
23 near the intersection of Walsh Lane and Field Point Drive?

24 A At that location on Field Point and Otter Rock, no.

25 Q Other than attending the funeral in an effort to
26 identify somebody, did you take part in any other efforts
27 with the Greenwich Police in this investigation?

1 A In the '90s I was contacted by an investigative
2 group, Sutton Associates.

3 Q If you can backtrack, do you recall having the
4 occasion in 1975 to visit with a police artist at the
5 Greenwich Police Department?

6 A When I did the interview the day of the interview
7 after the murder.

8 Q And when you did that, what, if anything, was
9 produced?

10 A Basically a composite sketch of the individual that
11 I identified.

12 Q Let me show you what has been marked State's 2, and
13 please disregard the shading --

14 A Mm-hmm.

15 Q -- around the face. It looks like roseola.

16 A That's my sketch.

17 Q Does that appear to be a photocopy of your sketch?

18 A Yes, it is.

19 Q Okay. Were you ever shown any -- you know what a
20 photo array is?

21 A Mm-hmm.

22 Q Were you ever shown any photo arrays?

23 A I can't remember really.

24 Q Okay. Do you recall ever being asked to confront
25 any individual in order to determine whether or not you
26 could recognize --

27 A No.

1 Q -- face to face the person you had seen at that
2 intersection --

3 A No.

4 Q -- of Walsh and Otter Rock -- excuse me, Walsh and
5 Field Point?

6 A No.

7 Q Okay. I think you were about to discuss some
8 further participation some years later in this
9 investigation. Would you tell us what happened there?

10 A This is going -- this is into the '90s. I was
11 already living in Chicago. I was approached by two
12 gentlemen from Sutton Associates, who later I found out were
13 investigating the murder.

14 Q Did they inform you who they were representing
15 above and beyond the name of the firm?

16 A No. They just said they were Sutton Associates
17 investigating the Moxley case.

18 Q Did they identify themselves?

19 A Yes, they did.

20 Q Do you recall the names?

21 A Not at this time.

22 Q Does the name Murphy ring a bell as to either one?

23 A Yeah, could be.

24 Q Anyway, this was in Chicago?

25 A They were sitting outside my house. I came outside
26 to go to work in the morning and they were sitting outside
27 of my house.

1 Q What happened when you found these people sitting
2 outside your house?

3 A I basically did not offer anything after finding
4 out what they were there for. I at that time called
5 Greenwich to determine which way they wanted me to proceed.

6 Q You mean the police department?

7 A The police department in Greenwich.

8 Q And what happened after that?

9 A Subsequently, I came into Greenwich, met with
10 Sutton Associates down in Belle Haven. He had quite a few
11 maps, and he wanted to go over the sequence of the events.

12 Q Was there anybody besides the associates of Sutton
13 Associates present?

14 A Yes, Frank Garr from Greenwich P.D.

15 Q At this point were you informed as to Sutton
16 Associates?

17 A I was informed at that time that Sutton Associates
18 was under retainer by the Skakel family.

19 Q So you met with Frank Garr, who was then a
20 detective with the Greenwich Police Department --

21 A Yes, he was.

22 Q -- and people from Sutton Associates. Where did
23 you meet with them?

24 A In Belle Haven. We met at Otter Rock Drive and
25 Walsh Lane.

26 Q What took place?

27 A He had an outline map of the area and he had just

1 basically asked me to go through my different locations that
2 I spotted Mr. -- the two individuals and the one on Field
3 Point Drive, and just trying to get a relationship with the
4 area.

5 Q You took them to the intersection of Walsh and
6 Field Point?

7 A We didn't go up there. We stood at Walsh and Otter
8 Rock, and he took the map out and kind of laid it out.

9 Q Okay. And while with these persons, were you able
10 to point out the location where you had identified that
11 individual on this somewhere up across the street from the
12 Skakel's house?

13 A Yes, we did that also.

14 Q And, again, that was approximately how far in
15 distance from the location where you were standing when you
16 made that observation?

17 A I would say 100 yards.

18 Q Okay.

19 MR. BENEDICT: No further questions.

20 MR. SANTOS: We have a bunch of things we
21 would like to mark. We are going to take a few
22 minutes.

23 (Whereupon Plaintiff's Exhibits A through G
24 were marked.)

25 **CROSS-EXAMINATION BY MR. SANTOS**

26 Q Good afternoon, sir.

27 A How are you doing?

1 Q I'm Attorney Santos.

2 Mr. Morganti, that night, as I understand what you
3 said on direct examination, you were basically working in a
4 capacity as a Greenwich Police Officer?

5 A I was working in the capacity as a side job for
6 Belle Haven --

7 Q Okay.

8 A -- as a Greenwich Police Officer.

9 Q As a Greenwich Police Officer?

10 A Yes.

11 Q Okay. So part of your duties would include
12 providing security in Belle Haven; correct?

13 A That was the full extent of my duties that night.

14 Q And if you discovered any suspicious activity that
15 might be considered criminal, would you feel you had an
16 obligation to report that to Greenwich P.D.?

17 A Always.

18 Q Okay. Now, prior to October 30th, 1975, which was
19 the -- you were on duty on that night at Belle Haven;
20 correct?

21 A Mm-hmm.

22 Q Right? You have to give her a yes.

23 A I'm trying to remember.

24 Okay. Yes. I'm sorry.

25 Q Okay. Prior to that, had you worked in any type
26 of -- in the same capacity as you worked on the 30th of
27 October 1975 before that at Belle Haven?

1 A Are you asking whether I worked in Belle Haven
2 previously?

3 Q Yeah, as a special.

4 A Not that I can remember. It's a long time. We
5 used to do quite a few side jobs, but I can't remember ever
6 doing another job at Belle Haven.

7 Q Would it be fair to say it was the first --

8 A Probably.

9 Q -- the first occasion that you worked as a special
10 police officer at Belle Haven?

11 A I would say yes, to the best of my ability to
12 remember.

13 Q Okay. And how about after October 30th, did you
14 ever work as a special police officer at Belle Haven?

15 A No.

16 Q So this was the one and only occasion?

17 A As far as I can remember. I mean, you are asking
18 me 30 years ago, but it is really hard to remember.

19 Q No, I appreciate that. It is a common problem
20 throughout the case.

21 But let me ask you this. So your best recollection
22 is on -- this was the one and only night or date that you
23 worked at Belle Haven as a special police officer.

