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

BRIEF OF THE COMMISSIONER OF CORRECTION- APPELLANT
WITH SEPARATE APPENDIX

To Be Argued By:

SUSANN E. GILL
Supervisory Assistant State's Attorney
Fairfield Judicial District
Post Conviction Unit
1061 Main Street
Bridgeport, CT 06604
Telephone: (203) 579-6506
Facsimile: (203) 579-8401
Juris Number: 409671
Susann.Gill@ct.gov
DCJ.FairfieldJD.Appellate@ct.gov

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE ISSUES i

TABLE OF AUTHORITIES iv

SUMMARY OF THE CASE 1

NATURE OF THE PROCEEDINGS AND FACTS 2

I. PROCEDURAL HISTORY 2

II. EVIDENCE FROM PETITIONER'S 2002 CRIMINAL TRIAL 4

A. Events Surrounding The Victim's Murder 4

B. Crime Scene And Autopsy Evidence 10

C. The Petitioner's Admissions 12

1. The Petitioner's Three Explicit Confessions 12

2. The Petitioner's Other Inculpatory Admissions 15

a. Admissions made 1975 – 1978 15

b. Admissions made at Elan, 1978-1980 16

c. Admissions made 1981 – 1997 18

D. Petitioner's Defense At Trial 21

ARGUMENT 23

I. THE HABEAS COURT ERRED IN FINDING INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THE RECORD SHOWS ACTIVE AND COMPETENT ADVOCACY 23

A. Guiding Principles 23

B. Counsel's Able And Effective Advocacy Precludes A Finding Of Ineffective Assistance 25

II. THE HABEAS COURT ERRED IN FINDING BOTH DEFICIENT PERFORMANCE AND PREJUDICE ARISING FROM DEFENSE COUNSEL'S DECISION NOT TO PRESENT A THIRD-PARTY CULPABILITY DEFENSE REGARDING THOMAS SKAKEL 31

A. Facts 32

1. Evidence Pertaining To Thomas Skakel From The 2002 Criminal Trial 32

2. Evidence From The Habeas Trial 34

3. The Habeas Court's Resolution Of This Issue 37

B. The Habeas Court Erred By (1) Rejecting The Reasonable Strategic Decision Made By Petitioner's Defense Team And (2) Basing Its Assessment Of Prejudice On Speculation Rather Than Evidence 39

1. The Habeas Court Erred In Discarding The Reasonable Strategic Decision Made By Petitioner's Defense Team 39

2. The Habeas Court Erred In Basing Its Finding Of Prejudice On Speculation 50

III. THE HABEAS COURT ERRED IN FINDING DEFICIENT PERFORMANCE AND PREJUDICE WITH REGARD TO THE TESTIMONY OF DENIS OSSORIO 60

A. Facts 61

1. The 2002 Criminal Trial 61

2. The Habeas Trial 64

3. The Habeas Court's Decision 65

B. The Habeas Court Erred In Finding The Defense Team's Performance Below The Standard Of Reasonable Competence 66

C. The Habeas Court Erred In Finding Prejudice 70

IV. THE HABEAS COURT ERRED IN FINDING DEFICIENT PERFORMANCE AND PREJUDICE WITH REGARD TO THE 2007 NEW TRIAL TESTIMONY OF SIMPSON, JAMES, AND GRUBIN 77

A. Facts 78

1. The 2002 Criminal Trial 78

2. The 2007 Petition For New Trial Proceeding 81

a. Facts relating to James, Grubin, and Simpson 81

i. Alton Everett James, III 81

ii. Cliff Grubin 82

iii. John Simpson 82

3. Judge Karazin's Findings 84

4. Evidence At The Habeas Hearing 85

5. The Habeas Court's Resolution Of This Claim 88

B. This Record Contains No Evidence To Support The Habeas Court's Determination Of Deficient Performance 89

C. If Considered, The Habeas Court Erred In Finding Prejudice 92

1. The Habeas Court Erred In Discarding Judge Karazin's Determination That The Testimony Offered By James, Simpson, And Grubin Was Not Material And Would Not Have Led To A Different Verdict 92

2. The Habeas Court Erred In Finding Prejudice 100

V. THE HABEAS COURT ERRED IN FINDING PETITIONER'S DEFENSE TEAM DEFICIENT IN ITS PRESENTATION OF THE THIRD-PARTY DEFENSE CONCERNING KENNETH LITTLETON, AND IN NOT PRESENTING A THIRD-PARTY DEFENSE CONCERNING TONY BRYANT 109

A. The Habeas Court Erred In Finding The Defense Team's Handling Of The Littleton Defense Below The Standard Of Reasonable Competence 110

1. Facts 110

a. The 2002 criminal trial and direct appeal 110

b. The 2007 petition for new trial proceeding and appeal 111

c. The habeas proceeding 112

d. The habeas court's resolution of this issue 113

2. The Habeas Court Erred In Finding Petitioner's Defense Team Deficient 114

a. The habeas court erred in reasoning that this court, either on direct appeal or on appeal from the denial of the petition for new trial, determined that counsel was deficient, under the first prong of *Strickland*, in failing to pursue the Morganti sketch 114

b. The petitioner failed to demonstrate that any reasonably competent attorney would have been constitutionally required to pursue the Morganti sketch 116

3. Petitioner Failed To Prove Prejudice 120

B. The Habeas Court Erred In Finding The Defense Team Deficient For Failing To Follow Up On The Bryant Allegations 120

1. Facts Pertaining To This Claim 122

a. Facts from the 2007 trial and appeal 122

b. Facts from the habeas hearing 126

c. The habeas court's resolution of this claim 128

2. The Habeas Court Erred In Allowing The Petitioner To Relitigate The Factual Issue Of When His Defense Team Became Aware Of Bryant's Identity And His Allegations Implicating Hasbrouck And Tinsley 129

3. The habeas court erred in finding the defense team was constitutionally deficient in not investigating Hauer's allegations regarding Bryant 133

4. Petitioner Failed To Prove Prejudice 136

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 140

A. The Habeas Court Erred In Adjudicating Grounds For Relief That Were First Raised And Argued By The Habeas Judge Himself 142

1. Facts pertaining to this claim 142

2. The habeas court erred in refusing to follow well-established law requiring a court to disregard claims not raised by the petitioner in the petition and choosing, instead, to adjudicate a claim that the habeas judge himself had first raised and for which the judge had actively advocated 149

B. In The Alternative, The Habeas Court Erred In Concluding That Defense Counsel Was Deficient In The Manner In Which It Addressed The Issues Of Why Petitioner Was Sent To Elan And Whether There Were Any Contacts Between Police And Elan Officials 154

1. Facts pertaining to this claim 154

2. The Habeas Court Erred In Finding Defense Counsel Deficient In Failing To Utilize Certain Police Reports To Rebut Portions Of The State's Case 158

a. The state's argument expressly acknowledged that there may have been multiple reasons why the petitioner was sent to Elan 159

b. There was nothing objectionable about the state's proffer of evidence, or its closing argument, relative to the issue of whether petitioner's involvement in the murder was the most compelling reason for his placement at Elan 161

c. Petitioner failed to demonstrate that the vague, hearsay statements in the police reports relied upon by the habeas court would have been admissible and/or added anything significant to the evidence already presented by the defense regarding other possible reasons for the petitioner's presence at Elan 163

d. The state never argued that there were no contacts between police officials and Elan while petitioner was at Elan 166

VII. THE HABEAS COURT ERRED IN FINDING THAT COUNSEL'S DECISION NOT TO PRESENT EXPERT TESTIMONY ON COERCED CONFESSIONS FELL BELOW THE STANDARD OF REASONABLE COMPETENCE 168

A. Facts Pertaining To This Claim 168

B. The Habeas Court Erred In Finding Deficient Performance 172

VIII. THE HABEAS COURT ERRED IN FINDING THAT COUNSEL'S ACCEPTANCE OF B.W. AS A JUROR FELL BELOW THE STANDARD OF REASONABLE COMPETENCE 182

A. Facts Pertaining To This Claim 183

B. The Habeas Court Erred In Finding That Attorney Sherman's Tactical Decision To Accept B.W. Was Constitutionally Deficient 185

IX. THE HABEAS COURT ERRED IN FINDING THAT COUNSEL'S CLOSING ARGUMENT FELL BELOW THE STANDARD OF REASONABLE COMPETENCE 195

A. Facts Pertaining To This Claim 195

B. The Habeas Court Erred In Finding Attorney Sherman Constitutionally Deficient In His Closing Argument 199

1. General principles of law 199

2. The court's stylistic criticisms 200

3. The court's focus on specific arguments not made by Sherman 202

a. Reasonable doubt and presumption of innocence 204

b. Third-party culpability evidence 205

c. Rebuttal of the state's argument regarding the masturbation story 211

d. The reason the petitioner was placed in Elan 215

4. Sherman's "improper comments" 215

X. THE HABEAS COURT ERRED IN FINDING THE DEFENSE TEAM WAS DEFICIENT IN FAILING TO SEEK SUPPRESSION OF THE HOFFMAN TAPES 218

A. Facts Pertaining To This Claim 218

B. The Habeas Court Erred In Finding The Defense Team Constitutionally Deficient In Failing To Attempt To Suppress The Hoffman Tapes 221

1. The habeas court's factual findings that "it did not even occur to" Sherman to attempt to suppress the tapes and that "Sherman made no effort to learn whether he had a basis for seeking to suppress" the tapes are clearly erroneous 221

2. The habeas court erred in concluding that Sherman was deficient in not pursuing a challenge to the tapes on the grounds that they were improperly seized from Hoffman because there was no evidence indicating that Sherman was ever informed of any factual basis for such a challenge and the sole evidence presented was to the contrary 224

3. The habeas court erred in concluding that Sherman was not functioning as counsel solely because of the court's disagreement with Sherman's opinion as to whether he could establish standing to challenge the seizure of the tapes from Hoffman 226

XI. THE PETITIONER DID NOT EVEN ARGUABLY DEMONSTRATE PREJUDICE SUFFICIENT TO SATISFY THE SECOND *STRICKLAND* PRONG UNDER A "CUMULATIVE ERROR" THEORY 232

A. Facts Pertaining To This Claim 232

B. In General, The Term "Cumulative Error" Has Been Used To Refer To Two Different Methods Of Analysis, One That Is Inconsistent With *Strickland* And Another That Is Consistent With *Strickland*. 233

1. "Cumulative error" theory in general 233

2. Only the "interrelated error" method of evaluating prejudice is consistent with the dictates of *Strickland* 235

C. There Is No Support For A Finding Of Relief Based Upon A Theory Of "Interrelated Error" In This Case 241

D. In The Alternative, Even If This Court Were To Adopt The "Aggregated Error" Theory, There Also Is No Basis For Relief Because The Habeas Court's Failure To Find Any Discernable Prejudice From Counsel's Alleged Deficiencies Individually Undermines Any Finding Of Discernable Prejudice In The Aggregate 244

CONCLUSION 247

COUNTERSTATEMENT OF THE ISSUES

I. WHETHER THE HABEAS COURT ERRED IN FINDING INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THE RECORD SHOWS ACTIVE AND COMPETENT ADVOCACY

II. WHETHER THE HABEAS COURT ERRED IN FINDING BOTH DEFICIENT PERFORMANCE AND PREJUDICE ARISING FROM DEFENSE COUNSEL'S DECISION NOT TO PRESENT A THIRD-PARTY CULPABILITY DEFENSE REGARDING THOMAS SKAKEL

III. WHETHER THE HABEAS COURT ERRED IN FINDING DEFICIENT PERFORMANCE AND PREJUDICE WITH REGARD TO THE TESTIMONY OF DENIS OSSORIO

IV. WHETHER THE HABEAS COURT ERRED IN FINDING DEFICIENT PERFORMANCE AND PREJUDICE WITH REGARD TO THE 2007 NEW TRIAL TESTIMONY OF SIMPSON, JAMES, AND GRUBIN

V. WHETHER THE HABEAS COURT ERRED IN FINDING PETITIONER'S DEFENSE TEAM DEFICIENT IN ITS PRESENTATION OF THE THIRD-PARTY DEFENSE CONCERNING KENNETH LITTLETON, AND IN NOT PRESENTING A THIRD-PARTY DEFENSE CONCERNING TONY BRYANT

VI. WHETHER 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

VII. WHETHER THE HABEAS COURT ERRED IN FINDING THE DEFENSE TEAM DEFICIENT FOR FAILING TO PRESENT EXPERT TESTIMONY ON COERCED CONFESSIONS

VIII. WHETHER THE HABEAS COURT ERRED IN FINDING THAT COUNSEL'S ACCEPTANCE OF B.W. AS A JUROR FELL BELOW THE STANDARD OF REASONABLE COMPETENCE

IX. WHETHER THE HABEAS COURT ERRED IN FINDING THAT COUNSEL'S CLOSING ARGUMENT FELL BELOW THE STANDARD OF REASONABLE COMPETENCE

X. WHETHER THE HABEAS COURT ERRED IN FINDING THE DEFENSE TEAM DEFICIENT FOR FAILING TO SEEK SUPPRESSION OF THE HOFFMAN TAPES

XI. WHETHER THE PETITIONER DEMONSTRATED PREJUDICE SUFFICIENT TO SATISFY THE SECOND *STRICKLAND* PRONG UNDER A "CUMULATIVE ERROR" THEORY

REFERENCE GUIDE

CT [month/day] : [page]	Transcript of criminal trial; year is 2002 unless otherwise noted.
NT [month/day] : [page]	Transcript of petition for new trial proceeding; year is 2007 unless otherwise noted.
HT [month/day] : [page]	Transcript of habeas trial; years is 2013 unless otherwise noted.
App. Pt. 1 : [page]	Appendix, Part One
App. Pt. 2 : [page]	Appendix, Part Two
Karazin, MOD: [page]	October 25, 2007 Memorandum of Decision re: petition for New Trial, Honorable Edward Karazin.
Sferrazza, MOD: [page]	March 1, 2013 Memorandum of Decision, Honorable Samuel J. Sferrazza
MOD: [page]	October 23, 2013 Memorandum of Decision, Honorable Thomas A Bishop, Judge Trial Referee
PE [number]	Petitioner's Exhibits
RE [letter]	Respondent's Exhibits
SE [number]	State's Exhibits from the criminal trial
DE [letter]	Defendant's Exhibits from the criminal trial
PNE [number]	Petitioner's Exhibits from 2007 New Trial Proceeding
RNE [letter]	Respondent's Exhibits from 2007 New Trial Proceeding

TABLE OF AUTHORITIES

Page

CASES

Adorno v. Comm'r of Correction, 66 Conn. App. 179, 783 A.2d 1202 (2001) 239, 240

Aillon v. Connecticut, 597 F.Supp. 158 (D.Conn.1984),
aff'd, 770 F.2d 157 (2d Cir.1985), *cert. denied*, 478 U.S. 1021 (1986) 228

Alvarez v. Comm'r of Correction, 79 Conn. App. 847, 832 A.2d 102,
cert. denied, 266 Conn. 933 (2003) 59, 178

Andrews v. Comm'r of Correction, 45 Conn. App. 242, 695 A.2d 20,
cert. denied, 242 Conn. 910, 697 A.2d 364 (1997) 136

Ashe v. Swenson, 397 U.S. 436, 90 S.CT 1189, 25 L.Ed.2d 469 (1970) 93

Asherman v. State, 202 Conn. 429, 521 A.2d 578 (1987) 95, 99

Barmore v. State, 323 Ga. App. 377, 746 S.E.2d 289 (2013) 186

Battle v. Delo, 19 F.3d 1547 (8th Cir. 1994),
opinion adhered to as modified on reconsideration, 64 F.3d 347 (8th Cir. 1995) 68

Bobby v. Van Hook, 558 U.S. 4, 130 S.Ct. 13 (2009) 117, 178

Boyle v. McKune, 544 F.3d 1132 (10th Cir. 2008) 174

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) 95, 111, 115

Burt v. Titlow, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013) 46, 91, 92, 223

Com. v. Torres, 71 Mass. App. Ct. 723, 886 N.E.2d 732 (2008),
aff'd, 453 Mass. 722, 905 N.E.2d 101 (2009) 186

Commercial Assocs. v. Tilcon Gammino, Inc., 998 F.2d 1092 (1st Cir.1993) 99

Com. v. Johnson, 600 Pa. 329, 966 A.2d 523 (2009) 234, 241

Crawford v. Comm'r of Correction, 285 Conn. 585, 940 A.2d 789 (2008) 50

Crocker v. Comm'r of Correction, 126 Conn. App. 110, 10 A.3d 1079,
cert. denied, 300 Conn. 919 (2011) 47

Cullen v. Pinholster, 131 S.Ct. 1388 (2011) 118, 173, 188, 237

Cumberland Farms, Inc. v. Groton, 262 Conn. 45, 808 A.2d 1107 (2002) 94, 133

Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993) 177

Diaz v. Comm'r of Correction, 125 Conn. App. 57, 6 A.3d 213 (2010) 239, 240

Enfield Federal Savings & Loan Assn. v. Bissell, 184 Conn. 569,
440 A.2d 220 (1981) 99

Gaines v. Comm'r of Correction, 306 Conn. 664, 51 A.3d 948 (2012) 68

Gray v. Weinstein, 110 Conn. App. 763, 955 A.2d 1246 (2008) 93

Harrington v. Richter, 131 S.CT 770 (2011) ..... *passim*

Harris v. Bowersox, 184 F.3d 744 (8th Cir. 1999) 68

Harris v. Reed, 894 F.2d 871 (7th Cir. 1990) 187

Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) 234, 237

Henry v. Comm'r of Correction, 60 Conn. App. 313, 759 A.2d 118 (2000) 60

Hicks v. Quaker Oats Co., 662 F.2d 1158 (5th Cir. Dec.1981) 99

Hopkins v. Comm'r of Correction, 95 Conn. App. 670,
cert. denied, 279 Conn. 911 (2006) 60

Hoxsie v. Kerby, 108 F.3d 1239 (10th Cir. 1997),
cert. denied, 522 U.S. 844 (1997) 244