24 A Yes. I would say yes.

25 Q Had you ever been to Belle Haven before
26 October 30th, 1975?

27 A Yes.

1 Q And why were you there?

2 A We used to partner with the regular officers at
3 nights. As specials, we would ride with the regular
4 officers. I had an occasion two or three times to go down
5 to Belle Haven with one of the regular officers on something
6 else.

7 Q Okay. And would that be -- would that be around
8 the same time period of the autumn of '75 or before?

9 A I couldn't tell you that.

10 Q Okay.

11 A I couldn't tell you that.

12 Q All right. But in terms of -- of how familiar you
13 were with the layout of Belle Haven and the streets and
14 et cetera, could you tell us how familiar you were with that
15 on October 30th, 1975?

16 A Very familiar.

17 Q Okay. And why was that?

18 A I was a lifelong resident in the area, in
19 Greenwich. Obviously, during the summer months, I had
20 occasion while working as a special officer on marine patrol
21 to come into -- through the harbor entrance over there quite
22 a bit. You know, growing up over there, we always used to
23 hang around the area. Byram Shore. You get to know it
24 after a while.

25 Q Right, but what I'm saying, as a youngster growing
26 up in Greenwich, would you go over to Belle Haven on
27 occasion?

1 A No, no, not really. We would be over at Byram
2 Shore, which is right next to it.

3 Q You see what I'm trying to get information on is we
4 have -- you've identified various streets: Otter Rock,
5 Walsh Lane, et cetera.

6 A Mm-hmm.

7 Q How familiar were you with the layout of those
8 streets on October 30th, 1975?

9 A I would say fair.

10 Q Okay. And that was because you had been in the
11 area with other Greenwich Police Officers?

12 A Other Greenwich Police, right. And we, you know --
13 as specials, one of the things we all try to do is basically
14 learn the streets in the village because if we were on a
15 call we know where to go.

16 Q Right.

17 A So you get to learn the streets after a while.

18 Q So I think you said you were on vehicular duty on
19 the 30th of October 1975?

20 A Yes.

21 Q Which meant what you were in some type of patrol
22 vehicle?

23 A My own vehicle.

24 Q Your own car?

25 A Yeah.

26 Q On the 30th of October '75, did you walk the area
27 at all?

1 A The only time -- I walked the area a couple of
2 times. Let's see. At the one time when I got out of the
3 vehicle to replace the stanchion that had been knocked over,
4 and also when I heard a large groups of youths earlier that
5 evening I had gotten out of the car and walked up on Otter
6 Rock to Walsh Lane maybe 20 yards. That was about it.

7 Excuse me. I also went down to the clubhouse, used
8 the facilities down there and got a cup of coffee.

9 Q Okay. But when you heard this I guess noise from a
10 large group --

11 A Yeah.

12 Q -- a little commotion --

13 A A bunch of kids out there.

14 Q -- where did you walk to?

15 A I walked from Otter Rock up the end of Walsh Lane
16 where it dead ends up there, walked up, as I said, about 20
17 yards up to there, couldn't see anything. It was pitch
18 black over there at that time.

19 Q Was there an open field in that area at all?

20 A I'm trying to think back now. Maybe there was.

21 Q What I'm trying to get at, whatever area -- I know
22 you are being asked to recall events that happened back in
23 1975, so we all understand that.

24 But when you hear this noise or commotion from this
25 group of kids, where was this in relation to the Skakel
26 home?

27 A If you were facing the Skakel home from the front,

1 it would have been between their home and Walsh Lane.

2 Q Okay. And did you -- did you confront any of these
3 kids?

4 A No, I didn't. They were too far up into it, and
5 they all ran to the Skakel house at that time.

6 Q Okay. So you figured that was kids having fun, so
7 to speak?

8 A Yeah.

9 Q All right. Now, when you're on special duty, as
10 you were there that evening at Belle Haven, were you and the
11 other officers, to the extent that you know their concerns,
12 have any concern about outsiders coming into Belle Haven?

13 A The only person that would basically have that
14 concern would be the individuals at the guard booth.

15 Q And who was that, if you know?

16 A That night it may have been Charlie Bickel. I
17 can't remember.

18 Q Okay. Could you get into Belle Haven without -- if
19 you're on foot without passing the guard post?

20 A Yes.

21 Q And how would you do that?

22 A You'd have to come up around a couple of houses on
23 Field Point Road. You could come in that way. You could
24 come off of Byram Shore and come up through that way.

25 Q Okay. Now, were there any African Americans who
26 lived in Belle Haven?

27 A If there was, I didn't know about it.

1 Q Right.

2 A Greenwich was a fairly lily-white community back
3 then.

4 Q Right.

5 A So I would say, to the best of my knowledge, no.

6 Q Do you know if there were any -- I mean, did you
7 know a Larry Jones?

8 A No.

9 Q Did you know an Ethel Jones?

10 A No.

11 Q Do you know whether there was a Larry Jones in the
12 area that evening --

13 A No.

14 Q -- October 30th, 1975?

15 A No.

16 Q Okay. Now, when you were on your patrol, did you
17 have any way of communicating with other individuals who
18 were on patrol that evening?

19 A I'm trying to remember if we picked up radios or
20 not. I can't remember.

21 Q All right. But I think you named four or five
22 other colleagues who were there that evening with you?

23 A Mm-hmm.

24 Q And could you go over their names again with me, to
25 the best that you recall?

26 A The best of my recollection was Larry Santora.
27 Chris Gardner. I'm not sure about Charlie Bickel, but I

1 think Al Robbins was there.

2 Q Charlie Bickel you are not sure of?

3 A I can't remember or not, but Al Robinson was there.

4 Q Did you say Robbins?

5 A Robinson.

6 Q Larry Santora. Do you know where he lived on
7 October 30th, 1975?

8 A He was a Greenwich --

9 Q Native?

10 A Yeah, yeah.

11 Q Have you ever had any contact with him since?

12 A No. I haven't heard from Larry since then.

13 Q Or Chris Gardner? The same question.

14 A No.

15 Q Was he a Greenwich native?

16 A You had to be in order to be on the specials.

17 Q And the same with Charlie Bickel?

18 A Yeah.

19 Q And Al Robinson?

20 A Yes.

21 Excuse me. Robbins. I'm dusting off some cobwebs
22 here.

23 Q Did you know a John Duffy?

24 A John Duffy, yes.

25 Q Name out of the past?

26 A Yeah.

27 Q And what about was he on duty that night?

1 A John was in another part of that Belle Haven
2 peninsula called Field Point Circle. He was the guard in
3 the shack up there.

4 Q And that was separate and distinct from Belle
5 Haven?

6 A Correct.

7 Q Did you have any interaction with him that night?

8 A I could have stopped and said, Hello, John, on the
9 way by one time. I can't remember back then.

10 Q But, again, was he, once again, a native of
11 Greenwich? Do you know?

12 A I don't know. I don't know that much about John.

13 Q All right. Okay. Now, when was the first time you
14 were contacted about this deposition?

15 A A couple weeks ago I think.

16 Q And who contacted you?

17 A Frank Garr.

18 Q Okay. And did Mr. Garr -- did you have a
19 conversation with him on the phone or was this by phone?

20 A Yeah, he called me.

21 Q Did you have a conversation with him?

22 A Yeah, he told me, he said, We might have to have
23 you come in for a deposition. I said okay.

24 Q Did he tell you what it was about?

25 A Well, obviously, I know what it is about.

26 Q Right.

27 All right. Did you have -- and did you have any

1 further conversations with anyone about the deposition after
2 the first conversation with Mr. Garr?

3 A My wife.

4 Q Okay. We'll leave her out of this.

5 But -- and when you arrived here, when did you
6 arrive here in Connecticut.

7 A Yesterday.

8 Q All right. Have you had a chance to talk to
9 Mr. Benedict or Mr. Garr about your deposition?

10 A Just basically to go over some of the facts that I
11 presented on paper just to refresh my memory a little bit.

12 Q Were you shown any reports?

13 A Yes.

14 Q And I assume you were shown the sketch?

15 A Yes.

16 Q All right. We have reports in front of you, and I
17 think what I'm going to do is probably sit next to you;
18 otherwise, we are going to do this Ping-Pong thing.

19 Let me just show you what we have marked as
20 Plaintiff's Exhibits. Now, A is a diagram --

21 A Mm-hmm.

22 Q -- that purports to be of the --

23 A Belle Haven area.

24 Q -- the Belle Haven area.

25 Were you shown this prior to the deposition?

26 A No, no.

27 Q Okay. The second thing is a page of a Greenwich

1 Police report signed by Michael Powell dated 10-31-75. Were
2 you shown this report?

3 A Yes.

4 Q All right. And the next is Plaintiff's C. It's
5 another police report dated 11-6-75. It looks like
6 Detective McGlynn signed that. Were you shown that?

7 A I don't remember this one.

8 Q I'm not saying you saw them. I'm just asking.

9 Plaintiff's D, as in David, is a report signed by
10 Detective Powell dated 11-1-75.

11 A I saw this one.

12 Q You saw that.

13 And Plaintiff's E is a report signed by Detective
14 Lunney dated 11-6-75.

15 A Yes, I believe so.

16 Q Two pages.

17 MS. SEELEY: Three pages.

18 Q And then Plaintiff's F is a report I believe was
19 authored -- it is dated October 8, 1994, and it is authored
20 by Officer Garr and it is two pages.

21 A Yes, I saw this.

22 Q And Plaintiff's G is a report dated 11-6-75,
23 officer's signature can't be made out, but does that --

24 A I don't remember this one.

25 Q Okay.

26 A But I could have been.

27 Q All right. Now, let me show you this.

1 Plaintiff's A.

2 A Mm-hmm.

3 Q And I'll let you look at it for a second because
4 this is the first time you've seen it. Go ahead, sir.

5 A When you're saying the first time I've seen it,
6 obviously, I've seen a street diagram when Sutton Associates
7 approached me. Whether it is this diagram or not, I can't
8 say.

9 Q I understand. I don't mean to suggest that it is.
10 But you indicated that you approached an area where
11 there was a commotion?

12 A Right.

13 Q Now, using this diagram -- and I'm not asking you
14 if it's 100 percent accurate. This is a diagram that we
15 have.

16 A Right.

17 Q Okay. And it shows the Moxley home, number one;
18 Skakel home, number two; the Ix's home; the Belle Haven
19 police booths; Hammond house; and McGuire house. Do you see
20 that?

21 A Mm-hmm.

22 Q I'm just asking you to --

23 A Yes, I understand.

24 Q -- to assume it's accurate as a general layout.

25 A Right.

26 Q Can you put an "X" in the area where you saw the
27 commotion or, you know, you got out of your vehicle?

1 A I heard the commotion.

2 Q You got out of the vehicle and approached an area?

3 A Right. It was approximately right here.

4 Q Okay.

5 A Which is just to the right of the Skakel house.

6 Q Okay. Okay. And you've got an "X" there in red
7 ink?

8 A Mm-hmm.

9 Q Did you park your vehicle and --

10 A My vehicle was parked here on Otter Rock between --
11 right at the -- almost the end of Walsh Lane.

12 Q Okay. And when you approached that area, the kids
13 scattered?

14 A They were in the process of scattering, yeah.

15 Q Okay. All right. Now, can you tell us on
16 October 30th, 1975, do you remember the identity of any of
17 the teenagers that you saw that night?

18 A No. I don't remember seeing any teenagers that
19 night.

20 Q You know, using the same 12- to 15-year-old age
21 group or, say, 12 to 15 or 16, 17, 18, you saw -- you saw
22 young adolescents or kids that night?

23 A Mostly shadows and noise. It was dark. There was
24 no light in that area. It was totally pitch black. There
25 is no way I could have recognized anyone over there.

26 Q Okay. All right. Fair enough.

27 Now, when you did -- when you were asked to help

1 with the preparation of the sketch --

2 A Mm-hmm.

3 Q -- was this the 30th of October or the next day,
4 the 31st --

5 A The next day.

6 Q -- which would have been, of course, Halloween?

7 A Right.

8 Q You went down to Greenwich P.D.?

9 A Correct.

10 Q And what was the process by which the sketch was
11 prepared? Was someone talking to you showing you pictures?

12 A No, there wasn't any photographs given to me at
13 that time prior to the sketch, as far as I can remember. I
14 was in one of the detective's offices. They asked me the
15 circumstances about the night before, you know, what went
16 on, and I told them about the individual I had stopped and
17 questioned. And they asked me if I could do a composite,
18 and I said yes.