In re Ross, 272 Conn. 653, 866 A.2d 542 (2005) 94, 115, 132

In re: Michael S., 258 Conn. 621, 784 A.2d 317 (2001) 2, 26

Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639 (1961) 193

Jean Alexander Cosmetics, Inc., v. L'Oreal USA, Inc.,
458 F.3d 244 (3d Cir. 2006) 99, 100

Johnson v. Comm'r of Correction, 36 Conn. App. 695, 652 A.2d 1050,
cert. denied, 233 Conn. 912, 659 A.2d 183 (1995) 24

Johnson v. Comm'r of Correction, 285 Conn. 556,
941 A.2d 248 (2008) 32, 45, 150, 153, 166

Joyner v. Comm'r of Correction, 55 Conn. App. 602, 740 A.2d 424 (1999) 153

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) 229

Knowles v. Mirzayance, 556 U.S. 111, 129 S.Ct. 1411 (2009) 40, 49

Lafayette v. General Dynamics Corp., 255 Conn. 762, 770 A.2d 1 (2001) 93

Lapointe v. Comm'r of Correction, 67 Conn. App. 674, 789 A.2d 491,
cert. denied 259 Conn. 932, 793 A.2d 1084 (2002) 90

LeBow v. Rubin, 95 Conn. App. 454, 897 A.2d 136,
cert. denied, 280 Conn. 933, 909 A.2d 960 (2006) 99

Ledbetter v. Comm'r of Correction, 275 Conn. 451, 880 A.2d 160 (2005) 177, 178

Lindstadt v. Keane, 239 F.3d 191 (2d Cir. 2001) 236, 242, 243

Long v. State, 867 N.E.2d 606 (Ind. Ct. App. 2007) 189

Lynne Carol Fashions, Inc. v. Cranston Print Works Co.,
453 F.2d 1177 (3d Cir.1972) 99

Mackey v. Russell, 148 F. App'x 355 (6th Cir.2005) 236

McKinney v. State, W200602132CCAR3PD, 2010 WL 796939
(Tenn. Crim. App. Mar. 9, 2010) 238

Michael T. v. Comm'r of Correction, 307 Conn. 84, 52 A.3d 655 (2012) 181

Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237 (2002) 237

Milford Bank v. Phoenix Contracting Grp., Inc., 143 Conn. App. 519,
72 A.3d 55 (2013) 165

Mozell v. Comm'r of Correction, 51 Conn. App. 818, 725 A.2d 971 (1999) 24

Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639 (1986) 239

Myers v. Comm'r of Correction, 128 Conn. App. 564, 17 A.3d 539 (2011) 25

Myers v. Manson, 192 Conn. 383, 472 A.2d 759 (1984) 151, 228

Naples v. Keystone Bldg. & Dev. Corp., 295 Conn. 214,
990 A.2d 326 (2010) 211, 222, 224

Negron v. Warden, 180 Conn. 153, 429 A.2d 841 (1980) 129, 133

Nieves v. Comm'r of Correction, 51 Conn. App. 615, 724 A.2d 808, *cert. denied*, 248 Conn. 905 (1999) 50, 59, 136

Orcutt v. Comm'r of Correction, 284 Conn. 724, 937 A.2d 656 (2007) 89

Ostolaza v. Warden, 26 Conn. App. 758, 603 A.2d 768, *cert. denied*, 222 Conn. 906, 608 A.2d 692 (1992) 45, 59

Ovation Plumbing Inc. v. Furton, 33 P.3d 1221 (Colo. App. 2001), *as modified on denial of reh'g.* (Sept. 6, 2001) 103

Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473 (2010) 237

People v. Coffman, 34 Cal. 4th 1, 96 P.3d 30 (2004) 186

People v. Hawkins, Docket No. 282483, 2009 WL 1027212 (Mich. Ct. App. Apr. 16, 2009) 189, 190

People v. Jones, 982 N.E.2d 202 (Ill. Ct. App. 2012), *appeal denied*, 985 N.E.2d 309 (Ill. 2013) 186

People v. Thompson, 21 N.Y.3d 555, 997 N.E.2d 1232 (2013) 186

People v. Turner, 37 A.D.3d 874, 829 N.Y.S.2d 261 (2007) 189

Pettaway v. Plummer, 943 F.2d 1041 (9th Cir.1991) 99

Powell v. Bowersox, 895 F. Supp. 1298 (E.D. Mo. 1995), *aff'd*, 112 F.3d 966 (8th Cir. 1997) 234

Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) 229

Rouillard v. Comm'r of Correction, 35 Conn. App. 754, 646 A.2d 948 (1994) 228

Safford v. Warden, 223 Conn. 180, 612 A.2d 1161 (1992) 217

Salem Park, Inc. v. Town of Salem, 149 Conn. 141, 176 A.2d 571 (1961) 99

Santiago v. Comm'r of Correction, 90 Conn. App. 420, 876 A.2d 1277, *cert. denied*, 275 Conn. 930, 883 A.2d 1246 (2005), *cert. denied sub nom. Santiago v. Lantz*, 547 U.S. 1007, 126 S.CT 1472, 164 L.Ed.2d 254 (2006) 24

Santiago v. Comm'r of Correction, 125 Conn. App. 641, 9 A.3d 402 (2010), *cert. denied*, 300 Conn. 910 (2011) 181

Scalzo v. Danbury, 224 Conn. 124, 617 A.2d 440 (1992) 93

Sekou v. Warden, 216 Conn. 678, 583 A.2d 1277 (1990) 178, 218, 227

Skakel v. Benedict, 54 Conn. App. 663, 738 A.2d 170 (1999) 26, 27

Skakel v. Connecticut, 549 U.S. 1030, 127 S.Ct. 578, 166 L.Ed.2d 428 (2006) 2

Skakel v. State, 295 Conn. 447, 991 A.2d 414 (2010) ..... *passim*

Skakel v. State, SC 18158 123

Smith v. Maryland, 442 U.S. 735, 99 S. Ct. 2577 (1979) 230

State v. Boles, 223 Conn. 535, 613 A.2d 770 (1992) 44

State v. Bryant, 202 Conn. 676, 523 A.2d 451 (1987) 35, 131

State v. Ceballos, 266 Conn. 364, 832 A.2d 14 (2003) 162

State v. Colon, 272 Conn. 106, 864 A.2d 666 (2004),
cert. denied, 546 U.S. 848 (2005) 241

State v. Colton, 234 Conn. 683, 663 A.2d 339 (1995) 153

State v. Echols, 203 Conn. 385, 524 A.2d 1143 (1987) 43, 46

State v. Elson, 311 Conn. 726, 91 A.3d 862 (2014) 153

State v. George, 194 Conn. 361, 481 A.2d 1068 (1984),
cert. denied, 469 U.S. 1191 (1985) 175, 176

State v. Gold, 180 Conn. 619, 431 A.2d 501,
cert. denied, 449 U.S. 920 (1980) 233

State v. Gonzalez, 205 Conn. 673, 535 A.2d 345 (1987) 67

State v. Harris, 48 Conn. App. 717, 711 A.2d 769,
cert. denied, 245 Conn. 922, 717 A.2d 238 (1998) 43

State v. Hart, 221 Conn. 595, 605 A.2d 1366 (1992) 90, 222, 225

State v. Henning, 220 Conn. 417, 599 A.2d 1065 (1991) 104

State v. Iban C., 275 Conn. 624, 881 A.2d 1005 (2005) 175

State v. John, 210 Conn. 652, 557 A.2d 93 (1989) 139

State v. Kinsey, 173 Conn. 344, 347-48, 377 A.2d 1095 (1977) 43

State v. Lamonica, 44 So. 3d 895 (La. Ct. App. 2010) 177

State v. Leecan, 198 Conn. 517, 504 A.2d 480 (1986) 67, 103

State v. Lemon, 248 Conn. 652, 731 A.2d 271 (1999) 201

State v. McDowell, 242 Conn. 648, 699 A.2d 987 (1997) 93

State v. McNeill, 83 Ohio St. 3d 438, 700 N.E.2d 576 (1998) 186

State v. Payne, 219 Conn. 93, 591 A.2d 1246 (1991) 139

State v. Pierce, 277 Conn. 42, 890 A.2d 474 (2006) 103

State v. Reddick, 207 Conn. 323, 541 A.2d 1209 (1988) 229

State v. Reynolds, 264 Conn. 1, 836 A.2d 224 (2003) 217

State v. Rinaldi, 220 Conn. 345, 599 A.2d 1 (1991) 233

State v. Robinson, 227 Conn. 711, 631 A.2d 288 (1993) 241

State v. Shabazz, 246 Conn. 746, 719 A.2d 440 (1998),
cert. denied, 525 U.S. 1179 (1999) 181

State v. Skakel, 276 Conn. 633, 888 A.2d 985 (2006) ..... *passim*

State v. Snelgrove, 288 Conn. 742, 954 A.2d 165 (2008) 53

State v. Swinton, 268 Conn. 781, 847 A.2d 921 (2004) 103

State v. Tillman, 220 Conn. 487, 600 A.2d 738 (1991),
cert. denied, 505 U.S. 1207 (1992) 241

State v. Trimble, 122 Ohio St. 3d 297, 911 N.E.2d 242 (2009) 190

State v. Warholic, 278 Conn. 354, 897 A.2d 569 (2006) 176

State v. Whelan, 200 Conn. 743, 513 A.2d 86,
cert. denied, 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d 598 (1986) 14, 18, 65

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) ..... *passim*

Taft v. Comm'r of Correction, 47 Conn. App. 499, 703 A.2d 1184 (1998) 136

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) 229

Thomas v. Comm'r of Correction, 141 Conn. App. 465, 62 A.3d 534, *cert. denied*, 308 Conn. 939, 66 A.3d 881 (2013) 59, 136

Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986) 200

Toccaline v. Comm'r of Correction, 80 Conn. App. 792, 837 A.2d 849 (2004) 67, 162, 187

Tolliver v. United States, 2009 WL 1393300 (S.D. Ill. May 15, 2009) 186

Torres v. Comm'r of Correction, 84 Conn. App. 561 (2004) 119

Townsend v. Comm'r of Correction, 116 Conn. App. 663, 975 A.2d 1282, *cert. denied*, 293 Conn. 930, 980 A.2d 916 (2009) 136

United States v. Amuso, 21 F.3d 1251 (2d Cir.), *cert. denied*, 513 U.S. 932 (1994) 175

United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984) 239

United States v. Farr, 297 F.3d 651 (7th Cir.2002) 67, 68

United States v. Jacobsen, 466 U.S. 109, 104 S. Ct. 1652 (1984) 230

United States v. McGill, 11 F.3d 223 (1st Cir. 1993) 181, 182, 228

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) 175

United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976) 230

Valeriano v. Bronson, 209 Conn. 75, 546 A.2d 1380 (1988) 228

Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995) 174, 188

Wickham Contracting Co., Inc. v. Bd. of Educ. of City of New York, 715 F.2d 21 (2d Cir.1983) 99

William C. v. Comm'r of Correction, 126 Conn. App. 185, 10 A.3d 115 (2011) 25

Williams v. Comm'r of Correction, 100 Conn. App. 94, 917 A.2d 555, *cert. denied*, 282 Conn. 914, 924 A. 2d 140 (2007) 89, 91, 96-98, 116

Williams v. Comm'r of Correction, 142 Conn. App. 744, 68 A.3d 111 (2013) 49, 69

Williams v. Manson, 195 Conn. 561, 489 A.2d 377 (1985) 162, 227

Williams v. Warden, 217 Conn. 419, 586 A.2d 582 (1991) 228

Woods v. Comm'r of Correction, 85 Conn. App. 544, 857 A.2d 986, *cert. denied*, 272 Conn. 903, 863 A.2d 696 (2004) 23

Wright v. Comm'r of Correction, 143 Conn. App. 274, 68 A.3d 1184 (2013) 174

Yarborough v. Gentry, 540 U.S. 1 (2003) 117, 118, 200, 204, 205, 208-210, 215

STATUTORY PROVISIONS

General Statutes §52-270 2

General Statutes §53a-35 (Rev. to 1975) 2

General Statutes §53a-54a (Rev. to 1975) 2, 7

CONSTITUTIONAL PROVISIONS

Fourth Amendment to the United States Constitution 229, 230

Fifth Amendment to the United States Constitution 35, 51, 137

Sixth Amendment to the United States Constitution ..... *passim*

MISCELLANEOUS

18 Charles Alan Wright et al., *Federal Practice and Procedure* (2d Ed.2002) 100

Advocacy Before the Supreme Court, 37 A.B.A.J. 801 (1951) 204

Carney, B. and Feigenson, N., *Visual Persuasion in the Michael Skakel Trial: Enhancing Advocacy Through Interactive Media Presentations*, 19 Criminal Justice (ABA) Spring 2004 4

Code of Evidence §4-4 58

Code of Evidence §4-5 58

Code of Evidence §7-2 175

Code of Evidence §8-6(4) 53, 87, 125

F. Bailey & H. Rothblatt, Successful Techniques for Criminal Trials (2d Ed. 1985) 208

J. Stein, Closing Argument (1992-1996) 209

P. Lagarias, Effective Closing Argument (1989) 209

Richardson, Eli J. *Taking Issue with Preclusion: Reinventing Collateral Estoppel*, 65 Miss.L.J. 41, 55 (1995) 95

SUMMARY OF THE CASE

Represented by a highly skilled and experienced defense attorney, who was himself aided by a team of other attorneys and who utilized resources that the vast majority of criminal defendants can only dream of accessing, the petitioner, Michael Skakel, nevertheless was found guilty by a jury of murdering Martha Moxley on the basis of evidence that no defense attorney could have precluded or successfully countered. After vainly attempting, in numerous post-conviction courts, to undo the jury's verdict, the petitioner eventually persuaded the habeas court below to give him another criminal trial on the theory that this exceptionally skilled defense team did not afford him reasonably competent representation. In so doing, the habeas court failed to cloak counsel's representation with the strong presumption of competence to which it was entitled. Instead, it erroneously reasoned that the petitioner's conviction resulted from his counsel's failure to make choices and follow strategies that the habeas court believed would have been more fruitful, even in the absence of proof to that effect. The habeas court's judgment violated every dictate of *Strickland v. Washington*, 466 U.S. 668 (1984), as well as other controlling precedent, to reach a result that is contrary to both the facts and law pertinent to this case.

A full review of the record shows that the defense team's efforts far exceeded the standards of most non-capital defenses. They spent years preparing the defense, challenged the state on legal issues large and small, consulted with experts, hired three sets of investigators, and assembled a full team of lawyers to assist in the defense, including some of Connecticut's most distinguished practitioners. Simply put, if the level of representation the petitioner received falls short of Sixth Amendment standards, no Connecticut conviction can be considered reliable.

NATURE OF THE PROCEEDINGS AND FACTS

I. PROCEDURAL HISTORY

On February 8, 2000, following a Grand Jury investigation, the state charged the petitioner, Michael Skakel, with murder pursuant to General Statutes §53a-54a (Rev. to 1975) for the October 1975 death of Martha Moxley. The charge was originally brought to the juvenile division of Superior Court. After a hearing, the Juvenile Court (*Dennis, J.*) ordered the prosecution transferred to the criminal division of Superior Court. The petitioner appealed the decision transferring his prosecution to criminal court. After briefing and argument, this Court held that the transfer order was not a final judgment and dismissed the petitioner's appeal. *In re: Michael S.*, 258 Conn. 621, 784 A.2d 317 (2001).

Following a trial before the Honorable John F. Kavanewsky, Jr. and a jury of twelve, the petitioner was found guilty. On August 29, 2002, the court sentenced the petitioner, pursuant to General Statutes §53a-35 (Rev. to 1975), to the custody of the Commissioner of Correction for a period of not less than twenty years nor more than life. CT 8/29: 86.

This Court unanimously affirmed the petitioner's conviction on January 24, 2006. *State v. Skakel*, 276 Conn. 633, 888 A.2d 985 (2006). The United States Supreme Court denied his Petition for Certiorari on November 13, 2006. *Skakel v. Connecticut*, 549 U.S. 1030, 127 S.Ct. 578, 166 L.Ed.2d 428 (2006).

On August 25, 2005, the petitioner filed a Petition for New Trial, pursuant to General Statutes §52-270. After trial, the court (*Karazin, J.*) denied the petition by Memorandum of Decision dated October 25, 2007. (*Karazin*, MOD, App. Pt 2: A-1106) On April 20, 2010, after briefing and argument, this Court affirmed the trial court's decision denying the petitioner a new trial. *Skakel v. State*, 295 Conn. 447, 991 A.2d 414 (2010).

On September 27, 2010, the petitioner began the present action by way of a petition for writ of habeas corpus. In accordance with the habeas court's (*Sferrazza, J.*) orders on the Commissioner's Request to Revise and Motion to Compel, Petitioner filed a 68 page Revised Petition on June 8, 2012. The habeas court permitted a further amendment of the petition after the close of the evidence. *See* 5/17/13, Fourth Amended Petition. App. Pt 1: A-832.

In his Return, the Commissioner of Correction denied all material allegations in the petition and presented three defenses: 1) that the petitioner cannot carry his burden of proving trial counsel's performance was constitutionally deficient and that he was prejudiced thereby within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S.CT 2052, 80 L.Ed.2d 674 (1984); 2) that petitioner's claims of ineffective assistance of counsel in counts one and two are procedurally defaulted due to his failure to raise them in his Petition for New Trial, and his attempt to raise them herein constitutes an abuse of the writ; and 3) that collateral estoppel bars the petitioner from relitigating several matters that were litigated and decided in the Petition for New Trial proceeding. Return App. Pt 1: A-903. Petitioner filed a Reply in which he denied these allegations. App. Pt 1: A-928.

The respondent filed a motion for summary judgment or dismissal based on procedural default and abuse of the writ which was denied by the Honorable Samuel J. Sferrazza on March 1, 2013. On the same date, Judge Sferrazza partially granted, and partially denied, respondent's motion for summary judgment or dismissal based on collateral estoppel. *See* Sferrazza, J., Memorandum of Decision (*Sferrazza*, MOD), dated March 1, 2013; App. Pt 1: A-625.