19 Q Okay.

20 A And this is subsequently what happened after that.

21 Q I mean, how was the composite done? Were you shown
22 different features?

23 A I did that based on one of the composite kits, if I
24 remember correctly.

25 Q And you were given choices?

26 A Multiple. These eyes. This face. This nose.
27 This type of rims. And, obviously, you alter it according

1 to what you need.

2 Q Okay. And who was, if you remember, the officer
3 that you were interacting with or --

4 A I don't remember that. There was so many going on
5 at that time. I couldn't tell you the name.

6 Q Okay. Did -- as far as you know, did you have any
7 other contact with any Greenwich Police Officer after
8 this -- in other words, after the 31st of October, 1975 --
9 concerning this sketch that you did?

10 A The last thing I heard about the sketch was that
11 the -- that day or the next day they took the sketch down to
12 Al Robbins and showed it to Al Robbins. And Al Robbins
13 said, I know exactly who that is. That was the last I heard
14 of the sketch.

15 Q All right. That was the last. That was it until
16 more recently?

17 A Until just now.

18 Q All right. Okay. And Al Robbins was one of the
19 special officers on --

20 A He was actually a full-time employee of Belle Haven
21 even though he was a special officer.

22 Q Okay. All right. And did you come to learn who
23 this sketch was that Mr. Robbins was of the view of a
24 particular person?

25 A Later on that day or something.

26 Q Do you know who that was?

27 A Yeah, he mentioned a name Carl Wold.

1 Q Did you know Carl Wold?

2 A No, never met him outside of the night that I
3 stopped him.

4 Q I think you told us at around 10 p.m. you were
5 repairing a stanchion that was knocked over or something?

6 A The time -- you know, thinking back on it, the
7 timeline between picking up the stanchion and seeing the
8 individual on Field Point Drive, I can't remember the
9 timeline. You know, it could have been as early as
10 9 o'clock. It could have been as late as 10 o'clock. I'm
11 really not sure.

12 Q Right.

13 A I can't remember the timeline.

14 Q It would be fair to say that your memory back on
15 the 30th of October 1975 is better than it is today?

16 A Without a doubt. Without a doubt.

17 Q Okay. That's -- that's one of those softball
18 questions they give us in law school.

19 Because here's our problem, sir. We have
20 Plaintiff's Exhibit B, which I think you said you saw?

21 A The one from Sutton?

22 Q No, this is the one done on the 31st of October
23 '75.

24 A Mm-hmm.

25 Q And I'll let you read that to yourself, if you want
26 to -- you don't have to -- because I want to ask you
27 questions.

1 A I know this one you are talking about. Go ahead.

2 Q All right. Now, I'm just looking at the report
3 and, "While assisting the state police officers in a search
4 of the area the undersigned was approached by the following
5 described subject" -- and the fellow who signed the report
6 is Detective Michael Powell, so I assume he's referring to
7 himself here. "While assisting the state police in a search
8 of the area the undersigned," who is apparently Michael
9 Powell, and it is also Captain Keegan signed it as
10 commanding officer, "was approached by the following
11 described subject," and he gives your name and your age and
12 address and phone number. You see that, sir?

13 A Yes.

14 Q Is that accurate?

15 A I would say it is, yeah, at the time. Mike made
16 the report. I didn't.

17 Q Right, but what I'm trying to get at, you got a
18 phone call to come down to --

19 A I think that was subsequent, after this.

20 Q It was after that?

21 A Yeah, yeah. I think it was after that.

22 Q So tell me what happened here. Were you -- did
23 you, in fact, approach a Detective Michael Powell?

24 A I could have spoken to Mike. You know, it's a long
25 time ago.

26 Q I know.

27 A There was a lot of different people I worked with

1 at that time, and I don't remember exactly who it was, but
2 what I can -- the best of my knowledge right now, my
3 recollection, if I remember speaking with somebody, I don't
4 know who it was.

5 Q All right. Look it, we understand it's been a long
6 time. We're not being critical. We are trying to put the
7 puzzle back together here.

8 All I'm trying to understand is did you show up at
9 Belle Haven while a search was being conducted by
10 Greenwich P.D. and in specific Detective Powell and approach
11 him?

12 A You know, I can't remember.

13 Q Okay. All right. Fair enough. All right.

14 But let me ask it this way. You had a conversation
15 with someone about seeing an individual the night of the
16 homicide or the night the 30th of October '75.

17 A I would say yes. I probably -- after hearing of
18 the murder there, I would say, yeah, I probably would have
19 notified somebody.

20 Q All right. And what we're trying to figure out,
21 who was the first person you notified that you might have
22 some relevant information regarding this matter?

23 A I don't remember who I spoke to.

24 Q Okay. Did you speak to anyone prior to going down
25 to the Greenwich P.D. to help with putting together the
26 sketch?

27 A Not that I can remember. As I said --

1 Q Okay.

2 A -- I really can't remember what the circumstances
3 or the timelines were.

4 Q All right. What was the -- how did you end up at
5 the Greenwich P.D.? Did someone call you?

6 A Yeah, I had a phone call. I remember that.

7 Q Okay. And did they seem to know -- whoever called
8 you from Greenwich P.D., did that person seem to know you
9 had some information relevant to the investigation?

10 A Yes.

11 Q How do you come to that conclusion?

12 A Because I remember being -- when I went into the
13 room and sat down, I forgot who was there, I remember Chief
14 Grant walking in and asking me the questions about, you
15 know, what went on, what occurred in the area, and that --
16 and I made a statement about the individual that I saw and
17 that from that point on led into the sketch.

18 Q Okay. Let me go to the next sentence of this
19 report or the next paragraph. "S.O.", special officer,
20 "Morganti related that he was working the Belle Haven area
21 last evening on a special duty basis." That's of course
22 correct?

23 A Correct.

24 Q "And that while on patrol at around 10 p.m. he
25 observed the following described subject walking northerly
26 on Field Point Road on the east side of the highway."