After trial and post-trial briefing, the habeas court (*Bishop*, JTR) issued a

Memorandum of Decision on October 23, 2013, granting the petition (hereinafter MOD); App. Pt 1: A-939. On November 5, 2013, the court partially granted and partially denied the respondent's petition for certification to appeal. *See* App. Pt 1: A-1090. On the same date, it partially granted and partially denied petitioner's petition for certification to appeal. App. Pt 1: A-1091.

From these orders, Respondent has appealed, and Petitioner has cross-appealed.

II. EVIDENCE FROM PETITIONER'S 2002 CRIMINAL TRIAL

A. Events Surrounding The Victim's Murder

In 1975, fifteen-year-old Martha Moxley lived on Walsh Lane in a section of Greenwich known as Belle Haven. CT 5/7: 27, 35-36. The petitioner's family lived diagonally across the street from the victim, in a house that fronted onto Otter Rock Drive.[1] *Id.* at 32. The Skakel family consisted of the father, Rushton Skakel, and seven children,

---

[1] State's Exhibit (hereinafter SE 1), from the criminal trial, is a large aerial photograph of the section of Belle Haven which included both the victim's and the petitioner's homes. This exhibit can be found on the evidence presentation program (hereinafter EPP), a CD-ROM of which was made part of the record on direct appeal and of this proceeding. See PE 278, RE: K. The EPP contains copies of most of the state's exhibits, with exhibit numbers from the criminal trial appearing in the lower right hand corner of the screen. The EPP was used throughout the criminal trial to display exhibits on a screen in the courtroom that was visible to all participants. See CT 4/26: 80; CT 5/7: 31.

To find State's Exhibit 1, click on Belle Haven in the Main menu. Rolling the cursor over various areas on the aerial photograph will bring up other state's exhibits. For instance, clicking on either the Moxley or Skakel residences will zoom in on each house. Clicking on an arrow in the upper right hand corner of the close-up screen will display photographs of these houses from various vantage points. Clicking on the grassy area to the left of the Moxley house will bring up an enlargement of the crime scene. Clicking on an arrow in the upper left hand corner of that enlargement will reveal where certain evidence was found. Pictures of the various items of evidence appear when you click on the marker for that evidence. *See*, SE 1 on EPP; *see also* Carney, B. and Feigenson, N., *Visual Persuasion in the Michael Skakel Trial: Enhancing Advocacy Through Interactive Media Presentations*, 19 Criminal Justice (ABA) Spring 2004, 22, 25-28 (explaining the basic features of the EPP).

most of whom were teenagers in 1975.[2] The children's names, from eldest to youngest, are: Rushton, Jr., Julie, Thomas, John, Michael, David and Stephen. CT 5/9: 69; *see* SE 69 (Skakel family photograph found at EPP/MainMenu/photographs/sailboat).

During the late summer of 1975, Martha had become acquainted with two of the Skakel sons -- Thomas, called Tommy, who was 17, and Michael, who was 15. Michael became infatuated with Martha. CT 5/20: 152-55; T. 5/21: 143. Unfortunately, so did his brother, Tommy. Friends testified they had seen Tommy "flirting" with Martha. CT 5/9: 41, 70-71. Michael had expressed frustration over the attention Martha was paying to Tommy. *See* SE 81 (Martha's Diary) at EPP/MainMenu/documents/diary.

On the evening of Thursday October 30, 1975, Martha left her home to go out with a neighborhood friend, Helen Ix, at about 6:30. CT 5/7: 37. Martha did not have school the next day, but the children who went to private school did. *Id.* at 36. The two joined up with two friends, Geoffrey Byrne[3] and Jackie Wettenhall, shortly thereafter CT 5/9: 41-43.

Martha and her companions stopped by the Skakel home a couple of times that evening, but the Skakel children, along with their live-in tutor, Kenneth Littleton, their cousin, James "Jimmy" Terrien (also known as James or Jimmy Dowdle) and a friend, Andrea Shakespeare Renna, were at the Belle Haven Club for dinner. CT 5/9: 42-43, 118. At about 9 p.m., Martha and her friends went to the Skakel house again. The Skakels had returned from dinner at this point. Martha, Helen Ix, Geoffrey Byrne, and the petitioner sat in a Lincoln Continental parked in the Skakel's side driveway, listening to music and talking. *See* EPP/MainMenu/BelleHaven/Skakel residence; CT 5/9: 65-67, 95. Michael later stated

---

[2] Petitioner's mother, Anne Skakel, was deceased. CT 5/15: 90.
[3] Byrne was deceased at the time of criminal trial. CT 5/9: 66.

that he invited Martha to go to his cousin's house with him, but she declined. See SE 108 frame #42-43 (Transcript and Audio of Hoffman's Taped Interview of Petitioner found at EPP/MainMenu/Audio/RichardHoffman); *see also* App. Pt 2: A-1142. He also explained that he considered the time he and Martha were in the car as a "moment of closeness" with her. CT 5/21: 144. Soon, however, his brother Tommy joined them. CT 5/9: 68-69.

At about 9:30, Rushton, Jr., John Skakel, and Jimmy Terrien came out of the Skakel house. They informed the teens sitting in the car that they needed the car to drive Jimmy Terrien home. CT 5/9: 68-70, 102-5. Tommy, Martha, Helen, and Geoffrey Byrne got out of the car. *Id.*: 69, 102-5. Helen Ix testified that as she was leaving to go home, Tommy and Martha were in the Skakel driveway, and the car going to the Terrien's was in the process of leaving. She stated that Tommy and Martha were engaging in flirtatious "horse play." Helen felt a little embarrassed by the flirting. She and Geoffrey Byrne left together. *Id.*: 69-71.

In a statement to the police approximately two weeks after the homicide, the petitioner claimed that he went with his brothers John and Rushton, and his cousin Jimmy, to the Terrien house. SE 112 (transcript of petitioner's 1975 police interview). The purpose of the trip was to bring Jimmy home and also to watch "Monty Python's Flying Circus," which was on television that night. In that same 1975 statement, the petitioner claimed that they stayed at Terrien's until between 10:30 and 11:00 p.m., and then returned home. *Id.* Petitioner claimed that he went to bed shortly after returning home, and did not leave the house again that night. He admitted, however, that he had snuck out of the house late at

night on previous occasions. *Id.*[4]

At trial, Helen Ix was unable to confirm petitioner's claim that he went to Terrien's. She stated that she was not sure whether Michael was in the car headed for Terrien's as she left for home. CT 5/9 at 75, 81.

Andrea Shakespeare Renna also provided testimony that cast doubt on petitioner's 1975 statement. Renna testified that, after the car going to Terrien's had left, she and Julie exited the front door of the Skakel house. CT 5/9: 125-26. Julie was going to drive Andrea home in another Skakel vehicle. This car was parked in the circular driveway in front of the house, rather than in the side driveway where the Lincoln had been parked. *Id.* Andrea was certain that at the time she and Julie went outside to get in Julie's car, the car going to Terrien's had already departed. *Id.*: 127. She was also certain that the petitioner was still at the house after the car left for Terrien's. *Id.*: 127.

Julie Skakel, called by the state as a rebuttal witness, testified that as she and Andrea were walking from the house to the car, Julie saw a figure running by and yelled "Michael, come back here." When they found no keys in the car, Andrea went back to the house to collect them. Because the front door had locked behind them, she had to ring the

---

[4] Petitioner's claim that he was at Terrien's house from approximately 9:30 until 11 p.m. that night provided only a partial alibi; it did not cover the entire time period (9:30 p.m. until 5:30 a.m.) during which Moxley may have been killed. Moreover, although there was ample evidence at trial from which the jury may have concluded that petitioner did not go Terrien's house on the night of the murder, there was also evidence from which the jury may have concluded that the petitioner did go to Terrien's but murdered Moxley after returning. The jury may have found that, as he told Richard Hoffman in 1997, petitioner left his house after returning from Terrien's and went looking for Martha. *See* discussion *infra.* For this reason, as the state argued at trial; *see* CT 6/3: 20, 94; the jury did not have to reject the alibi in order to find petitioner guilty. Nor did the jury have to resolve the issue of Moxley's time of death: time of death is not an element of the crime requiring a unanimous finding by the jury. General Statutes §53a-54a (Rev. to 1975).

bell. Tommy answered. As she went into the front entranceway and collected the car keys from a bureau near the door, she saw Ken Littleton on the stairs. *Id.*: 126-27, 140-43.

Meanwhile, at the Moxley house, Dorthy Moxley, Martha's mother, was home alone. CT 5/7: 38. Martha's father, David Moxley, was out of town on a business trip. Her 17-year-old brother, John, was out with friends. Mrs. Moxley spent the evening upstairs in the master bedroom painting the mullions on the windows. *Id.*: 37-9.

At about 9:30 or 10:00, Mrs. Moxley decided to stop painting for the evening. She cleaned up her paint supplies and took a shower. *Id.*: 42-45. At 11:00 p.m., Mrs. Moxley went downstairs to watch the news. While she was watching the news or shortly thereafter, her son John came home. Mrs. Moxley started watching a movie, but fell asleep on the sofa. *Id.*: 45-46. When she woke up at about 1:30 or 2:00 a.m. and discovered Martha was not home, Mrs. Moxley woke John and asked him to go out to look for his sister. *Id.* When John returned with no information, Mrs. Moxley called Helen Ix. Helen told Mrs. Moxley that she had last seen Martha at the Skakels' with Tommy. Mrs. Moxley called the Skakel house. *Id.*: 46-47.

Mrs. Moxley stated that she called the Skakel residence three or four times during the course of the night; each time the phone was answered by eighteen-year-old Julie Skakel. Mrs. Moxley testified that it did not take Julie a long time to answer the phone and she did not sound groggy or sleepy when she did, despite the fact that it was then after 2:00 a.m. *Id.*: 47-48. During one of her calls to the Skakels that night, Mrs. Moxley asked to speak with Tommy. She stated that it did not take long to bring Tommy to the phone and he did not sound sleepy when he answered. During the last phone call to the Skakels', Julie suggested Mrs. Moxley call Jimmy Terrien's house. *Id.*: 48-49. When Mrs. Moxley called

the Terriens, Jimmy's mother answered. Mrs. Moxley explained that she was looking for her daughter, Martha. Mrs. Terrien asked for Mrs. Moxley's number and stated she would check to see if Martha was there and call her back. When Mrs. Terrien called back, she said that neither Martha *nor Jimmy* were there. *Id.*: 62-63.

At that point, Mrs. Moxley called everyone she thought could possibly know where Martha was. Eventually, she called the Greenwich Police, who sent an officer to the house. *Id.*: 63-64. After the officer left, Mrs. Moxley fell asleep in the library. When she awoke the next morning, she went to the Skakel's to see if Martha had fallen asleep in the motor home that was often parked in the Skakel driveway. *Id.*: 64-65. By this time, it was after 8:00 a.m. High school students from the neighborhood who went to private school had left for school already. Yet the petitioner, who was fifteen and a private school student, answered the door. Mrs. Moxley told him who she was and that she was looking for Martha. Michael, whom Mrs. Moxley described as looking "hung over," in bare feet and dressed in a pair of jeans and a t-shirt, said Martha was not there. Mrs. Moxley asked if she could look in the Winnebago. A Skakel employee said that he would look for her. He found no sign of Martha. *Id.*: 66-68.

Mrs. Moxley returned home. At about 12:30 p.m. that day, a teenage friend of Martha's found Martha's body under a large pine tree on the Moxley property. *Id.*: 70, 114-16. The victim was lying face down, with her pants and panties pulled down around her knees. *Id.* at 120; SE 15, 16, 17; EPP/BelleHaven/CrimeScene/Victim. When news of the killing spread, Andrea Shakespeare was called to the office at the high school she and Julie attended and was asked to accompany Julie Skakel home. CT 5/9: 129. When the two girls pulled down Otter Rock Drive, they could not park in the Skakel driveway because there

were vehicles blocking the way. Julie parked on the street. *Id.*: 130. Upon seeing them, the petitioner, who appeared "hyper," ran up to the car and told them that Martha had been killed and "he and Tommy were the last to see her that night." *Id.*: 132.

B. Crime Scene And Autopsy Evidence

The investigation of the crime scene and the autopsy of the victim revealed that Martha had died from blunt traumatic head injuries sometime between 9:30 p.m. and 5:30 a.m. CT 5/8: 108, 127. The murder weapon, a Toney Penna 6 iron golf club, was found soon after the victim's body was discovered. The head of the golf club and two pieces of shaft were found at the crime scene. CT 5/7: 161; SE 26A; *see* EPP\MainMenu\BelleHaven \CrimeScene. An eighteen to twenty-inch section of the golf club, which included the handle, was never found. CT 5/7: 170.

Dr. H. Wayne Carver, the state's Chief Medical Examiner, interpreted the findings from the autopsy conducted in 1975. CT 5/8: 93-127. The autopsy revealed that the assailant struck the victim in the head at least eight or nine times with the golf club. *Id.*: 124. Additionally, the victim had been stabbed a number of times with a portion of the golf club shaft. One of these injuries ran in one side of the victim's neck and out the other, dragging a length of head hair with it. Dr. Carver was of the opinion that this injury was inflicted after the blunt force injuries and at a point where the victim was either *in extremis* or deceased. *Id.*: 123-24. The witness further testified that, in 1975 when the coroner applied an ultraviolet light to detect the presence of semen on the victim's pubic area, the results were negative. Additional analysis of internal vaginal and anal swabbings taken from the victim to detect the presence of semen or any other indication of her having engaged in sexual intercourse also proved negative. *Id.*: 101-103. There was no indication, however, that any

attempt was made to detect semen on the victim's back or buttocks.

Dr. Henry Lee testified about a partial crime scene reconstruction he conducted in 1991. CT 5/8: 130-179. Dr. Lee testified that a small amount of blood in the Moxleys' driveway and some gravel on the victim's face indicate the assault likely began there. CT 5/8: 147-48, 152-53. The victim then traveled approximately 40 feet to where the fatal bludgeoning occurred. *Id. See* SE 40 (diagram); EPP/Main/Photographs/Distances.

Dr. Lee explained that the golf club shaft broke into pieces as a result of "reverse bending" during the blunt force assault and that the through-and-through stab wound of the neck which dragged head hair with it had to have occurred subsequently. *Id.*: 144-47. Dr. Lee further explained that the victim had been dragged partly feet-first and partly shoulders-first from the site of the major assault to her final resting place. *Id.*: 140-41. Examination of the victim's body revealed a reddish mark at the top of the victim's inner left thigh. Autopsy pictures revealed a similar mark on her right thigh. Dr. Lee stated that these marks were consistent with bloody hands trying to push the victim's legs apart. *Id.*: 149.

Neither Dr. Lee nor Dr. Carver testified to any findings consistent with the victim having been dragged by her hair.

Detective James Lunney, from the Greenwich Police Department, went to the Skakel house on the afternoon of October 31 following the discovery of the body. While he was in the house, he observed golf clubs, along with umbrellas and other things, in a barrel. The barrel was in a hallway leading to a back door. CT 5/9: 9-12. On the following day, November 1, Lunney returned to the Skakel house and, with Rushton, Sr.'s consent, seized a golf club. It was a Toney Penna four iron. *Id.*: 13-15. That club, as well as the murder weapon, had belonged to the petitioner's mother. The club seized by Lunney bore a label

near the handle which read: Mrs. R. W. Skakel. *Id.*: 17-19; SE 65; EPP/Main Menu/Photographs/Label. The handle of the murder weapon, which had been broken off below the presumed location of the identification label, was never found. *Id.*: 21.

Kenneth Littleton, a young teacher whom Rushton Skakel, Sr. had just hired as a live-in tutor, arrived at the Skakel residence on October 31 to a scene of "mayhem." He was directed by a person, who appeared to him to be an attorney, to transport the petitioner, Tommy, John, and Jimmy Terrien to a house the Skakel family owned in Windham, New York. Littleton did this the next morning, Saturday, and returned on Sunday. Julie Skakel, the sole female sibling, and the two youngest Skakel boys, Stephen and David, stayed behind. CT 5/9: 175-76.

C. The Petitioner's Admissions

During the course of the trial, the jury heard that the petitioner confessed to murdering Martha Moxley three times (to Gregory Coleman, John Higgins, and Geranne Ridge), and made more than a dozen incriminatory statements to others over the years. This evidence is summarized below.

1. The Petitioner's Three Explicit Confessions

In March 1978, about two and a half years after Moxley's murder, petitioner's family placed him in Elan, a residential treatment facility for troubled youth in Poland Springs, Maine. Gregory Coleman, who was himself a teenage resident of Elan from 1978 to 1980, testified before the Grand Jury, at the juvenile transfer hearing, and at the hearing in probable cause. Coleman passed away before the 2002 criminal trial. The state presented his probable cause hearing testimony (direct and cross) to the jury at the criminal trial.

Coleman testified "about an exchange that he had had with the [petitioner] while

Coleman stood 'guard' over the [petitioner] following the [petitioner's] failed escape attempt from Elan. During this conversation, the [petitioner] confided in Coleman about murdering a girl who had rejected his advances. According to Coleman, the [petitioner] "had admitted killing the girl with a golf club in a wooded area, that the force with which he had hit her had caused the golf club to break in half, and that he had returned to the body two days later and masturbated on it." *State v. Skakel*, 276 Conn. at 648. In addition, Coleman stated that the petitioner had bragged that he would get away with murder because he was a Kennedy. Further, the petitioner admitted to Coleman that his family had placed him in Elan to remove him from the reach of the police investigation. CT 5/17: 137-38.

Greg Coleman's widow, Elizabeth Coleman, testified that, shortly after first meeting her former husband in 1986, he had recounted attending a school named Elan where he met a youth named "Mike Skakel" who admitted having murdered a girl with a golf club. Ms. Coleman further described an incident in the mid- to- late nineties where her husband had been watching television and suddenly exclaimed, "You thought you could get away with this but your time is up." Coleman explained to his wife, "This is the kid I told you about." CT 5/20: 89-93.