27 A Mm-hmm.

1 Q Did you tell -- did you make that statement to
2 somebody?

3 A I had to make it to someone or else they wouldn't
4 have put it in there.

5 Q Do you know if it was Detective Powell?

6 A I can't remember that.

7 Q Do you remember talking to Detective Powell?

8 A Everybody was on that case at that time. I don't
9 know who it was. I really can't give you an honest answer.

10 Q When you went down to Greenwich P.D., you described
11 to someone in authority what you saw?

12 A Chief Grant was there and some of the other
13 detectives. I can't remember who it was.

14 Q I'm not asking you specifically who it was, but
15 when you were down there on the 31st of October --

16 A Mm-hmm.

17 Q -- the day after you were on duty --

18 A Right.

19 Q -- 1975, you told somebody at Greenwich P.D. what
20 you saw?

21 A Yes.

22 Q Okay. You just don't know who it is at that point?

23 A I just can't remember who it is.

24 Q Okay. And do you know whether or not anybody was
25 taking notes when you were speaking to them?

26 A No.

27 Q Okay. And this report goes on to refer to your

1 description of the individual. "White male, six feet tall,
2 200 pounds, late 20s to early 30s, dark rimmed glasses,
3 fatigue jacket, tan slacks, blond hair."

4 A Mm-hmm.

5 Q Is that description accurate as to the person you
6 saw on the 30th of October?

7 A I would said maybe the hair was more sandy, if I
8 remember correctly, but it is accurate.

9 Q Okay. And then it goes on to report that,
10 "Morganti asked the subject where he was going. The subject
11 replied, 'I'm going home. I live on Walsh Lane.'" Is that
12 accurate?

13 A Yes.

14 Q "With this the subject turned into Walsh Lane." Is
15 that accurate?

16 A Yes.

17 Q And it says, "This same subject was later observed
18 in just a very few minutes walking northbound on the west
19 side of Otter Rock Drive just north of the Walsh Lane
20 intersection." Is that accurate?

21 A Yes.

22 Q Then it says, "Special Officer Morganti viewed
23 subject William Edward Hammond," H-A-M-M-O-N-D, "and related
24 that is not the subject that he observed the previous
25 evening." Is that -- did that occur?

26 A You know, when I read this, I could not answer the
27 question and I still can't. I don't remember being shown a

1 photograph of Hammond or anybody.

2 Q Did they bring a live person in for you to see?

3 A I can't remember. Too many years.

4 Q Okay. That's fine. That's fine.

5 Now, the other report that we have is Plaintiff's
6 D, as in David, and you said I think you have seen it
7 before?

8 A Yes, yes.

9 Q Okay. And, once again, let me go through this with
10 you. "Special Officer Morganti was contacted and related
11 that he would later appear at the detective bureau for the
12 purpose of putting a composite picture of the subject that
13 he observed on Field Point Road near Walsh Lane on Thursday
14 10-30-75."

15 A Mm-hmm.

16 Q Is that accurate to your knowledge?

17 A Yes.

18 Q All right. Now this report is dated 11-1-75?

19 A It was the 1st then.

20 Q I'm sorry?

21 A It was two days later then.

22 Q I'm not -- I understand. Who knows. It could have
23 been misdated or whathaveyou.

24 But your best recollection is you went down there
25 Halloween night or Halloween day?

26 A It must have been after. I thought it was
27 Halloween, but I'm not sure.

1 Q I'm not saying it is not, but.

2 A Yeah.

3 Q It said, "Morganti further related that he observed
4 the below described auto on Field Point Road at around
5 10 p.m. on the night of 10-30-75: Blue Mustang, occupied by
6 two white males, 30s, grubby looking, Connecticut
7 registration 533-A??" Do you remember --

8 A I remember giving that information.

9 Q -- that information?

10 A Yes.

11 Q You gave that information?

12 A Yes.

13 Q Now, what drew your attention to this vehicle?

14 A Just observation.

15 Q I mean, did it strike you?

16 A The individuals were a little bit grubby looking,
17 and they didn't look familiar to the area.

18 Q It didn't look like they belonged to Belle Haven?

19 A I would say so.

20 Q And that caused you to draw attention to them?

21 A Mm-hmm.

22 Q You have to give her a yes.

23 A Yes. I'm sorry.

24 Q And were you asked to give a description of these
25 individuals?

26 A I couldn't give a description, no.

27 Q Okay. Do you know who they were?

1 A No.

2 Q With regard to the vehicle, the blue Mustang, did
3 you pull behind it and try to get the registration number,
4 or did you do anything relative to the vehicle?

5 A I don't remember.

6 Q You do remember, however, telling someone at
7 Greenwich P.D. about this?

8 A Subsequent, after the fact, yeah.

9 Q All right. Now, let me show you what's been marked
10 as Plaintiff's Exhibit E, which is another one of these
11 reports. I believe -- I don't know if you saw this, but
12 it's a three-page report, and I want to draw -- you can most
13 certainly look at it any time you want, but I'll show you
14 what I want to draw your attention to. In the third page
15 there is a reference to you.

16 A Okay.

17 Q And this is the bottom of the third page of that
18 report, that exhibit, and it says 8:30 p.m - November 5,
19 1975 - Detective Lunney - Brosko.

20 A Mm-hmm.

21 Q Did you know Detective Lunney?

22 A Yeah, Lunney and Brosko. I knew them both.

23 Q "Reinterviewed Special Officer Charles Morganti,
24 described on page 17 of this report. He again reiterated
25 the same story as noted and stated he was positive that the
26 subject he stopped on Field Point Road and Walsh Lane was
27 the same subject he observed on Otter Rock Drive."

1 A Okay.

2 Q Is that a fair statement?

3 A It's a fair statement.

4 Q And they went on to say that person was "walking
5 northbound on the west side, opposite the Skakel residence."
6 Is that a fair statement?

7 A Yes.

8 Q And did you also tell the officers at the time of
9 the interview -- okay. All right. All right.

10 Now, you have to excuse myself. I'm going to be
11 repeating myself to a certain extent, but we have certain
12 rules that we have to comply with. Okay.

13 After October 30th, 1975 --

14 Okay?

15 A Mm-hmm.

16 Q -- at any time after that, did you tell anyone that
17 while on patrol at Belle Haven on the 30th of October 1975
18 at about 10 p.m. you observed a subject walking northerly on
19 Field Point Road on the east side of the road? Did you ever
20 tell anyone that?

21 A Yes.

22 Q And did you describe that person as having -- being
23 a white male, six feet tall, 200 pounds, late 20s to early
24 30s, dark rimmed glasses, fatigue jacket, tan slack, and
25 blond hair?

26 A Yes.

27 Q Okay. And at any time after October 30th, 1975,

1 did you tell anyone particularly with the Greenwich Police
2 that on the night of October 30th around 10 p.m. you had
3 observed a blue Mustang occupied by two white males, 30s,
4 who were grubby looking?

5 A Yes.

6 Q And did you give them a registration of 533-8, the
7 best you could do?

8 A Yes.

9 Q All right. And at any time after October 30th,
10 1975, did you tell anyone at the Greenwich Police Department
11 that you were positive that the subject you stopped on Field
12 Point Road and Walsh Lane was the same subject you observed
13 on Otter Rock Drive --

14 A Yes.

15 Q -- walking northbound --

16 A Yes.

17 Q -- on the west side --

18 A Yes.

19 Q -- opposite the Skakel residence?

20 A Yes.

21 Q And you told the -- after October 30th, 1975, you
22 told the Greenwich -- a Greenwich Police Officer that you
23 had a conversation with the individual that you eventually
24 described in your sketch?

25 A Yes.

26 Q And this individual told you he was basically going
27 home?

1 A Yes.

2 Q And then you met with the Sutton Associates --
3 someone from Sutton Associates --

4 A Mm-hmm.

5 Q -- and Mr. Garr in '94?

6 A If it was '94, yeah.

7 Q Okay. What was your best recollection when it was?

8 A It had to be early '90s sometime.

9 Q And this whole issue came up again about your
10 observations and the sketch. Am I correct?

11 A To the best of my recollection, yes.

12 Q I mean, what were they talking to you about?

13 A Yeah. As I said, to the best of my recollection,
14 yes.

15 Q And did you give -- and Mr. Garr and the
16 representative from Sutton were in the same room with you?

17 A We were outside in Belle Haven.

18 Q Walking around the area?

19 A Just stopped at the end of Walsh and Otter Rock.

20 Q Okay. But did you give them the same information
21 you had given the Greenwich Police about your observations
22 that night?

23 A The timelines in 1990, I would probably say were
24 not as accurate as they were in 1975.

25 Q Okay.

26 A All right. But to the best of my ability, I did
27 the best I could.

1 Q All right. Now, let me just show you
2 Plaintiff's G, which is a report of an interview with
3 Mrs. Bjork. Do you remember, did you ever see this one
4 before, this report?

5 A I don't remember this one.

6 Q Okay. Let me just ask you this. You remember
7 being near the Bjork residence around 10 p.m. on
8 October 30th, 1975?

9 A If the timeline is correct, yes.

10 Q Okay. What were you doing there?

11 A Picking up a stanchion. A roadway stanchion had
12 been knocked over.

13 Q All right. And was it at that time you then saw an
14 individual that you thought you had seen earlier?

15 A Yes.

16 Q Now, since the -- after October 30th, '75, right
17 until the present, have you had any conversations with
18 anyone about the Skakel case or, let me put it this way,
19 about the homicide of Martha Moxley?

20 A Well, obviously, the state's attorney's office when
21 they called me concerning the deposition.

22 Q Right.

23 A And the Sutton.

24 Q The more recent events?

25 A Right.

26 Q I'm saying, over the years, has anyone contacted
27 you relative to the case or have you had any conversations

1 with anyone about the case?

2 A The only time -- outside of friends and family.
3 They knew about it.

4 Q Right.

5 A That's about it.

6 Q Okay. All right. When you were sworn in, did you
7 give your home address?

8 A No, I didn't.

9 Q All right.. Would you -- I mean, we could ask you
10 your home address. Could we have this agreement: You'll
11 provide that to Mr. Benedict with your phone number; and if
12 we need it, we can get it from Mr. Benedict? Is that
13 agreeable?

14 A Yeah.

15 MR. BENEDICT: Sure.

16 Q Can we do the same with regard to your social
17 security number? We normally ask that on the record.

18 A I don't prefer to have my social security number
19 out in public right now.

20 Q That's why I'm doing it this way. That's why I'm
21 doing it this way.

22 A Okay.

23 Q Would you be willing to provide that to
24 Mr. Benedict; and if we need it, we will contact
25 Mr. Benedict?

26 A My social security number I would like to keep
27 private; however, I will provide it to Mr. Benedict.

1 MR. BENEDICT: All right. And if you need it,
2 we will discuss it at that point.

3 MR. SANTOS: Okay.

4 Q At the time of the -- well, let's put it this way.
5 Were you ever asked or alerted you could be a witness at the
6 Skakel trial, the trial of Michael Skakel?

7 A Not that I can remember. Not that I can remember.
8 I didn't think I was pertinent to the trial at that time.

9 Q All right. I'm going to ask you if you were ever
10 interviewed or spoke to the following people. Okay?

11 A Mm-hmm.

12 Q Since October 30th, 1975, Mr. Leonard Levitt?

13 A No.

14 Q Mr. Mark Fuhrman?

15 A He called, but we never got into conversations to
16 any great degree. I don't think. I can't remember.

17 Q He called just once or --

18 A I can't remember.

19 Q Was it -- do you remember approximately when it was
20 in the '90s?

21 A He was playing with his book at that time. I don't
22 really remember.

23 Q But did you ever speak with him?

24 A I can't remember if I did or not.

25 Q Okay. Okay.

26 A I could have.

27 Q Did Mr. Fuhrman ever mention in a conversation with

1 you anything about the sketch that you provided to the
2 Greenwich Police?

3 A I can't remember talking to Mark Fuhrman at all. I
4 don't remember it having anything to do with the sketch.

5 Q Just so I don't forget here, the sketch that's
6 marked as Defendant's Exhibit 2 is the sketch that you
7 produced?

8 A Yes, it is.

9 Q That was produced based on your input on the --
10 after October 30th, '75; correct?

11 A Correct.

12 Q And is it a fair and accurate rendition of the
13 person you saw that night?

14 A Yes.

15 Q Okay. And did you ever have any conversations or
16 interviews by a gentleman known as Tim Dumas?

17 A Tim, yes.

18 Q Okay. And when did you talk to Mr. Dumas?

19 A Oh, he called me before the time he was writing his
20 book.

21 Q Okay. Did he call you once or more than once?

22 A I can't remember. Maybe one time.

23 Q And what was the -- was it a phone conversation
24 only?

25 A Yeah, it was a phone conversation.

26 Q Where were you living at the time?

27 A In Chicago.

1 Q Okay. And what did you talk to Mr. Dumas about?
2 Could you tell us what that conversation was about?

3 A Basically my impressions of the night there that I
4 was working.

5 Q And what did you say to him?

6 A Pretty much everything that had been public record
7 that was out there already.

8 Q Why don't you -- to the best you can recall, what
9 did you say to him?

10 A Oh, boy. That was a dark night. Cold. I mean,
11 Belle Haven is a quiet area, you know. Going back a long
12 time, I can't remember what I spoke to him about.