Jennifer Pease testified in the state's rebuttal case that she had been placed at Elan in 1978 at the age of fourteen. CT 5/29: 100. There she met Gregory Coleman. In 1979, trusting Coleman to keep a confidence, Pease mentioned that she was thinking of escaping. With that, Coleman brought up the subject of Michael Skakel's earlier treatment for having escaped. CT 5/29: 105. He continued, stating that he thought Skakel was sick because he had admitted that he had beaten in a girl's head with a golf club and killed her. He further stated that Skakel thought he could get away with it because he was related to

the Kennedys. *Id.*: 108.[5]

The second explicit confession heard by the jury came from John Higgins. Higgins, another former resident of Elan, testified that one night when he and Skakel were on guard duty, they started talking about why they were at Elan. The petitioner began talking about a murder in which he was involved. CT 5/16: 180-82. Higgins further testified

> "that the [petitioner] had told him that, on the night of the murder, there was a 'party of some kind or another' at the [petitioner's] home. The [petitioner] also told Higgins that he remembered rummaging through his garage looking for a golf club, running through the woods with the club and seeing pine trees. Higgins further stated that, as the conversation continued, the [petitioner's] acknowledgment of his culpability in the victim's murder progressed from `he didn't know whether he did it' to 'he may have done it' to `he must have done it,' and finally to 'I did it.'"

State v. Skakel, 276 Conn. at 648; *see also* CT 5/16: 179-82.

Petitioner's third direct confession came into evidence through Geranne Ridge. Petitioner's confession to Ridge was admitted via a recorded W*helan*[6] statement. Although the court reporter did not transcribe this statement as it was played for the jury, it can be heard on the state's evidence presentation program. *See* EPP\MainMenu\Audio\RidgeExcerpt. The transcript of this recording; SE 104; was also admitted at the criminal trial and is included in the Appendix. *See* App. Pt 2: A-1210.

In this audio clip, which the jury considered as substantive evidence, Ridge tells a friend that during the spring of 1997, Skakel was at a party at her home. CT 5/21: 9. Ridge states that during the course of the party the petitioner, who appeared drunk and possibly

---

[5] During the criminal trial, Coleman's testimony was further corroborated by the introduction of the prior consistent testimony he had given at both the juvenile hearing and during the Grand Jury proceeding. *See* T. 5/20: 72-79, 82-84.

[6] *State v. Whelan*, 200 Conn. 743, 513 A.2d 86, *cert. denied*, 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d 598 (1986).

high on cocaine, admitted that on the night of the murder he had been outside smoking "pot" and "doing LSD and acid and really big-time drugs, mind, you know, altering drugs." SE 104 at 11-16; *see* EPP\MainMenu\Audio\RidgeExcerpt. Skakel admitted that when he found out that his brother Tommy had sex with Martha, "he got so violent and he was so screwed up" that he hit her with the golf club. *Id.*: 7-16. Skakel also acknowledged that his guilt has been "eating away at him and that's why he's been abusing drugs and has turned to alcohol . . . ." *Id.*: 104.

2. The Petitioner's Other Inculpatory Admissions

a. Admissions made 1975 – 1978

As previously related, on October 31, 1975, the day Martha's body was discovered, Andrea Shakespeare Renna drove Julie Skakel home from school. When the two girls parked on Otter Rock Drive, the petitioner, who appeared "hyper," ran up to them and announced that Martha had been killed and "he and Tommy were the last to see her that night." CT 5/9: 132. In the Spring of 1976, the petitioner, Julie, and Rushton, Jr. went into a barbershop in Greenwich. Julie asked the barber, Matthew Tucciaroni, if he had time for a haircut. Tucciaroni said he did. As he was preparing to cut the petitioner's hair, the petitioner said, "I'm going to kill him." Julie responded, "Shut up, Michael." Michael's reply was, "Why not? I did it before." CT 5/15: 158-67, 172.

In 1977, Rushton Skakel, Sr. asked Larry Zicarelli, who worked for the family as a gardener and driver, to drive Michael into New York City for an appointment. Michael and his father had been fighting and Michael was distraught. CT 5/16: 13-15. On the way into the city, the petitioner told Zicarelli that he had done something very bad and he had to either kill himself or get out of the country. *Id.*: 15. As they were driving home, they were

stopped in traffic on the Triborough Bridge. The petitioner jumped out of the car and ran to the side of the bridge. Zicarelli grabbed him and forced him back into the car. Skakel then leapt out of the other side of the car and again tried to make it to the side of the bridge. After getting back in the car a second time, the petitioner told Zicarelli that if he knew what he had done, he'd never talk to him again. *Id.*: 22-23.[7]

b. Admissions made at Elan, 1978-1980

In addition to directly confessing to Coleman and Higgins, petitioner made a number of other statements of varying degrees of incriminating impact during his time at Elan. These statements, such as the ones in which he claims he was drinking and "partying" and did not recall all of the events of the night of the murder, and those in which he attempted to shift blame to his brother, Tommy, are powerful evidence of guilt, as they are in stark contrast to the recorded statement he gave to the police in 1975 in which he described his trip to Terrien's, as well as to the detailed recitation of the night's events he related to Richard Hoffman in 1997.[8] (Discussed *infra.*)

---

[7] Zicarelli's testimony was bolstered at trial by that of Edwin Jones. Jones, a banker, stated that Zicarelli was a long-term customer at the bank in which he worked in the early nineties. He recalled a conversation with Zicarelli in which Zicarelli told him Michael had confessed to the murder of Martha Moxley. CT 4/28: 16-19.

[8] The jury also heard evidence, largely through defense witnesses, about the general conditions at Elan and petitioner's confrontation in large meetings regarding his responsibility for the murder. For instance, Charles Seigan testified that petitioner's involvement in a homicide was first announced to the Elan community at a "general meeting." This was called as a result of Skakel's being returned to the facility after having run away. CT 5/16: 57-8, 69. In the course of the general meeting, Joseph Ricci, director of Elan, disclosed petitioner's involvement in the murder to an assemblage of approximately ninety staff and students. This subject remained a topic through the remainder of Skakel's stay. *Id.*: 73-75.

A number of petitioner's former classmates have provided vivid descriptions of the general meeting. Angela McFillin explained that the meeting was convened because petitioner had run away. Upon his return, Skakel was held on the dining room stage for two

While at Elan, petitioner met an acquaintance and fellow Greenwich resident, Dorothy (Rogers) Mickey. Mickey testified that they met at a social function at Elan and began talking about the circumstances that led to their placement at Elan. CT 5/16: 136-38. The petitioner told her that he had been drinking the night Moxley was murdered and could not remember what he had done. He explained that he thought his family had put him in Elan because they were afraid he might have committed the murder. In addition, he said his family was trying to hide him from the police so that he would not go to jail. *Id.*: 138.

In smaller therapy sessions that followed the general meeting described in footnote 8, *supra*, petitioner provided more detail as to his activities on the night of the murder. Charles Seigan recalled two occasions in which Skakel first appeared to become annoyed at being pressed on the subject of the murder, then broke into tears, but finally admitted he did not know if he did it. Petitioner described his condition the night of the murder as "blind drunk" and "stumbling." CT 5/16: 78, 82, 123.

Elizabeth Arnold testified that she recalled one session in which the group discussed the murder of a girl in the petitioner's home town CT 5/17: 3. She recalled the petitioner saying that he did not know what happened that night, but he could have done it. *Id.* 6, 16,

---

or three days. During part of this time he was guarded by Gregory Coleman. This was followed by the general meeting. CT 5/23: 6-14. Alice Dunn recalled director Ricci appearing to read incidents from a file; CT 5/17: 58; and asking what happened to his neighbor, following which "we all found out about this golf club." *Id.*: 83. Defense witness Michael Wiggins testified that Ricci confronted petitioner by announcing that "we are going to get to the bottom of this, and Michael is going to tell us why he murdered Martha Moxley." CT 5/23: 171, 193. The meeting digressed into an increasingly harsh confrontation on the subject of the murder without producing any admission by petitioner. When he eventually responded, "I don't know," the meeting ended. (Seigan) CT 5/15: 96; (Dunn) CT 5/17: 85; (Wiggins) CT 5/23: 175. Thereafter, Skakel was required to wear a large sign that read, "Confront me on why I killed Martha Moxley." *Id.*: 177; *see also* (Sara Peterson) CT 5/23: 111; (Donna Kavanaugh) CT 5/23: 207; (Angela McFillin) CT 5/24: 4.

19. He claimed that he was very drunk, that he had some sort of a blackout, and that he did not know if he had killed her or if his brother had done it. CT 5/17:4. She further recalled him saying that he had been running around outside that night. He also said that his brother "f. . . his girlfriend." CT 5/17: 4. When Arnold asked him how his brother could have done that to him, he said they did not actually have sex, but they were "fooling around' and his brother "stole his girlfriend." *Id.*

Alice Dunn also testified to private conversations she had with the petitioner. On one occasion, when Skakel was scrubbing floors in the kitchen, he led her to believe that he did not know if he had killed Moxley, but he did state that he had been drinking that night. CT 5/17: 61. Another conversation occurred some months later, while the two were at a restaurant. In her Grand Jury testimony, which was admitted under *State v. Whelan*, 200 Conn. at 753-54, Dunn testified that the petitioner said he did not know if he killed Moxley, that "nothing in his own mind was definitive, but as far as he was concerned, he might have done it. But if he did do it, he was not in his normal state." The petitioner also said it could have been either him or his brother. CT 5/17: 75-76.

c. Admissions made 1981 – 1997

In approximately 1981, Rushton Skakel Sr. told his close friend and confidant, Mildred "Cissy" Ix that Michael had said he might have done it. In a portion of Ms. Ix's Grand Jury testimony admitted under *State v. Whelan, supra*, the witness recalled a statement made by petitioner's father around 1981 wherein Rushton Skakel, Sr. had commented that "Michael had come up to him and he said, you know, I had a lot to drink that night and I would like to see if, if I could have had so much to drink that I could have forgotten something and I could have murdered Martha." CT 5/15: 128; SE 87.

In the summer of 1987, the petitioner became acquainted with Michael Meredith, who had resided at Elan in 1985. CT 5/20: 108. Meredith lived at the Skakels' Greenwich home that summer while he and Michael worked on a class action lawsuit against Elan. *Id.* at 109. Meredith testified that he knew nothing of the murder until one night when the petitioner brought up the subject. The petitioner said that he had been in a tree on the Moxley property the night of the murder masturbating while watching Martha through a window of her house. CT 5/20: 111-12. Michael further said that while he was in the tree, he saw his brother Tommy walk through the property toward the Moxley house. Michael claimed he then climbed down from the tree without his brother seeing him. *Id.*: 113.

Andrew Pugh, who had been the petitioner's best friend in 1975, stated that after the murder, things changed at the Skakel residence and he did not see Michael often. *Id.*: 143, 157, 159-63. When he met Michael again in 1991, Michael wanted to renew their friendship. *Id.*: 163. Pugh told Michael he had some misgivings regarding the murder. Michael told Pugh that he did not kill Martha, but that he had been in "the tree" masturbating the night she was killed. Pugh said he knew the petitioner was referring to the pine tree under which her body was found. *Id.*: 164-65. Shortly after the foregoing conversation, petitioner telephoned Pugh and asked him to meet with a representative of Sutton Associates, the private investigation firm that had been retained by the petitioner's father, Rushton Skakel, Sr. CT 5/20: 169.

In 1997, the petitioner planned to write his autobiography with the help of author Richard Hoffman. CT 5/21: 139. Skakel and Hoffman spent a few days together at the Skakel family home in Windham, during which time the petitioner talked about his life. *Id.*: 139-40. Hoffman recorded their conversations. *Id.* One section of the recordings concerned

the night of the Moxley murder. *Id.*: 144-47. In this taped statement, petitioner contradicted both his 1975 claim that he never left the house after returning from Terrien's, and some of his Elan statements in which he claimed he had no clear recall of the night's events. Rather than reporting he was so "blind drunk" he did not know if he or his brother had killed Martha, petitioner described his activities of the night in detail. For instance, he told Hoffman he was drinking planter's punch at the Belle Haven Club, and gave an elaborate description of a bedroom in the Terrien house. See SE 108 (CD of interview); *see* EPP/Audio/RichardHoffman-Screen 22, 53-61; see also App. Pt 2: A-1142 (transcript of interview reproduced).

While the petitioner maintained that he did go to Terrien's that night, he stated that when he returned, he went through the house looking for various people. He stopped at the door to his sister's room and "remembered that Andrea had gone home." SE 108 (CD of interview); see EPP/Audio/Richard Hoffman - Screens 50-52, 74. He reported that he went to bed, but was "horny" and decided to spy on a woman on Walsh Lane. *Id.*: Screen 77-79. He claimed he was drunk and "couldn't get it up" so he thought "fuck this . . . Martha likes me, I'll go, I'll go get a kiss from Martha." *Id.*: Screen 84-85. He claimed he went to the Moxley house, climbed a tree and masturbated. *Id.*: Screen 86-94. Petitioner claimed that as he climbed down the tree and headed for home, he stated that something told him not to go through the dark oval section in their front lawn. *Id.*: Screen 96-98. He began to "chuck" rocks into the oval, saying, "Come on motherfucker, I'll kick your ass." *Id.*: 100.[9] As he ran

[9] Tellingly, the area Michael reportedly feared to enter corresponds to the Moxley's oval driveway, where, according to Dr. Lee, the assault most likely began. Further, as the state argued in summation, the action of "chucking rocks" could serve as a ruse for swinging a golf club. CT 6/3: 137.

home, Michael said he was worried that someone had seen him "jerking off." *Id.*: Screen 103.

Michael described how he woke the next morning (for him a school day) to Mrs. Moxley saying, "Michael, have you seen Martha?" He claimed he was still high and a little drunk from the night before. He stated he remembered thinking: "Oh my God, did they see me last night? And I'm like, I don't know, I'm like, and I remember just having a feeling of panic. Like 'oh shit.' You know. Like my worry of what I went to bed with, like may . . . I don't know, you know what I mean, I just had, I had a feeling of panic." *Id.*: Screen 105-107.

D. Petitioner's Defense At Trial

Based on thousands of hours of pre-trial preparation, and consultation with and among several attorneys and other experts, petitioner's lead counsel, Michael Sherman, developed a three-part defense strategy to combat the state's evidence. Sherman attacked the state's evidence through aggressive cross-examination – primarily focusing on the alleged unreliability both of the state's witnesses and the petitioner's "admissions" to them; he attempted to establish an alibi defense through evidence that petitioner had been at the Terrien house during at least part of the time when the murder could have occurred, and he asserted a third-party culpability defense against Kenneth Littleton, the Skakel's tutor, who lived at the Skakel residence, had access to the murder weapon, was in Belle Haven at the time of the murder, acknowledged making an arguable admission of guilt, and was linked to the crime scene through a hair which microscopically matched his own. These efforts are described below, and, where relevant, throughout the brief.

In a recorded statement to the police in 1975, petitioner claimed he went with his brothers and cousin to Jimmy Terrien's house the night of the murder. SE 112 (transcript of

petitioner's 1975 Police Interview). He further stated that after returning from the Terrien house, he went to bed and did not leave the house again that night. *Id.*

Petitioner's brother, Rushton, and cousin, Jimmy Terrien (Dowdle), testified at trial that the petitioner had accompanied them to Terrien's on October 30, 1975. These witnesses stated that they left the Skakel residence about 9:30 p.m., watched a television show that started at 10:00 p.m. (*Monty Python's Flying Circus*) at the Terrien residence. According to these witnesses, Michael, John and Rushton Skakel left the Terriens' shortly before 11:00 p.m. and drove 20 minutes home to petitioner's house in Belle Haven. CT 5/22: 10-15, 64-67. *See also* CT 5/28: 34-35.[10] Another cousin of the petitioner's, Georgeann Dowdle, Jimmy's sister, testified that she was home at the Terrien household on the evening of October 30, 1975. She stated, as she had to the Grand Jury, that she heard voices in the house that night belonging to her Skakel cousins, but could not identify the voices as belonging to any particular cousin. T. 5/23: 53-65.

In an attempt to blunt the state's evidence of petitioner's confessions and other inculpatory statements while at Elan, the defense presented several of its own "Elan witnesses." These defense witnesses, Angela McFillan, Michael Wiggins, Sarah Peterson, and Donna Kavanaugh, testified to the coercive nature of Elan in general and to the administration's treatment of petitioner in particular. They related various accounts of petitioner being accused of this murder, "pummeled" in a boxing ring, and forced to wear a sign which said, "Ask me why I killed my neighbor." Despite this brutality, none of these witnesses heard petitioner confess to the murder. Rather, they testified that petitioner

[10] John Skakel stated, as he had to the Grand Jury in 1998, that he could not remember who went to Terrien's. *See* CT 5/22: 11-13, 64-65; CT 5/28: 57-60.

usually responded to these tactics by saying he did not know what happened or could not remember. See T. 5/23: 111-216; T. 5/24: 3-72.

The evidence produced regarding a third-party culpability defense aimed at Kenneth Littleton is discussed in Section II-B, *infra*.

ARGUMENT

I. THE HABEAS COURT ERRED IN FINDING INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THE RECORD SHOWS ACTIVE AND COMPETENT ADVOCACY

A. Guiding Principles

"In *Strickland v. Washington*, *supra* at 1, the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." (Citation omitted; internal quotation marks omitted.) *Woods v. Comm'r of Correction*, 85 Conn. App. 544, 549, 857 A.2d 986, *cert. denied*, 272 Conn. 903, 863 A.2d 696 (2004).

"The first [*Strickland*] component, generally referred to as the performance prong, requires that the petitioner show that counsel's representation fell below an objective standard of reasonableness . . . . In *Strickland*, the United States Supreme Court held that [j]udicial scrutiny of counsel's performance must be highly deferential . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged

conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Santiago v. Comm'r of Correction,* 90 Conn. App. 420, 425, 876 A.2d 1277, *cert. denied*, 275 Conn. 930, 883 A.2d 1246 (2005), *cert. denied sub nom. Santiago v. Lantz*, 547 U.S. 1007, 126 S.CT 1472, 164 L.Ed.2d 254 (2006).

"'To satisfy the second prong, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable.'" *Johnson v. Comm'r of Correction*, 36 Conn. App. 695, 702, 652 A.2d 1050, *cert. denied*, 233 Conn. 912, 659 A.2d 183 (1995). Accordingly, "[a]n 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." *Strickland v. Washington*, 466 U.S. at 691. "The second prong is thus satisfied if the petitioner can demonstrate that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mozell v. Comm'r of Correction*, 51 Conn. App. 818, 821, 725 A.2d 971 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. at 694.

"[The] standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this Court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but [the] review of

whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." *Myers v. Comm'r of Correction*, 128 Conn. App. 564, 569, 17 A.3d 539 (2011) (citing *William C. v. Comm'r of Correction,* 126 Conn. App. 185, 189, 10 A.3d 115 (2011)).

B. Counsel's Able And Effective Advocacy Precludes A Finding Of Ineffective Assistance

As explained in the ensuing sections of this brief, in awarding petitioner a new trial the habeas court ignored or misapplied *Strickland's* bedrock principles. Before turning to a refutation of the habeas court's conclusions, however, it is important to focus on the able and effective advocacy petitioner received, because, as *Strickland* teaches "it is difficult [or at least it should be] to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 131 S.CT 770, 791 (2011).

In July 1998, at the time a Grand Jury was investigating the 1975 murder of Martha Moxley, the petitioner hired Attorney Michael Sherman to represent him. HT 4/17: 49. Attorney Sherman, a 1971 graduate of the University of Connecticut School of Law, had been practicing criminal law for approximately 27 years at that time. HT 4/16: 27; 4/17: 51. Although he had spent most of this time as a criminal defense attorney, he had also worked as a prosecutor. HT 4/17: 51. He is a past president of the Connecticut Trial Lawyers Association. *Id.*

Attorney Sherman continued to represent the petitioner for the next four years – through to his sentencing in August 2002. *Id.*: 57-58. Prior to petitioner's arrest in January 2000, Sherman devoted approximately 75% of his practice to his representation of the petitioner. *Id.*: 58. From arrest through to sentencing, he spent 80-85% percent of his professional life working on petitioner's behalf. *Id.*: 58-59. As Sherman explained, this case

was the number one priority in his life. *Id.*: 58. In addition to the time and effort he personally expended on petitioner's behalf, Sherman hired an associate, Jason Throne, in late 1999 to work on this case. HT 4/23: 3-4. Throne spent 90% of his time working exclusively on petitioner's defense from the date of his hire until sentencing. *Id.* At or about the same time as Throne began his representation of petitioner, Attorney Stephan Seeger was added to the team. *Id.*: 5. About a year prior to the 2002 trial, Attorney Mark Sherman also joined the defense team. Petitioner was represented by these four attorneys during numerous pre-trial hearings and every day of his criminal trial.

In addition to these four attorneys, Sherman engaged the services of Attorney David Grudberg to assist with research, briefs and memoranda of law as needed. Sherman also sought the expertise and advice of such other legal luminaries as David Golub, William F. Dow, Richard Emmanuel, Barry Sheck, and F. Lee Bailey. HT 4/18: 59-62.

At Attorney Sherman's direction, Attorney Grudberg briefed and argued two pre-trial appeals: *Skakel v. Benedict,* 54 Conn. App. 663, 738 A.2d 170 (1999) and *State v. Michael S.,* 258 Conn. 621, 784 A.2d 317 (2001). In *State v. Michael S.*, petitioner challenged his transfer from the juvenile to the criminal division of superior court. That challenge was dismissed by this court for lack of a final judgment.

Skakel v. Benedict arose during the grand jury proceedings. When called as a witness, Elan's Director, Joseph Ricci, resisted his grand jury subpoena by claiming, *inter alia*, that all statements petitioner had made while a resident of Elan were privileged. Sherman brought in a well-known criminal defense attorney from New Jersey, Linda Kenny, and hired an expert witness to litigate the privilege issue before Judge Edward F. Stodolink. Because of Sherman's efforts, after the Appellate Court's remand and a further hearing

before Judge Stodolink, the end result was favorable to petitioner: the state was denied access to any statements he may have made to professional staff members of Elan. HT 4/17: 60-63; see also *Skakel v. Benedict*, *supra*.

Attorney Sherman secured another significant legal victory for the petitioner by working with attorneys representing petitioner's father, Rushton Skakel, and petitioner's brother Thomas Skakel, to successfully invoke the attorney/client privilege and the attorney work product doctrine with regard to the investigation of the murder undertaken by a private firm, Sutton Associates.[11] This invocation prevented the state from calling the Sutton investigators as witnesses during the criminal trial and, thus, prevented the state from obtaining evidence of petitioner's statements to Sutton, and his brother Tommy's statements to Sutton, which differed considerably from their 1975 statements to the police.

Sherman's efforts also kept other potentially damaging evidence from the state. After his arrest, petitioner's wife initiated divorce proceedings. It came to Sherman's attention that petitioner's soon-to-be ex-wife intended to write a book titled "I Married a Killer." Sherman reviewed the book proposal and tapes, researched the issue of spousal privilege, and spent many hours speaking with the attorneys involved in the divorce. The book was never published and petitioner's ex-wife never testified for the state. HT 4/18: 45-47.

An examination of the criminal trial file reveals that petitioner's defense team, headed by Sherman, filed dozens of pre-trial motions. These included motions *in limine*; motions requesting discovery; and a motion, memorandum and supplemental memorandum seeking dismissal of the prosecution on statute of limitations grounds. *See*

[11] Petitioner's father, through his attorney, Thomas Sheridan, hired Sutton Associates in the early 90's to investigate Moxley's murder. Both petitioner and his brother Tommy asserted their attorney/client and work product privileges with regard to the Sutton investigation.

court file, CR00-135792T.

At a three-day hearing before Judge Maureen Dennis, Sherman vigorously contested the transfer of petitioner's case from juvenile court; cross examining the state's witnesses, and presenting both lay and expert testimony. HT 4/17: 64-66.

At the hearing in probable cause held over several days before Judge John Kavanewsky in April 2001, Sherman subjected the state's witnesses, particularly Gregory Coleman, to rigorous cross-examination. *See* CT 4/18/01: 98-181; CT 4/19/01: 2-91, 109-121. Further, he had witnesses of his own present and ready to testify to contest probable cause. Judge Kavanewsky, however, declined to hear them. HT 4/17: 66.

Sherman, and the rest of the defense team, reviewed the entirety of the state's discovery, which included over 1800 pages copied and provided to the defense, as well as other materials made available for viewing or copying at the State's Attorney's office. Further, Sherman and the defense team read the entire Grand Jury transcript, which Sherman successfully obtained prior to trial. Thus, prior to trial Sherman was well-aware of the nature of the state's evidence, having already cross examined several of the state's key witnesses at both the juvenile transfer and probable cause hearing, and having read the Grand Jury transcript and reviewed the voluminous discovery. HT 4/17: 67-70; HT 4/18: 59; HT 4/23: 9, 36.

Although some anticipated state's witnesses refused to meet with him, Sherman succeeded in securing pre-trial interviews with many of the state's witnesses. HT 4/17: 63; HT 4/18: 48-49, 50-52. As his time sheets attest; *see* PE 120 (binder containing Sherman's invoices); Sherman and the rest of the defense team spent hundreds of hours preparing for trial, meeting with witnesses, preparing for cross examination, preparing opening and

closing arguments, preparing defense witnesses, and researching legal issues.

Prior to trial, Sherman also met with his client on a nearly bi-weekly basis, flying to Florida where his client was then residing because his client did not want to travel to Connecticut. HT 4/18: 40-50.

Sherman hired three different private investigative firms to work on this case: one in Connecticut, one in Boston, and one in the mid-west. HT 4/18: 58. Sherman followed up on all investigative leads provided by his client, and many that he received from other sources. *Id.*: 55-58; HT 4/26:93-94.

Sherman consulted with several mental health experts, some at the suggestion of his client. HT 4/18: 63-66. He sent his client for an evaluation by Dr. Howard Zonana at the Law and Psychiatry Clinic at Yale University. *Id.*: 63. He also consulted with a person known for her work in the area of "false confessions", Dr. Elizabeth Loftus. *Id.* Because none of these consultations resulted in information useful to his client, and in fact, some uncovered damaging information (such as a diagnosis of anti-social personality disorder), Sherman did not use these experts at trial. *Id.*: 64-66. He did, however, call a medical expert, Dr. Joseph Jachimczyk, to offer his opinion as to the approximate time of death, thereby buttressing the alibi defense. *Id.*: 63.

Contrary to petitioner's contention below that Attorney Sherman had a "good time" at his client's expense; *see* Petitioner's Post-Trial Memorandum at 1; the record demonstrates that petitioner received the best efforts of a dedicated professional. Attorney Throne testified that Sherman could not have been more invested in providing the best defense possible for his client. HT 4/23: 22-23. Sherman's devotion to his client was so extraordinary that he dedicated an entire room of his house to this case, setting up a "war

room" where the walls were covered with charts, photographs and other materials used to plot preparations by the defense team. HT 4/23:21-26; 4/26:127. Sherman's devotion to his former client remained apparent throughout the habeas hearing: while defending his work, Sherman peppered his responses in this trial with comments favorable to his former client.

Further, despite petitioner's allegations to the contrary, Throne testified he saw no evidence that Sherman had become "mesmerized by the media" or that the extensive media coverage of this case interfered with either his judgment or his efforts on behalf of his client. HT 4/23: 21-24. In fact, Throne, who had worked with Sherman during the summer of 1997, prior to Sherman's representation of petitioner, testified that Sherman was appearing on television as a legal commentator at that time. Throne stated that although there was more media around while Sherman was representing petitioner, "as far as his engagement with them, or Mr. Sherman operating in any form or fashion that was different than what I saw back in '97, before he was retained by Michael, no, I didn't see any market [sic] change." HT 4/23: 22.

Sherman similarly averred that although his client was very concerned with his portrayal in the media, and Sherman's media savvy was one reason the petitioner hired him, he did not become enthralled by the media. HT 4/17: 51-57. As Sherman explained, he had been appearing on television for years prior to representing petitioner: "I've been doing media for nine – for years before that . . . I worked for some of the stations. This was not my first time in front of a camera. I was not so enthralled." *Id.*

Strickland does not guarantee perfect representation; there is no requirement that counsel be prepared for every contingency or be a "flawless strategist or tactician." *Harrington v. Richter*, 131 S.Ct. at 791. All that is required is reasonable competence.

Petitioner's defense team exceeded that standard. At trial they presented a defense based on a three-fold strategy: attacking the state's evidence; presenting an alibi, and presenting a third-party culprit defense. This strategy failed not because of any fault of defense counsel, but because of the strength of the state's case.

II. THE HABEAS COURT ERRED IN FINDING BOTH DEFICIENT PERFORMANCE AND PREJUDICE ARISING FROM DEFENSE COUNSEL'S DECISION NOT TO PRESENT A THIRD-PARTY CULPABILITY DEFENSE REGARDING THOMAS SKAKEL

In the proceedings below, petitioner alleged that his trial counsel was ineffective in that he failed to present evidence the murder was committed by his brother, Tommy Skakel. He argued that his defense team should have used the information in the 1976 warrant application for Tommy Skakel, prepared by the Greenwich Police, a report prepared by a private investigation firm hired by his father in the early nineties ("Sutton Report"), and the "profile report" prepared by state investigators at about the same time, to build a third-party culpability defense. PB at 14-15. The habeas court agreed, although in so doing, it went further than petitioner proposed, culling information from sources not identified by the petitioner.

The habeas court assumed that the defense had access to evidence of Tommy Skakel's alleged admission that he had a sexual liason with Martha the night she was killed. This alleged statement by Tommy, which was included in the Sutton Report, represented a change from Tommy's 1975 police statement in which he claimed he and Martha parted ways shortly after the car left for Terrien's. Based on this and a few other statements the habeas court culled from police reports, the court determined there was sufficient evidence to satisfy the requirements for a third-party culpability defense implicating Tommy, and rejected counsel's strategic reasons for declining to advance such

a defense at trial.

Both the claim as advanced by the petitioner, and the somewhat different formulation of that claim concocted by the habeas court, must be rejected. Petitioner's defense team made a reasoned decision to eschew multiple third-party defenses and focus on Kenneth Littleton, the person they believed, in the exercise of their reasonable professional judgment, made the best third-party suspect. Further, the defense team recognized that much of the information on which the habeas court relied would have damaged the defense by corroborating both the state's evidence of motive and two key state's witnesses. A careful review of the record makes clear that the habeas court's disregard of their reasoned, strategic decision is indefensible.

Not only did the habeas court err in finding deficient performance, it erred in basing its conclusion that petitioner was prejudiced, not on witnesses produced in this habeas hearing, but on police and other reports disclosed to the defense prior to the 2002 criminal trial. The habeas court assumed this "investigative gateway" may have led to evidence in support of a third-party defense against petitioner's brother. In so doing, the habeas court ignored *Strickland's* command that prejudice be based on "demonstrable realities" rather than speculation. *Johnson v. Comm'r of Correction,* 285 Conn. 556, 584, 941 A.2d 248, 265 (2008) (Speculation that additional investigation may have led to exonerating evidence insufficient to make out a Sixth Amendment violation).

A. Facts

1. Evidence Pertaining To Thomas Skakel From The 2002 Criminal Trial

As recounted in the previous fact section, the jury at petitioner's 2002 criminal trial was well aware that Helen Ix observed Tommy Skakel "flirting" with Martha in the driveway

at around the time the car going to Terrien's left. T. 5/9: 69-71. They also heard, via Martha's diary, Martha's impressions of Tommy as flirting with her on other occasions, and, importantly, the petitioner's jealous reaction to the interplay between his brother and Martha. *See* SE 12 at EPP/Main Menu/Documents/Diary. The state also introduced evidence that one of Martha's shoes had the word "Tom" written on it. CT 5/8: 9-10. Further, Richard Hoffman testified about petitioner's statements that he had a "crush" on Martha, and that he felt the time he spent with Martha in the car prior to his "nemesis," Tommy, joining them was his "moment of closeness" with her. CT 5/21: 142-44. The jury also heard statements the petitioner made to others asserting it was either he or his brother who had killed Martha (Elizabeth Arnold CT 5/17: 4; Alice Dunn CT 5/17: 75-76), or claiming he and Tommy were the last to see her alive (Andrea Shakespeare Renna, CT 5/9: 132), or claiming that after masturbating in the tree he observed his brother Tommmy heading towards the Moxley property. (Michael Meredith, CT 5/20: 113). Further, the jury was aware that the Greenwich police unsuccessfully sought an arrest warrant for Tommy Skakel in 1976. T. 5/8: 67.

In addition, both Geranne Ridge and Elizabeth Arnold testified to petitioner's awareness that his brother had some sort of sexual liaison with Martha the night she was killed. Significantly, Elizabeth Arnold stated the petitioner made his statement to her when they were both residents of Elan. The petitioner originally told her that his brother "f...d his girlfriend." When Arnold expressed sympathy, he clarified by stating that they did not really have sex they just "fooled around." CT 5/17: 4. Petitioner's statement to Geranne Ridge came decades later during a 1997 party at her condominium in Boston. There he told Ridge that when he found out his brother had sex with his girlfriend he was so "violent" and

"screwed up" (presumably from the "mind altering" drugs he admitted ingesting) that he hit her with the golf club. SE 104 at 11-16; (App. Pt 2: A-1210).

2. Evidence From The Habeas Trial

During the habeas hearing, petitioner's attorney questioned Sherman about his decision not to pursue a third-party defense against Tommy Skakel. Sherman indicated that he considered raising such a defense, but ultimately concluded that it was not in his client's best interest. HT 4/16: 173-174; HT 4/17: 132, 150-52.

Sherman was guided in his decision by several considerations. As he explained, although some defense attorneys may take a different tack, he does not believe it is advantageous to, as he put it, "lay out the buffet table" of possible third-party defenses. HT 4/16: 173. Given that they had what in his professional judgment was a more viable third-party defense centered on Kenneth Littleton, Sherman did not believe pointing the finger at an additional suspect would be a good strategic move. HT 4/16: 173-74; HT 4/17: 32, 150-52; HT 4/23: 99-103.

Sherman also expressed his professional opinion that they did not have evidence directly connecting Tommy Skakel to the murder as required to establish a third-party defense. Sherman explained that although he was aware Tommy Skakel had admitted to the Sutton investigators that he had a sexual liaison with Martha that night, he did not believe this information provided the requisite connection. HT 4/16: 172, 173; HT 4/17: 151; HT 4/26: 99-100.

Further, Sherman acknowledged the difference between being aware of certain information and having *admissible evidence* that could be used in court. Sherman explained that Tommy Skakel's lawyer, Emanuel Margolis, made it abundantly clear that

his client would invoke his Fifth Amendment privilege if called to testify. Thus, even if Sherman thought it was a wise move – something about which he had serious reservations as explained *infra*, -- Sherman knew he could not get Tommy's change of story before the jury through Tommy's testimony. HT 4/17: 144.[12]

Moreover, Sherman acknowledged that the state's evidence indicated petitioner committed the murder in a jealous, drug-fueled rage after discovering Tommy had a sexual liaison with Martha. Putting on evidence confirming for the jury that Tommy did in fact have such a liaison would only strengthen the state's case, and corroborate two important state's witnesses – Elizabeth Arnold and Geranne Ridge. HT 4/17: 148-50; HT 4/26: 104. Both of these witnesses provided evidence of admissions by the petitioner indicating he was aware his brother had sexual contact with Martha the night of the murder. As explained *supra*, the petitioner's admission to Ridge went further, making explicit that his discovery of that encounter is what triggered the rage which led to her death. *Id.*

Other evidence petitioner suggested Sherman should have used against Tommy also was problematic. As Sherman explained, although he was aware – both from conversations with his client and from the Sutton reports --that Tommy had some mental health issues, he did not have *evidence* to that effect; nor did he have a waiver granting him access to Tommy's therapists or mental health records. HT 4/17: 140-42.