13 Q Anything about the sketch?

14 A No, not that I remember.

15 Q Do you know -- did you know Tim Dumas?

16 A No, never heard of him before. I heard his name
17 thrown about with the fact that he was writing a book.

18 Q Right. And that's your best recollection?

19 A Going back a long time, I can't remember it.

20 Q Was it a fairly short conversation?

21 A I would say 15 minutes, 20 minutes maybe.

22 Q Okay. How about any conversations or interviews by
23 Dominick Dunne?

24 A No, no, I don't remember anything with Dominick
25 Dunne.

26 Q How about Attorney Mickey Sherman?

27 A No.

1 Q Or anyone from Mr. Sherman's office?

2 A No, not to my recollection.

3 Q Okay. And was your contact with Mr. Garr limited
4 to the incident where you were with the Sutton Associates
5 people also and looked at the -- went over to Belle Haven?

6 A Yes, yes.

7 Q How about an investigator by the name of John
8 Solomon?

9 A Doesn't ring a bell.

10 Q Okay.

11 MR. SANTOS: We're going to take one minute if
12 we could to confer.

13 (Whereupon there was a break.)

14 Q All right. So let me just get one thing. I showed
15 you Plaintiff's, these exhibits, A through G; correct?

16 A Yes.

17 Q Now, were you shown -- other than A through G, and
18 I know you didn't see all of these, were you shown any other
19 documents in connection with your deposition?

20 A No.

21 Q Preparing for your deposition?

22 A No.

23 Q By either Mr. Garr, Mr. Benedict, or anyone working
24 with them?

25 A No.

26 Q Okay. Prior to you coming down here for the
27 deposition, had you had any conversations with Mr. Benedict?

1 A No.

2 Q Or Mr. Morano? Chris Morano?

3 A No.

4 Q Or Attorney Susann Gill?

5 A No.

6 Q All right. Is it fair to say that the only person
7 you discussed the sketch with from the state's attorney's
8 office is Mr. Garr?

9 A At what point in time?

10 Q At any time after October 30th, 1975?

11 A No, I -- there were two people on the sketch:
12 Frank Garr and Jonathan Benedict.

13 Q Okay. What do you mean by that?

14 A I was shown the sketch when I got here yesterday.

15 Q Yeah, I understand that. I understand. I mean
16 before yesterday. In other words, I'm saying we start with
17 October 30, '75 --

18 A Mm-hmm.

19 Q -- and we go up to yesterday, before yesterday --

20 A Right.

21 Q -- is it fair to say the only person you discussed
22 the sketch with who was associated with the state's
23 attorney's office, the prosecutor's office, is Mr. Garr?
24 I'm not counting Greenwich Police.

25 A I don't remember discussing the sketch, per se, in
26 itself with Frank Garr.

27 Q Right.

1 Well, let's put -- your observations that led to
2 the sketch, he's the only person that you discussed about
3 your observations that led to the sketch that were a member
4 of the state's attorney's office since October 30th, 1975,
5 until a few days ago; Mr. Garr? Only Mr. Garr?

6 A I had not discussed the sketch with anybody to the
7 best of my recollection outside of the people involved with
8 Greenwich P.D. back in '75.

9 Q Right. What I'm referring to, you were visited
10 later on by the Sutton people and Mr. Garr.

11 A Sutton didn't bring up the sketch to me.

12 Q Okay.

13 A Sutton didn't ask for the sketch. They didn't
14 bring that up. All they were looking at was the area and
15 the circumstances surrounding the date and time.

16 Q Mm-hmm. You remember talking to Mr. Garr about
17 your observations that night, Frank Garr, I guess according
18 to this report in 1994?

19 A Yes.

20 Q That's what I'm trying to get at.

21 A Okay.

22 Q All right. Other than your conversations with
23 Mr. Garr --

24 A Okay.

25 Q -- did you discuss your observations that night,
26 that night being October 30th, 1975, with anyone else from
27 the prosecutor's office?

1 A No.

2 Q Okay. Sorry?

3 A I just want to make sure.

4 Q No, no, no, no. It's my fault.

5 Now, in addition to these documents that I've
6 showed you here at this deposition, did you ever -- were you
7 ever shown a document that was the so-called Sutton reports?
8 Did you ever see the document?

9 A I saw it online.

10 Q Oh, you saw it online. Okay.

11 MR. BENEDICT: You're one up on us all.

12 Q And when was that?

13 A Got to be a few years back. I can't remember when.

14 Q Okay. All right. Did you see anything else online
15 other than the Sutton reports?

16 A No, just the Moxley website, you know how these
17 things go on there.

18 Q You observed a website that reports on the Skakel
19 case?

20 A MarthaMoxley.com.

21 Q Is that a website that you go to?

22 A That's the one that carries all the information
23 that I know of. I don't know if there is any other ones out
24 there.

25 Q Whatever you read online, was the sketch that had
26 been marked in this proceedings mentioned at all?

27 A Not that I know of.

1 MR. SANTOS: That's all I have.

2 **REDIRECT EXAMINATION BY MR. BENEDICT**

3 Q I'm going to backtrack a little bit .

4 Apparently you had a conversation with Tim Dumas
5 and somehow the subject of weather arose. What do you
6 recall the weather was on that night?

7 A It was dark, cold.

8 Q Do you recall rain?

9 A Not that I can remember.

10 Q Okay. Now, Mr. Santos presented you with a police
11 report that included an interview of Mrs. Bjork. Now, you
12 recall where the Bjork residence was?

13 A They were at the end of Walsh Lane and Otter Rock.

14 Q The house was situated on which street?

15 A On Otter Rock.

16 Q That would have been opposite where Walsh Lane --

17 A Ended.

18 Q -- ends?

19 A South of that.

20 Q And is that the location where this stanchion you
21 were talking about was?

22 A The stanchion was just about 20, maybe 25, yards
23 north of the Bjork residence, the end of Walsh Lane.

24 Q Headed up more towards where the Skakel residence
25 was?

26 A Correct.

27 Q More toward where this individual that you observed

1 was?