Further, Sherman noted that some of the evidence petitioner suggested pointed to

[12] Knowing this, Sherman understood that he could not call Tommy for the dramatic effect of having him invoke the privilege before the jury. HT 4/16: 171-72. See *State v. Bryant*, 202 Conn. 676, 684-85, 523 A.2d 451 (1987) (defendant prohibited from calling witness to the stand solely for him to invoke Fifth Amendment). Further, even if he had, Sherman stated he was not sure what effect that somewhat theatrical move would have on the jury – rather than cast suspicion on Tommy the jury could view it as stonewalling by a family member with guilty knowledge of petitioner's responsibility. HT 4/17: 144.

Tommy as the murderer was before the jury—the state introduced evidence of Tommy and Martha flirting in the driveway, and the fact that "Tom" was written on one of Martha's shoes. Sherman also managed to introduce the fact that the Greenwich police unsuccessfully sought an arrest warrant for Tommy Skakel in 1976. HT 4/17: 132-33.[13]

Finally, Sherman flatly denied that petitioner's family influenced him in any way in his decision not to pursue Tommy as a third-party suspect Sherman stated that his loyalty was to petitioner alone and that the Skakel family was well aware of this. HT 4/26: 102-3.

Sherman's testimony was corroborated in important respects by Attorney Jason Throne. Throne recalled discussing the issue of whether and how to raise a third-party defense implicating Tommy many times throughout the three years he represented the petitioner. In fact, Throne stated the matter was a subject of ongoing discussion. HT 4/23: 38-39. He concurred in Sherman's assessment, however, that doing so would be counterproductive. *Id.* He also explained that they simply did not have evidence connecting Tommy to the murder:

> I think strategically by us shining a light on anyone that we thought we could, we thought that would water down our focus on Mr. Littleton. Ultimately, if I recall, I don't believe we had as much evidence that was compelling in the fashion that we thought we had with Mr. Littleton, I don't think it was even close *as far as actual evidence*.

HT. 4/23: 39. (Emphasis added.)

Sherman testified that Tommy Skakel's attorney, Emanuel Margolis, permitted him a brief meeting with Tommy about a week before evidence began. Throne testified that he accompanied Sherman to this meeting. HT 4/23: 13. Throne stated that he believed he was

[13] Because the jury was well-aware that Tommy had long been a suspect, and because petitioner implicated his brother in many of his statements, the state discussed Tommy as a possible suspect in its summation. CT 6/3: 114.

aware of information regarding Tommy and Martha's sexual liaison prior to meeting with Tommy. Importantly, however, *Throne testified he had no recollection of Tommy discussing sexual contact with Martha during their meeting.* HT 4/23: 37. What he did recall was Tommy telling them everyone's assumption as to time was off:

> I recall Tommy discussing the fact that the timeframe – or, excuse me—everyone had believed that when Tommy and Martha said goodnight to each other that night, that that was the last interaction that they had. He shared with us that they had actually reconvened again after the time when, I guess it was reported that everyone believed they had said goodbye for the night.

HT 4/23: 13-14.

Throne could not recall whether Tommy divulged when this second meeting took place. HT 4/23: 14. Further, Throne did not recall Tommy saying anything that would reveal when the alleged sexual activity took place, if it was shortly after Tommy and Martha were last seen flirting in the driveway or later during their second meeting. HT 4/23: 40. Throne did acknowledge, however, that since so much of their defense strategy was aimed at convincing the jury Martha was killed during the period of petitioner's alibi, introducing evidence suggesting she was alive after that time period would have undermined that defense. HT 4/23: 15.

3. The Habeas Court's Resolution Of This Issue

The habeas court found petitioner's defense team ineffective in not raising a third-party defense directed at Tommy, and found prejudice from their failure to do so. While acknowledging Sherman made a strategic decision to forego this defense, the court found this choice unreasonable. The court concluded that if it was sound strategy to limit a third-party defense to one suspect, the defense team picked the wrong one. MOD: 34-35.

In reaching its conclusion, the court relied almost exclusively on discovery

documents from the criminal trial, *see* MOD: 35-48, which the court mistakenly refers to as the "Greenwich police investigative report" or the "Greenwich police investigative file." *See* MOD: 35-48. Virtually all of the information the court relies on to suggest the viability of a third-party defense against Tommy comes, not from witnesses presented by petitioner in this proceeding, but rather from three boxes of photocopied materials offered as a defense exhibit for identification during a post-verdict proceeding in 2002.[14] *See* PE 274, 275, 276. These boxes were marked as exhibits in this proceeding along with all the exhibits from the criminal trial, and the exhibits from the petition for new trial proceeding.

As to its conclusions, the habeas court stated the following:

> As presented, Attorney Sherman's defense deprived the petitioner of an opportunity for the jury to hear T. Skakel's admission of a sexual encounter with the victim, and for Attorney Sherman to point out the compatibility of

---

[14] On August 29, 2002, during a hearing on petitioner's Motion for New Trial, petitioner asked that three boxes of materials be marked as an exhibit for identification. CT 8/29: 2-9. Petitioner's counsel represented that these boxes contained discovery documents provided to his law firm (Santos and Seeley) by Attorney Sherman. He asked that they be marked for identification to create a record for anticipated appellate claims concerning discovery.

The state countered that it had never inspected the boxes to see if everything given to Attorney Sherman was included, but even if it was, it would not represent the entire course of disclosure provided to the defense. The state noted that numerous other things such as photographs, sketches, and audio and video tapes were made available to Sherman, but were not photocopied and provided to him. CT 8/29: 7. The court permitted defendant to mark the boxes for identification with the following caveat:

> "Okay, this is what I am going to do. I am going to allow them to be marked for identification only. They will not be a full exhibit. . . .
>
> The state has not examined these reports. We don't know whether they are the full reports. They are not even claimed to be the reports that were provided directly by the state. They are reports that were allegedly provided by Mr. Sherman to you which may or may not be for any number of reasons the full set. Things may have been misplaced or lost or whatever.
>
> So, I just think that it has limited utility but I think he is allowed to mark it for identification for purposes of this hearing. . . .
>
> These are defendant's exhibits for identification only on the motion for a new trial."

CT 8/29: 8-9.

> some aspects of this story with the physical crime scene findings regarding the victim's clothes. Attorney Sherman deprived the petitioner of an opportunity to present T. Skakel's consciousness of guilt change of stories, his growing sexual interest in and aggressiveness toward the victim leading to the date of her murder, and the police awareness that he had a history of emotional instability. In this court's view, there is no reasonable justification rooted in the petitioner's defense for Attorney Sherman not to have asserted a third-party culpability defense centered on T. Skakel. Had he done so, there is a reasonable probability that the jury would have entertained a reasonable doubt as to the petitioner's guilt with the result that he likely would have been acquitted.

MOD: 48-49.

B. The Habeas Court Erred By (1) Rejecting The Reasonable Strategic Decision Made By Petitioner's Defense Team And (2) Basing Its Assessment Of Prejudice On Speculation Rather Than Evidence

1. The Habeas Court Erred In Discarding The Reasonable Strategic Decision Made By Petitioner's Defense Team

In casting aside the reasoned strategic decision of the petitioner's defense team not to raise a third-party claim directed at Tommy Skakel, the habeas court violated a bedrock principle of ineffective assistance jurisprudence. Under *Strickland,* strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, 466 U.S. at 690-91. Here, both Sherman and Throne testified that all members of the defense team read the discovery documents on which the habeas court relied; HT 4/17: 67-70; HT 4/18: 59; HT 4/23: 9, 36; and came to a reasoned decision that they did not have enough *actual evidence* regarding Tommy Skakel to pass the third-party culpability threshold, and, even if they did, using some of the suggested information posed substantial risks to the defense. Further, they reasonably concluded that raising multiple third-party defenses was not in their client's best interests. *See, e.g.*, HT 4/16: 173-74; HT 4/17: 132, 150-52; HT 4/23: 99-103. Thus, the defense team exercised reasonable professional judgment to pursue Littleton as a third-party culprit instead of Tommy Skakel.

This being so, the habeas court erred in supplanting their judgment with its own.

Strickland recognizes that there are "countless ways to provide effective assistance in any given case" and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Strickland v. Washington*, 466 U.S. at 689. Further, "judicial scrutiny of counsel's performance must be highly deferential" and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Knowles v. Mirzayance*, 556 U.S. 111, 124, 129 S.Ct. 1411 (2009) citing *Strickland*, 466 U.S. at 690. A habeas court is required to suppress any temptation it may have when "examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. "[A]dvocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." *Id.* at 681.

The habeas court violated these principles by refusing to presume the defense team's choice was professionally reasonable. As Sherman and Throne both noted, the decision of whether to make Tommy a third-party culprit was given a great deal of consideration. In the end, they exercised their reasonable professional judgment in deciding that pointing the finger at Kenneth Littleton would be more effective. It is the exercise of this professional judgment that serves as the touchstone of why "strategic choices *must be respected.*" *Id.* (emphasis added). Further, in evaluating this decision, this Court must remove the distorting effects of hindsight and look at it from the perspective of petitioner's defense team at the time of the trial. *Strickland*, 466 at 690.

At the time of trial, petitioner's counsel were in possession of a videotaped interview of Littleton in which he makes an arguable admission of guilt. During the taped interview with Dr. Kathy Morall, Littleton told Morall that he had admitted to Mary Baker, his ex-wife, that he had killed Moxley. The defense was able to get this supposed admission into evidence. *See* CT 5/13: 114-118; *see also* CT 5/13: 123-24, 163-69. In addition, the defense cross examined Littleton on allegedly inconsistent statements he made regarding his conduct and whereabouts the night of the murder, his strange and arguably obsessive interest in the murder, a phone call he made to the victim's father referring to the murder as our "mutual tragedy," his diagnosis as bi-polar and the medications he was taking at the time of his testimony, his illegal drug use, his offer to take a sodium pentothal test to see if anything "resided in [his] mind . . . which would give a break in the case"; CT 5/13: 33; the strange or paranoid statements he had made regarding the Skakel or the Kennedy families, his dismissal from the Brunswick School, and law enforcement's pursuit of him as a suspect in the early 90's. See CT 5/13: 3-58, 91-118.[15] Further, the defense presented the jury with evidence that a hair found on the sheet covering the victim's body was microscopically similar to Littleton's. CT 5/8: 170.

The defense team reasonably assessed this evidence as stronger than any available evidence regarding Tommy. Although Mary Baker's testimony explaining that Littleton had never admitted to the murder, but that she had convinced him he had done so during an alcoholic blackout in an attempt to elicit an admission from him; CT 5/13: 163-69; was apparently credited by the jury, the defense team could not know, at the time they were

[15] The defense team explained the 16 pieces of evidence it would use to build this third party defense against Littleton in a written memorandum of law and proffer to the court. *See* App. Pt 2: A-1525.

choosing a defense, how good a witness either Littleton or Baker would be. What they did know, however, is that both Littleton and Baker were available to testify, unlike Tommy. They thus knew the jury would have an opportunity to hear from both Baker and Littleton, but no opportunity to gauge Tommy's credibility or "size him up" as a suspect based on his performance on the stand.

Further, the defense team had reason to believe the jury would find Littleton and Baker unsympathetic and not particularly credible witnesses. The defense team was aware of Littleton's extensive substance abuse and mental health issues and could reasonably anticipate that he would not perform well on cross examination. As for Baker, it could reasonably be anticipated that the jury would view her with disdain due to her extensive efforts to ensnare her ex-husband. Further, Baker's cooperation with law enforcement in an attempt to develop evidence against Littleton may have been viewed by the jury as proof she believed or knew he was guilty.[16] In any event, it was not unreasonable for the defense team to believe their best chance of creating a reasonable doubt of petitioner's guilt was by casting suspicion on Littleton.

Further, the fact that the state gave Littleton immunity in order to obtain his testimony did not fatally weaken the third-party defense, as the habeas court suggests. *See* MOD: 24-25. In fact, the opposite is true. It is more likely the jury would view the grant of immunity as undermining Littleton's credibility and increasing its suspicion of him. Having received immunity for the underlying crime in exchange for his testimony against the

[16] The jury heard extensive evidence of Baker's cooperation with law enforcement, which included providing a sample of Littleton's hair for testing, tape recording their phone calls, agreeing to meet her ex-husband in a hotel room equipped with listening devices, and numerous attempts to elicit admissions from him. CT 5/13: 155-176; CT 5/14: 2-205.

petitioner, the jury may have viewed Littleton as eager to satisfy the state's wishes and help convict the petitioner. The grant of immunity, therefore, may have been viewed as a license to fabricate. Further, the jury may well have viewed it as placing the state's imprimatur of "suspect" on Littleton, and reasoned that only someone who remained a serious suspect would have need of immunity. Therefore, the habeas court's opinion about the effect of Littleton's immunity is, at best, a judgment call, and at worst just plain wrong. Either way, it is insufficient to defeat the reasoned, professional judgment of defense counsel.[17]

Further, in criticizing the defense team's decision to focus on Littleton, the habeas court lost sight of the critical distinction between information referenced in reports and admissible evidence. The defense team reasonably concluded that they did not have sufficient admissible evidence connecting Tommy to the crime to launch a successful third-party culprit defense.

The defense team appropriately recognized that presenting a third-party defense requires evidence of a direct connection between the suspect and the murder. *State v. Kinsey*, 173 Conn. 344, 347-48, 377 A.2d 1095 (1977). "It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused." (Citations omitted.) *State v. Echols*, 203 Conn. 385, 392, 524 A.2d 1143 (1987); *State v. Harris*, 48 Conn. App. 717, 724-25, 711 A.2d 769, *cert. denied*, 245 Conn. 922, 717 A.2d

[17] The habeas court's view of the impact of Littleton's immunity on the viability of the defense centered on him apparently rests on its assumption the jury would accept the state's decision to grant him immunity as a credible exoneration. If this is a reasonable inference, and one sufficient to doom a third-party culprit defense, then a defense centered on Tommy would suffer the same infirmity: the jury would treat the state's decision to charge Michael as a credible exoneration of Tommy.

238 (1998). Both Throne and Sherman reasonably assessed the available evidence as failing to make the requisite connection. Unlike with Littleton, who they had on tape making an arguable admission, they had no evidence of any admission of guilt by Tommy. Nor did they have forensic evidence connecting Tommy to the murder, such as the hair on the sheet covering the victim's body which provided an arguable physical link to Littleton.

Further, Sherman reasonably concluded that even if they had a witness available who could testify to Tommy's alleged admission of sexual contact with Martha, and assuming that hearsay statement was admissible (neither of which was proven by petitioner below), it would not provide the requisite connection. Importantly, there is no evidence to suggest that anything happened between Martha and Tommy that would have caused him to lose his temper. Tommy's alleged statement to the Sutton investigator indicates Martha was a consensual and active participant in the sexual interlude. Therefore, the habeas court's assumption that evidence of sexual contact between Tommy and Martha would have been sufficient to establish a third-party culprit defense is unwarranted. Indeed, as this court has recognized, even evidence of an argument between the victim and a third person shortly before the murder fails to establish the requisite connection for a third-party claim. *See State v. Boles*, 223 Conn. 535, 548-49, 613 A.2d 770 (1992).

In addition to unreasonably second-guessing counsel's professional assessment as to whether the requisite connection could be established, the habeas court engaged in rank speculation as to what evidence could have been produced in 2002. As mentioned previously, the habeas court relied, not on witnesses produced at the habeas hearing, but on information contained in discovery material which had been offered as an exhibit for identification during a 2002 post-trial hearing. This included police reports which contained

statements attributed to various persons. None of those persons who allegedly made those statements testified at the habeas trial. The habeas court itself recognized neither the police reports nor the "Sutton report" on which it relied was likely to be admissible in a criminal trial. MOD: 48, n.32; see also MOD: 45 n.30. Nevertheless, the habeas court believed it was sufficient, for purposes of proving ineffective assistance of counsel, to show the availability of this information as an "investigative gateway" which may have led to admissible evidence. *Id.*: 48 n.32. In this the court grievously erred. The court was not free to cast aside the reasonable assessment of experienced counsel that there was not enough *actual, admissible evidence* to launch a third-party defense centered on Tommy Skakel on the basis of speculation that such evidence may have been developed. In order to satisfy his burden under *Strickland*, petitioner was required to prove that it was below the standard of reasonable competence not to locate and produce evidence suggesting Tommy Skakel's culpability. In order to do so, petitioner had to prove, at a minimum, what that evidence was, that such evidence was actually available to the defense, and that it was admissible in 2002. The habeas court erred in relieving petitioner of his burden of proof. *See, e.g.*, *Johnson v. Comm'r of Correction*, 285 Conn. 556, 584, 941 A.2d 248 (2008); *Ostolaza v. Warden*, 26 Conn. App. 758, 766-67, 603 A.2d 768, *cert. denied*, 222 Conn. 906, 608 A.2d 692 (1992) (petitioner's failure to show that claimed missing witnesses were available or that their testimony would have been admissible is fatal to his claim).

Because "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' *Strickland,* 466 U.S. at 690, and [because] . . . the burden to 'show that counsel's performance was deficient' rests squarely on the defendant, *id.,* at 687, 104 S.CT

2052. . . . . *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.' Id.,* at 689, 104 S.CT 2052." *Burt v. Titlow,* 134 S.Ct. 10, 17, 187 L.Ed.2d 348 (2013) (emphasis added). By failing to produce *any* evidence in this regard, petitioner abjectly failed to carry his burden of proof; the habeas court erred in relying on supposition rather than evidence.[18]

Further, even if the defense team had a witness who could testify to Tommy's purported statements of sexual conduct with the victim, and if that testimony were admissible despite its hearsay nature, (none of which was established below) the habeas court failed to take into account the risks of presenting this information. Petitioner's jealousy was central to the state's evidence of motive. Informing the jury that Tommy had a sexual encounter with Martha the night she was killed would only strengthen that evidence. This is particularly true when the testimony of Elizabeth Arnold and Geranne Ridge is considered. Petitioner admitted to both women – in strikingly different contexts and years apart – that he was aware his brother had sexual contact with Martha the night of the murder. In fact, he admitted to Ridge that his discovery of this fact is what triggered the murder. App. Pt 2: A-1216 – A-1225; PE 67; CT 5/21: 32; HT 4/17: 150. Given this, it would have been foolish for the defense to corroborate Arnold and Ridge and strengthen the state's evidence of

[18] For this reason, the habeas court's rejection of one of Sherman's reasons for not presenting the suggested defense, namely, Sherman's reasonable assessment that he did not have enough evidence available to directly connect Tommy to the murder as required; see *Echols*, 203 Conn. 385; "[o]n the basis of the extent and strength of inculpatory information concerning T. Skakel then available to Attorney Sherman" is indefensible. *See* MOD: 49 n.33. In light of petitioner's failure to prove what evidence would have been available to Sherman in 2002, the habeas court had no legitimate reason to cast Sherman's assessment aside.

motive by presenting Tommy's statements. See *Crocker v. Comm'r of Correction*, 126 Conn. App. 110, 131-32, 10 A.3d 1079, *cert. denied*, 300 Conn. 919 (2011) (court declined to second guess counsels' decision not to introduce statement which risked inculpating client). To highlight Tommy Skakel's relationship with Martha would play directly into the state's hand. The gruesome nature of the crime demonstrates a crime of extreme passion. The state's evidence showed that petitioner harbored such passion and that it was fueled by his ingestion of "mind-altering drugs." *See* App. Pt 2: A-1224 (Geranne Ridge). Sherman would have been foolish to emphasize the very thing that triggered petitioner's rage: Tommy's amorous relationship with Martha.

Moreover, even if this Court were willing to assume, with no evidence to support that assumption, that Jason Throne would have recalled more of the conversation with Tommy at the time of trial than he did in 2013, presenting Tommy's statements through Throne carried particular risks. Throne's testimony would risk opening the door to Tommy's assertion that the timeline was "off." Throne testified below that Tommy told them he and Martha rendezvoused later that evening – past the time that everyone assumed they had parted ways. Although Throne could not recall if Tommy said when the second meeting took place, Throne recognized that evidence suggesting Martha may have been alive after the period of petitioner's alibi elapsed would undermine that aspect of their defense.[19] HT

[19] Despite Throne's lack of specificity as to when this second meeting took place, the jurors, had they been aware of and credited Tommy's alleged statements, may well have concluded the second meeting occurred *after* the time period covered by the petitioner's alibi, and *later* than the time of death endorsed by the defense (and, apparently, by the habeas court). This is so because Tommy is seen by Andrea Shakespeare Renna in the Skakel house at about 9:45, and by Littleton by 10:10 or so. Evidence from the criminal trial indicated that Tommy joined Littleton in an upstairs bedroom at about 10:10 and watched a portion of *The French Connection*. Littleton stated Tommy left at the conclusion of the

4/23: 14-15. In its Memorandum, the habeas court ignores this important revelation, and assumes the 9:30-10:00 time frame in the Sutton Report to be *both* the approximate time of the sexual encounter and of Moxley's murder. MOD: 36, 41, 56-57. Throne's testimony regarding Tommy's statements seriously undermines this assumption.

Finally, in determining that any and all reasonably competent attorneys would have targeted Tommy as a third-party suspect, the habeas court fails to give due regard to the fact that Ken Littleton, a person who has never been shown to have any reason to lie to protect a member of the Skakel family, provides Tommy with an alibi for the time period during which the habeas court apparently believes the murder occurred. Littleton told the police shortly after the murder, and testified at the criminal trial, that when Tommy sat down with him to watch *The French Connection* a little after 10 pm he was "perfectly composed," "not agitated," not "soiled or dirty," he was not "perspiring heavily," there was "nothing unusual" about his clothes, and he did not seem "excited or upset." CT 5/9: 169-170; CT 5/13: 104, 134; HT 4/30: 122-23.

It simply strains credulity that a 17 year old boy could have parted from Martha, then (according to Jason Throne's recollection of Tommy's statement) reconnected with her, had a consensual sexual interlude, somehow and for some unknown reason lost his temper,

---

chase scene, which ended at 10:35. CT 5/13: 104, 134; *see* SE 84. Thus, there would have been little or no time for Tommy and Martha to part ways and then reconnect prior to Tommy joining Littleton to watch television. Further, the jury may well have concluded that after leaving Littleton's company at about 10:35 or so, Tommy went to meet Martha. It would make sense to assume the sexual contact occurred during the second meeting, there being little time for it following their brief good-by in the driveway. Thus, had the jurors been apprised of Tommy's statements, they may well have concluded that petitioner returned from Terrien's at about the time of Tommy's second meeting with Martha and either came upon them, or somehow learned of their encounter. This awareness, as he told Ridge, is what triggered the murder.

beaten her to death with a golf club, stabbed her through the neck with the shaft, dragged her body under a pine tree on the Moxley property, returned home, somehow removed all evidence of blood from his clothes and his person, and sat down to watch television with Ken Littleton, composed and collected, all within the space of a half hour or less. Because this scenario is so highly implausible, an experienced defense attorney could reasonably decline to target Tommy as a suspect.

Nor would it help to attempt to persuade the jury Tommy killed Martha later in the evening. Endorsing a *later* time of death would render petitioner's alibi useless. And, of course, unlike the petitioner who admitted he was at the murder scene after returning from Terrien's, no evidence was produced at the criminal trial, and petitioner produced none below, suggesting Tommy's culpability during a later time period.

In sum, petitioner failed to overcome Sherman's reasonable strategic assessment, made after considering the very same discovery documents on which the habeas court relied, of the risks of multiple defenses, the unavailability of evidence in support of the suggested defense, and the potential hazards of strengthening the state's evidence of motive, corroborating two key state's witnesses, and undermining the alibi. Although "counsel . . . is not required to have a tactical reason – above and beyond a reasonable appraisal of a claim's dismal prospects for success – for recommending that a weak claim be dropped altogether," *Knowles v. Mirzayance*, 556 U.S. at 127, Sherman here had several sound reasons. *See Williams v. Comm'r of Correction*, 142 Conn. App. 744, 755, 68 A.3d 111 (2013) (attorney's choice of one defense over another possible defense was a reasonable strategic decision).

2. The Habeas Court Erred In Basing Its Finding Of Prejudice On Speculation

In addition to erroneously discarding the defense team's reasoned choice of defenses, the habeas court erred in failing to hold petitioner to his burden of proving prejudice. Rather than require petitioner to carry his burden by producing witnesses and evidence that purportedly implicate Tommy in the crime, the habeas court was willing to assume information in the state's discovery materials could be magically transformed into admissible, available evidence. In the absence of witnesses whose testimony would have purportedly supported the defense, the habeas court had no legitimate basis on which to evaluate the probable effect of that defense on the verdict. See e.g. *Nieves v. Comm'r of Correction*, 51 Conn. App. 615, 724 A.2d 808, *cert. denied*, 248 Conn. 905 (1999) (failure of habeas petitioner to offer testimony of the witnesses he contends his counsel should have interviewed is fatal to his claim; court is left with only speculation and conjecture as to what each witness would have said). "In a habeas corpus proceeding, the petitioner's burden that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities. . . ." *Crawford v. Comm'r of Correction*, 285 Conn. 585, 599, 940 A.2d 789 (2008). A review of the types of information on which the habeas court's determination rests makes clear that it had no "demonstrable realities" before it.

The habeas court placed great reliance on statements attributed to Tommy Skakel that appear either in police reports or the Sutton report. See MOD: 35-37. These statements fall into two categories: statements Tommy allegedly made to the police in 1975 concerning his activities the night of the murder; *see* App. Pt 2: A-1469-72, A-1476-78; and statements he purportedly made to Sutton investigators in the early 1990s during which he described a sexual encounter he had with the victim the night she was killed. *See* PE 282.

As to Tommy's purported statements to the police, petitioner failed to produce his brother Tommy or anyone to whom Tommy purportedly made these statements. Thus, he failed to produce any evidence indicating a witness would have testified consistently with these reports. Further, keeping in mind that Sherman was aware Tommy Skakel would invoke his Fifth Amendment privilege if called to the stand, petitioner failed to prove that Sherman had a witness available to him in 2002 through whom he could offer Tommy's hearsay statements. Petitioner also failed to establish that these purported statements, if offered in the form of hearsay, would have been admissible.

Petitioner similarly failed to establish that his defense team had any witnesses available in 2002 through whom they could have admitted Tommy's purported statement to the Sutton investigators. Again, petitioner failed to produce testimony from either Tommy or the Sutton investigators who allegedly took the statement.

Moreover, evidence that was before the habeas court suggests that securing testimony from the Sutton investigators may have been precluded by either the attorney client privilege or the work product doctrine. Sherman testified that the investigators resisted the state's attempt to secure their testimony by asserting such a privilege. In this proceeding, petitioner failed to prove that Sherman could have overcome that assertion and compelled their testimony. [20]

The habeas court speculated that if the defense were unable to admit Tommy's statements through the Sutton investigators, the defense could have presented evidence of

[20] Sherman testified that he believed petitioner's father, Rushton Skakel, Sr. asserted a privilege, as it was his attorney, Tom Sheridan, who hired Sutton Associates. HT 4/17: 135-40; 4/18: 8-11; 4/26: 87. In the midst of the Grand Jury, Attorney Margolis also asserted a privilege on behalf of his client, Thomas Skakel, as did Attorney Sherman on behalf of petitioner.

Tommy's alleged admission of a sexual encounter with Martha through Jason Throne (presumably by having Throne withdraw from the defense and testify as a witness). MOD:39.

Nevertheless, despite the habeas court's glib assumption that Jason Throne could have withdrawn as petitioner's counsel and testified during the 2002 trial, petitioner presented no evidence that Throne would have been able to testify to Tommy's purported statement. At the habeas proceeding, *Throne had no recollection of Tommy discussing his sexual liaison with Martha during their pre-trial meeting.* And, while Sherman acknowledged that during that meeting Tommy told them "basically" what was in the Sutton report, he qualified this by saying Tommy's discussion of the sexual contact "was not as specific as [in the Sutton report] only that there was some sexual conduct." HT 4/18: 152. Petitioner never asked him whether Tommy related the specific details regarding opening Martha's pants that the habeas court found so compelling. *See* MOD: at 39-40. Thus, petitioner failed to produce *any evidence* that a witness existed in 2002 who could testify to the detailed admission Tommy purportedly made to Sutton Associates.[21]

---

[21] The habeas court found significance in what it saw as a correspondence between Tommy's supposed admission to Sutton Associates, that during the episode he described as "mutual masturbation" he opened Martha' pants, slightly pushing them down. . . .[and] fondled her vagina without pushing her panties down." PE 282, and Dr. Henry Lee's description of the victim's pants as "unbuttoned" and her pants and panties pulled down to her knees when found. CT 5/8: 141-45. In addition, Dr. Lee testified that the presence of blood on the inside of the panties indicated they were pulled down prior to the victim receiving major injuries. *Id.*

From this, the habeas court argues that what started out as a consensual sexual encounter with Tommy turned very bad and led to Martha's brutal killing. Of course, there was no evidence whatsoever to support such rank speculation. Unlike with the petitioner, whose numerous admissions corroborated the state's evidence indicating he killed the victim in a jealous rage after she spurned his advances, the theory the habeas court insists the defense should have pursued was based on nothing other than conjecture. Assuming

Just as importantly, petitioner failed to prove that any alleged hearsay statements by Tommy, if available, would have been admissible in 2002. Although the habeas court assumed hearsay evidence of Tommy's purported statement would be admissible as a statement against penal interest; MOD: 38; that conclusion is doubtful at best. A statement is against penal interest if it "so far tend[s] to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement . . . ." Conn. Code of Evid. §8-6(4). There has been no suggestion that the sexual contact between Tommy and the victim was unlawful. In the absence of such a claim, Tommy's statement was not against his penal interest and hence, inadmissible on that basis. *Cf. State v. Snelgrove*, 288 Conn. 742, 769-70, 954 A.2d 165 (2008) (defendant's statement that victim "got what she deserved" not against penal interest because although it tended to show animus toward the victim, "it did not imply that [declarant] was responsible for the victim's death.").

---

the defense could have produced evidence of Tommy's alleged admission of sexual contact, it would, at best, suggest consensual sexual contact between two teenagers. It provides no explanation for how that consensual activity could have suddenly and inexplicably led to a fatal bludgeoning.

An additional flaw in the habeas court's supposition is that is relies on a misconstruction of Dr. Lee's testimony. Dr. Lee testified that the panties were down prior to the major blood loss that resulted in death. He did not state that they were down prior to the assault's inception. In fact, he testified that the presence of a small amount of blood in the driveway, and the presence of gravel on the victim's face, were consistent with the initial blow occurring there, the victim falling, and then somehow making it to the site of the major assault where she was killed. CT 5/8: 147-48.

If, consistent with Dr. Lee's findings, the victim was first struck in the driveway, then managed to flee her attacker approximately 40 feet to the place of the major assault, it is unlikely her pants were down prior to the first blow. See CT 6/3: 10 ("Looking at the evidence, the beating started again in the driveway. Her pants certainly weren't below her knees at that point because she couldn't have gotten five feet, let alone near 50 feet, to get over toward that bloody major assault scene. And, of course, it only took one good swing over at the bloody major assault scene to render her permanently beyond help.").

Petitioner similarly failed to produce any evidence to substantiate the rest of the information the habeas court viewed as contributing to the suggested defense. Without identifying its sources, the habeas court relied on statements in a 1975 police report attributed to a "Richard Cuyler" – identified in the report as a Brunswick School English teacher. This document was amongst the disclosure provided the defense prior to trial and marked *en masse* as a defense exhibit for identification during a post-trial hearing. See n. *supra*. The habeas court felt Cuyler's supposed statements impeached a statement attributed to Tommy in another report that he worked on a homework assignment related to log cabins the night of the murder. *See* MOD: 37. According to the "Cuyler report," six weeks after the murder, Cuyler told the police that, to the best of his knowledge, Tom did not turn in any assignment to him related to log cabin architecture. He did state, however, that students were free to write in their journals about topics of their choosing. He also reported that he did not have Tom Skakel's journal. *See* App. Pt 2: at A-1479 (report reproduced).

Again, despite the fact petitioner did not present testimony from this educator during the habeas hearing or anyone to whom this educator had allegedly made this statement, the court inexplicably concluded: "Thus, T. Skakel's claim that he had gone to his father's room to work on this non-existent homework assignment in order to explain his absence from his own room was proven to be false." MOD: 37. It is incomprehensible how the court could have made such a finding solely on the basis of inconclusive statements in a police report.[22]

[22] Further, even assuming these hearsay statements are reliable, they fail to prove Tommy was lying about the homework assignment. In a December 13, 1975 interview with the

The habeas court posited that defense counsel should have also relied on "evidence" Tommy was infatuated with Moxley. Of course, this evidence was before the jury in 2002, as the infatuation of both Skakel youths with Martha and the jealousy this engendered supplied proof of petitioner's motive for killing her. Nevertheless, no evidence was produced by petitioner to substantiate Tommy's supposed "increased sexual aggression" which the habeas court intuited from the victim's diary and various discovery documents. *See* MOD: 42-44.

Some of the court's speculation on this matter stems from a April 3, 1976 police report (which was part of the state's pretrial disclosure and marked with numerous other papers *en masse* as a defense exhibit for identification in 2002, see *supra* n.14), which relates certain statements reportedly made by Martha Moxley and relayed to the police by her friend, Allison Moore, during a police interview. MOD: 43-44; *see also* App. Pt 2: A-1490. The habeas court suggests this was "evidence" available to Sherman despite the fact petitioner never presented Moore at the habeas trial. Petitioner thus failed to establish that Moore was available in 2002, and that if called as a witness her testimony would have been consistent with the statements attributed to her. Thus, the habeas court erred in assigning any credence to this information.

---

police, Tommy Skakel purportedly stated that he "was doing a paper for History for extra credits and he believes that he went to the guest room, across the hall on the third floor to get a book. He related that he needed the book, which was on Abraham Lincoln and the Log Cabin." *See* App. Pt 2: A-1478. Inexplicably, the Greenwich Police attempted to check on these assertions by speaking with Richard Cuyler, who is identified as a teacher in the *English* (not History) Department of the Brunswick School. *See* App. Pt 2: A-1479. Thus, not only could Mr. Cuyler not specifically refute Tommy's purported statement because he acknowledged that students were free to write in their journals on topics of their choosing, there is no indication that as an *English* teacher he would necessarily be aware of a student's extra credit work in a *History* class.

Further, despite the obvious double hearsay nature of Moxley's supposed statement to Moore and Moore's alleged statement to the police, the habeas court suggests that Sherman could have sought to introduce this information through Detective James Lunney, the author of the report, or Chief Thomas Keegan, who co- signed the report. Although both men testified during the 2002 trial, petitioner did not present either as a witness at the habeas hearing.[23] Further, neither the habeas court nor the petitioner suggested any means for admitting Moxley's purported statement through either witness.

The habeas court also relied on what it characterized as a "profile report' of the alleged killer prepared by Dr. Joseph Jachimczyk in 1976. Again, this came, not from any evidence admitted during the 2002 trial or the habeas trial, but from a letter included among the discovery given to Sherman by the state and marked as a defense exhibit for identification in 2002; *see* App. Pt 2: A-1480. The habeas court found Jachimczyk's opinion in his February 3, 1976 letter to the Greenwich police about the likely attributes of Moxley's killer, including that he was known to her, had a probable unstable personality, was "homosexually inclined," and "either panicked following what may have started out as a prank, or became so angry upon being rejected that he engaged in an 'overkill'" to be "additional insights relevant to a third-party culpability against [sic] T. Skakel." MOD: 45. The court qualified its reliance on this letter, however, by stating "the court is not suggesting that Attorney Sherman could have introduced Dr. Jachimczyk's suppositions into evidence; nor is the court excluding that possibility. Rather, the court is impressed that these insights were available to Attorney Sherman before trial. If read, they reasonably could have informed his choice of third-party culprits." MOD: 45 n. 30.