2 A Correct.

3 Q Now, correct me if I'm wrong, the incident which
4 Mrs. Bjork -- was it Mrs. or Mr. Bjork?

5 A No, Mr.

6 Q -- Mr. Bjork came outside, you picked up a
7 stanchion and you saw an individual across the street from
8 the Skakel house, this is all the same general time frame?

9 A To the best of my knowledge, yes.

10 Q How long a period of time were you out there at
11 that location?

12 A Oh, ten minutes at the most.

13 Q Okay. And while there -- withdrawn.

14 Skipping for a moment to an earlier incident that
15 you talked about where a bunch of kids ran off, forgetting
16 that other incident and the incident where Mr. Bjork got
17 involved, were you ever at that specific vicinity of Walsh
18 and Otter Rock out of the car that night?

19 A To the best of my knowledge, no.

20 Q While you were on Otter Rock Drive with Mr. Bjork
21 on that occasion, do you recall hearing or seeing any other
22 activity?

23 A Outside of the individual that I said?

24 Q Correct, outside of that.

25 A No.

26 Q Did you hear any noises off in the vicinity of the
27 Moxley property?

1 A To the best of my recollection, I can't say.

2 Q Okay. You don't recall any?

3 A No, I can't.

4 Q When you went to police headquarters and
5 participated in the creation of that composite sketch or
6 artist drawing on that occasion, were you shown any
7 photographs of Carl Wold?

8 A To the best of my knowledge, no.

9 Q Or anybody, for that matter, that you recall?

10 A I really can't remember that far back, Jonathan.

11 Q Okay. When Mr. Santos was early on questioning
12 you, you seemed to be under the impression that on Halloween
13 day you were down there. You did respond to Belle Haven on
14 Halloween day, is that correct, the 31st?

15 A It appears I did. I can't remember, but I guess I
16 did.

17 Q You seemed to be under the impression that being
18 the date that you first reported what you observed the night
19 before might also have been the very same date that you
20 responded to police headquarters to prepare the composite?

21 A It could have been.

22 Q What do you recall as you sit here today?

23 A As I say, the best of my recollection, the series
24 of events that occurred, I would say it was Halloween when I
25 went there, which was the next day. It could have been the
26 1st. I don't know the sequence of events. That period of
27 time, it kind of flows together.

1 Q Okay. Do you recall getting a phone call to come
2 down to headquarters and participate in the creation of the
3 sketch?

4 A Yes.

5 Q Where were you when you got the phone call?

6 A I believe I was at work.

7 Q Okay.

8 A I think.

9 Q This is 1975. Did you have a cell phone at that
10 time?

11 A No.

12 Q So you would not have been down at Belle Haven when
13 you received the phone call?

14 A No, no.

15 Q Okay.

16 MR. BENEDICT: Now, where is your A I think,
17 the map?

18 Q Okay. You marked with a red "X" the location where
19 you observe people.

20 A Yes.

21 Q Okay. And you indicated early on I think when I
22 was in direct examination, it might have been in response to
23 my suggestion of ages 12 to 15 or early teens, and in
24 response to Mr. Santos you indicated you saw mostly shadows.
25 It was hard to tell?

26 A Well, listening to the age of the voices.

27 Q Okay. All right. It sounded like early teenagers?

1 A Yes.

2 Q And that would have been before 8 p.m.?

3 A Yes.

4 Q And it would have been a good bit before the
5 incident you described where you were out on Otter Rock with
6 Mr. Bjork?

7 A Yes.

8 Q John Duffy was the fellow you indicated may have
9 been a gate guard?

10 A Field Point Circle.

11 Q Is he a young person or elderly?

12 A John had to be his late 60s at that time.

13 Q Okay. And you learned somehow that a fellow named
14 Al Robbins had seen the sketch and said it was Carl Wold?

15 A Yes.

16 Q Were you present for that?

17 A No.

18 Q How did you learn that?

19 A Heard later on just up at the department.

20 Q How old was Al Robbins back in those days?

21 A Al was in his 60s.

22 MR. BENEDICT: I have nothing else.

23 **RE-CROSS-EXAMINATION BY MR. SANTOS**

24 Q I want to do the timeline with you very briefly.
25 You started around 6 p.m. on October 30th?

26 A Somewhere around 6 p.m.

27 Q And when did you finish that night?

1 A Sometime between 11 and 12, to the best of my
2 recollection.

3 Q Okay. And around 8 p.m. you heard this commotion
4 of a group of kids?

5 A Sometime between 6 and 8.

6 Q All right. That's when you drove over to a spot
7 and got out of your vehicle?

8 A Correct.

9 Q All right. Sometime after that would it be fair to
10 say that you saw an individual walking in the area, you got
11 out of your car and talked to him?

12 A It was a while later.

13 Q A while later. All right.

14 And you had a conversation with this gentleman;
15 correct?

16 A Short engagement.

17 Q And he said he was going home?

18 A Yes.

19 Q And then after that, there was this problem with
20 the stanchion?

21 A Yes.

22 Q Right?

23 And then while you were picking it up or doing
24 whatever you were doing with the stanchion --

25 Which was near the Bjork residence?

26 A Just north of it.

27 Q All right.

1 -- at that point you saw a person who you believed
2 was the same person you saw earlier?

3 A Yes.

4 Q And you -- and, thereafter, you provided this
5 information to the Greenwich Police Department and helped
6 them prepare a sketch?

7 A Yes.

8 Q And what has been marked as the State's Exhibit 2
9 [sic] is the result of your participation in preparing the
10 sketch?

11 A Yes.

12 Q Along with the kit and the other people?

13 A Yes.

14 MR. SANTOS: All right. Thank you, sir.

15 MR. BENEDICT: I have nothing else. Thank
16 you.

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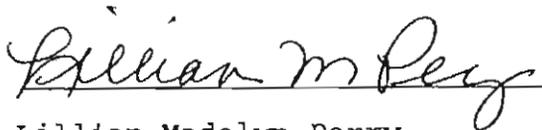
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C E R T I F I C A T I O N

I, Lillian-Madelyn Perry, a certified court reporter for the Superior Court of the State of Connecticut, Judicial District of Fairfield at Bridgeport, do hereby certify that the foregoing is a true and accurate transcription to the best of my ability of the stenographic notes taken by me in the above-entitled case.

Dated this 24th day of October, 2006.



Lillian-Madelyn Perry
Certified Court Reporter