[23] Detective James Lunney died on November 21, 2011.

As argued throughout, it was not sufficient for the habeas court to speculate on what evidence might have been developed. Petitioner's burden in this proceeding was to introduce the evidence purportedly establishing a third-party claim so its relevance, credibility, and materiality could be assessed. In addition, petitioner should have been required to prove that such evidence was available to counsel in 2002, and that it could have been successfully admitted. Nothing was offered below to satisfy of any aspect of this burden.[24]

The habeas court further opined that Sherman had "substantial background evidence available to him of T. Skakel's mental and emotional instability and his penchant for violent outbursts." MOD: 46. The court's source for this assertion, once again, is not witnesses produced by the petitioner at the habeas trial or by either side during the 2002 criminal trial, but allegations in the Sutton Report or in the discovery material the court has mischaracterized as the "Greenwich police investigative report." *See* n.14, *supra*. One police report apparently attributes statements to Franz Josef Wittine, a "gardener" employed by the Skakels at the time of the murder. *See* App. Pt 2: A-1483-85. Again, petitioner produced neither Wittine nor anyone to whom he allegedly made the statements attributed to him.[25] In addition, the court likewise relied on a police report attributing statements to another Skakel employee, James Marr. *See* App. Pt 2: A-1486. Again, petitioner produced no evidence from Marr or regarding his availability as a witness in

[24] Even if defense counsel could have offered Jachimczk's opinion into evidence, a reasonable attorney would have good reasons to refrain from doing so. This is because Jachimczyk's insights better describe Michael Skakel than his brother. Further, they dovetail nicely with the petitioner's confession to Gregory Coleman: that he killed Moxley after she rejected his advances. Thus, an astute defense counsel would not have offered this evidence even if admissible.

[25] Franz Wittine was dead by the time of the trial in 2002.

2002.

The habeas court further suggests that Sherman could have asked Thomas Keegan, a former Greenwich police chief, about certain assertions regarding Tom's alleged mental health issues contained in an arrest warrant affidavit prepared by the Greenwich police in 1976. MOD:47. The court does not explain how this information, which would most likely be excluded as inadmissible character or propensity evidence; *see* Conn. Code of Evid. §§ 4-4, 4-5; and is clearly hearsay, would have been admissible through Chief Keegan. Further, petitioner presented no evidence defense counsel would have been able to obtain a waiver from Tommy Skakel in 2002 in order to present expert testimony on this issue.

The habeas court also suggested that Sherman could have somehow developed admissible evidence from a police report, referring to an interview with Skakel neighbor and friend Mildred "Cissy" Ix, in which she reports a conversation she allegedly had with "a Mr. Roosevelt of the Whitby School" in which Roosevelt allegedly suggested to Ix that Rushton Skakel, Sr. should not let the police see Tommy Skakel's school file because it contains negative information. MOD: 47-48; *see* App. Pt 2: A-1487. The same report contains statements attributed to Ix in which she purportedly claims to have seen a picture damaged by Tommy Skakel in a sexually suggestive way. *Id.* Again, no evidence from Mildred Ix or "Mr. Roosevelt" was produced by petitioner in the habeas proceeding.

In order to carry his burden of proof, petitioner was required to produce the witnesses and evidence he contends counsel should have introduced, and establish that such evidence was admissible and available to counsel in 2002. His failure to do so deprived the habeas court of any legitimate basis on which to assess the relevance, credibility, and materiality of the evidence. Because petitioner produced none of the so-

called "evidence" the habeas court assumed could form the basis of a third-party defense, it is impossible to assess its likely impact on the verdict. It is not enough to point to statements attributed to persons in reports and assume that 1) those persons would have been available to testify in 2002 and 2) whatever information they had would have taken the form of admissible evidence. It is also preposterous to assume live testimony, subject to cross-examination, would unfailingly replicate second-hand hearsay reports. As an experienced criminal defense attorney such as Sherman surely knows, witnesses often contradict statements attributed to them in reports, or at least offer qualifications or context that cast their purported prior statements in a different light. And, of course, cross examination may reveal inconsistencies, uncertainties, or biases not apparent from a mere reported statement. Thus, the habeas court's assumption that each purported witness, if produced in 2002, would have testified in unfailing conformity with the statements attributed to them is foolhardy.

Having failed to produce the witnesses who purportedly could have aided in establishing a third-party defense, petitioner failed to prove prejudice. *Nieves*, 51 Conn. App. 615 (failure of habeas petitioner to offer the testimony of the witnesses he contends his counsel should have interviewed is fatal to his claim; court is left with only speculation and conjecture as to what each witness would have said); *Ostolaza*, 26 Conn. App. at 766-67 (petitioner's failure to show that claimed missing witnesses were available or that their testimony would have been admissible is fatal to his claim); *Alvarez v. Comm'r of Correction*, 79 Conn. App. 847, 850, 832 A.2d 102, *cert. denied*, 266 Conn. 933 (2003) (petitioner who failed to establish that contested evidence was admissible at trial failed to show he was prejudiced by counsel's failure to offer that evidence); *Thomas v. Comm'r of*

Correction, 141 Conn. App. 465, 472, 62 A.3d 534, *cert. denied*, 308 Conn. 939, 66 A.3d 881 (2013) (petitioner's failure to call witness at habeas trial makes it impossible to discern whether he would have testified in accord with his statement to the police); *Henry v. Comm'r of Correction*, 60 Conn. App. 313, 321, 759 A.2d 118 (2000) (counsel's failure to interview and to call witnesses not ineffective where petitioner failed to present witness at habeas trial); *Hopkins v. Comm'r of Correction*, 95 Conn. App. 670, 674 *cert. denied*, 279 Conn. 911 (2006) (counsel not proved to be ineffective for failing to call witness in absence of any evidence that witness was available to testify). The habeas court erred in concluding otherwise.

III. THE HABEAS COURT ERRED IN FINDING DEFICIENT PERFORMANCE AND PREJUDICE WITH REGARD TO THE TESTIMONY OF DENIS OSSORIO

The habeas court found petitioner's defense team constitutionally ineffective for not producing Denis Ossorio as an additional alibi witness during the 2002 criminal trial. The court came to this conclusion despite crediting the testimony of Sherman and Throne that neither petitioner nor his family members supplied the name Denis Ossorio; no one indicated there was a nonfamily member watching *Monty Python* with them at Terrien's house that night; and no one stated that cousin Georgeann Dowdles' boyfriend could verify the presence of Michael Skakel at Terrien's the night of the murder, HT 4/16: 232-234; HT 4/23: 11-13; 4/26: 115-11. Under these circumstances, the habeas court erred in finding Sherman ineffective.

The court also erred in finding prejudice. The evidence before the jury in 2002, as well as the state's argument and the trial court's charge, all rendered it unnecessary for the jury to determine whether or not petitioner went to the Terrien residence the night of the murder. Moreover, in light of the multitude of inculpatory admissions by the petitioner, the

abundant evidence of his motive, and the substantial evidence of petitioner's consciousness of guilt, petitioner failed to establish a reasonable probability that an additional alibi witness, especially one whose credibility was open to challenge, would have changed the verdict The habeas court erred in finding otherwise.

A. Facts

1. The 2002 Criminal Trial

As discussed in the main fact section *supra*, petitioner's defense team presented the testimony of petitioner's brothers Rushton and John, and his cousins Jimmy (Terrien) Dowdle[26] and Georgeann Dowdle as alibi witnesses. None of these witnesses testified to the presence of Ossorio at the Terrien home the night of the murder. In fact, Rushton, Jr. directly contradicted Ossorio's habeas testimony in which he asserted that he watched *Monty Python* with petitioner. When Rushton, Jr. was asked who watched *Monty Python* with him at the Terrien home that night, his criminal trial testimony was: "Jimmy Dowdle, my brother John and my brother Michael." CT 5/22: 64.

In addition to presenting these alibi witnesses, Sherman closely questioned Helen Ix in an unsuccessful attempt to elicit a definitive statement affirming petitioner's presence in the car when it left for Terrien's. *See* CT 5/9: 75-86, 93-95, 102-113, 115-16. Sherman also vigorously examined Andrea Shakespeare Renna in an attempt to shake her assertion that petitioner was at the house after the car left, and even called her back during the defense case for further questioning on this point. CT 5/9: 133-43, 147-49, 151; 5/14: 76-109, 114-

[26] After being adopted by his stepfather, George Terrien, and using his stepfather's last name in his youth, Jimmy Dowdle had reverted to his birth name by the time of his testimony. Throughout the criminal trial, most witnesses referred to him as "Jimmy Terrien," although he testified under the name James Dowdle. *See* CT 5/22: 7-8.

117, 118. In addition, Sherman questioned Julie Skakel, who was called by the state, and sought to have her explain away her exclamation "Michael come back here" made in response to a figure darting across the lawn after the car left for Terrien's. CT 5/29: 60-64, 82-83. Further, Sherman presented expert testimony from Dr. Joseph Jachimczyk in an attempt to convince the jury Moxley was killed during the 9:30 to 11 p.m. time period covered by petitioner's partial alibi. CT 5/28: 120-40, 146-51.

The state vigorously cross-examined Dr. Jachimczyk, and argued to the jury that his opinion was based largely on Moxley's purported curfew and on the fact that dogs were barking during this time period, rather than medical evidence. *See* CT 5/28: 132-146; CT 6/3: 96. The state's medical expert, Dr. H. Wayne Carver, testified that the time of death could not be determined other than to say it occurred between 9:30 p.m. and 5:30 a.m. Dr. Carver also opined that the evidence was consistent with a time of death between 9:30 p.m. and 1 a.m. CT 5/8: 108, 127.

During the criminal trial, the jury was expressly told, by the state in closing argument, and by the court in its instructions, that it did not have to determine the time of death other than to find it occurred during the 9:30 p.m. to 5:30 a.m. time period alleged in the state's information. CT 6/3: 92-95, 170, 178; *see* App. Pt 2: A-1317 (closing arguments reproduced). The court explained to the jury that time is not an essential element of the crime of murder and "[t]he state is not required to narrow the time of the commission of the offense more than the available evidence warrants." CT 6/3: 170.

As to the partial alibi, the state argued that petitioner had undermined his alibi by statements he made to Hoffman and others indicating he went looking for Martha *after* he

returned from Terrien's. CT 6/3: 92.[27] Due to the uncertain time of death and evidence indicating petitioner may have murdered Moxley *after* returning from Terrien's, the state told the jury it did not have to determine whether petitioner took the fateful trip to Terrien's. As the state explained:

> As regards time, you must be unanimous that the crime occurred during the time set in the information, 9:30 to 5:30. And that's all. As long as you are satisfied beyond a reasonable doubt that the defendant murdered Martha Moxley within that time frame, you must convict For that matter, if half of you were to buy into Zock the dog and figured the crime happened early and not accept the alibi and the other half of you were to accept the alibi and conclude the defendant as he sort of describes to Richard Hoffman came by later on at night and did it, nevertheless if you all agree beyond a reasonable doubt that the defendant murdered Martha Moxley, you must convict. For that matter, all 12 of you, sixteen full count, could each come up with his own personal time. As long as everybody's time came up between 9:30 and 5:30 and you are convinced beyond a reasonable doubt that Michael Skakel murdered Martha Moxley, you must convict.

CT 6/3: 94; *see also* CT 6/3: 20 ("you can accept the alibi at face value and still convict the defendant[.]"); CT 6/3: 8 ("The trip to Terrien's next took place. Exactly who went there is one of our controversies in this trial. But, as you will see, it is not one that the state necessarily has to resove in order for you to convict."); *see also* CT 6/3: 44 (defense counsel acknowledges state's "alternative theory that Michael came back after 11 and then went out and did this horrible thing[.]").

The court's charge similarly informed the jury that it could accept the alibi and yet find the defendant guilty:

> *You should also bear in mind the state's claim that even if you find the*

[27] The state argued: "The concept of exact time for a murder is obviously of great concern for the defense, as it should be. Because from 1975 until 1992 or thereabouts, Michael Skakel had a nice neat 9:30, 10:00 type alibi. But as you will see with Andy Pugh and ghost writer Richard Hoffman, the defendant has dug himself a hole that throws his alibi somewhat to the wind." CT 6/3: 92; *see also* CT 6/3: 92-97.

> *defendant was where his testimony (sic) and that of his witnesses indicates, he could still have reached the scene of the crime in time to have committed it*, in this regard you may consider all of the evidence which you believe bears on the time of Martha Moxley's death. That may include the testimony of Dr. Carver and Dr. Jachimczyk and any other evidence that concerns this issue using the standards for finding facts and drawing inferences I have given you previously.

CT 6/3: 178. (Emphasis added.)

2. The Habeas Trial

During the habeas hearing, the petitioner produced the testimony of Denis Ossorio who claimed that he was at the Terrien's (Dowdle) residence on October 30, 1975 visiting Georgeann Dowdle. HT 4/18: 74. He further testified that he remembers Michael, John and "Rush" Skakel being there. *Id.*: 75. He stated that while Georgeann was putting her daughter to bed, he watched *Monty Python* and talked with "the boys." He recalled that *Monty Python* came on television at 10 p.m. and, although he was "in and out," to the best of his recollection, "we watched the whole show." Id.: 76. He claimed recalling that he left the residence around midnight, but could not recall if the Skakels left before him. *Id.*: 76.

On cross examination, Ossorio admitted that he lived in the area during the 2002 criminal trial. He also admitted following the trial through the media, although he claimed he did not realize the role played by alibi evidence. He further admitted that he never contacted either law enforcement or petitioner's defense team to share the information contained in his testimony. *Id.*: 76, 79.

Sherman and Throne both testified that they never heard the name "Denis Ossorio" until shortly before the habeas trial. Sherman asserted that in preparing for the criminal trial, he asked the Skakel family and their cousins if there was anyone else who could

substantiate the alibi. HT 4/16: 233-34. No one mentioned that a nonfamily member was present while they watched *Monty Python*; no one mentioned having seen Georgeann's boyfriend or of even being aware he was at the Terrien house the night of the murder. *Id.*

In addition, Sherman and Throne both testified that they read the Grand Jury transcripts prior to trial. HT 4/17: 68-69; 4/23: 36. In one section of her Grand Jury testimony, which was admitted during the criminal trial as substantive evidence pursuant to *State v. Whelan*, 200 Conn. 743, 513 A.2d 86 (1986), Georgeann Dowdle states that she was in "her mother's library – which is off the living room and I was in there with my beau at the time and I didn't really venture out." Georgeann Dowdle further testified that she did not see her Skakel cousins that night, although she heard their voices. Nevertheless, she could not be certain which of her Skakel cousins were present. CT 5/23: 64-65.

After reviewing the above testimony, Sherman stated Georgeann never gave him any reason to believe her "beau" saw the "Skakel boys" that night. HT 4/18: 187. Throne agreed and, after refreshing his recollection by re-reading Georgeann Dowdle's Grand Jury testimony, stated that she never gave any indication her "beau" saw or heard the "Skakel boys" that evening or that the "beau" would know who they were if he had. HT 4/23: 49-50.

3. The Habeas Court's Decision

The habeas court elected to credit the testimony of Denis Ossorio, finding him a "disinterested and credible witness with a clear recollection of seeing the petitioner at the Terrien home on the evening in question." MOD: 53.

The court then found the defense team ineffective in failing to discover Ossorio and produce his testimony. The court reasoned that although a lawyer will "generally" not be ineffective in failing to locate a witness not identified by his client, Sherman was ineffective

"notwithstanding the failure of the petitioner to bring this person to Attorney Sherman's attention."[28] MOD: 55-56. The court found that Sherman was "on notice from [Georgeann] Dowdle's grand jury testimony that she was in the company of another person at the Terrien home, and she had identified this person as her "beau." MOD: 55.

Further, while recognizing that the time of death was a disputed issue at trial, the court found prejudice from the failure to produce Ossorio's testimony, stating:

> Given the weighty evidence that the victim was murdered in the time range of 9:30 to 10 p.m. on October 30, 1975, the importance of the petitioner's alibi defense to the fact finders cannot be discounted. And, given the importance of petitioner's alibi defense, its persuasiveness would have been greatly enhanced by the testimony of Ossorio . . .

MOD: 60.

B. The Habeas Court Erred In Finding The Defense Team's Performance Below The Standard Of Reasonable Competence

In light of the fact none of the persons who testified they were at Terriens that night ever indicated they had seen Georgeann Dowdle's "beau" or that he had actually watched television with them, and the fact that Georgeann Dowdle admitted she never saw her Skakel cousins that night and, while hearing their voices, could not identify the voice of any particular Skakel cousin, there is no basis on which to find the defense team ineffective for not discovering the identity of the "beau." Under these circumstances, Georgeann's cryptic reference in her Grand Jury testimony to being in her mother's library with her beau did not

[28] Although petitioner testified in this proceeding that he gave Attorney Sherman two names, Denis Ossorio and Ian Kean, as boyfriends of Georgeann's who could verify his presence at the Terrien residence; HT 4/30:109; the habeas court appropriately rejected his self-serving testimony. It is simply preposterous to suggest that both Sherman and Throne, who dedicated years of their professional lives to the preparation of this case and who continued to exhibit extraordinary loyalty to their former client throughout the habeas proceeding, would ignore such information, had it been provided by petitioner.

give counsel any reason to believe the "beau" ever saw Michael Skakel, or that he would know who he was if he had. Importantly, Georgeann stated she never ventured out, and, as indicated, stated she did not see her cousins. The bottom line of her testimony was that she could not verify Michael Skakel's presence at the house that night, and she never volunteered any information indicating her beau could. *See* CT 5/23: 57-65. "An ineffective assistance of counsel claim cannot rest upon counsel's alleged failure to engage in a scavenger hunt for potentially exculpatory information with no detailed instruction on what this information may be or where it might be found." *United States v. Farr*, 297 F.3d 651, 658 (7th Cir.2002).[29]

"It is well settled that '[d]efense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of the witness and that the attorney, without a reasonable investigation and without adequate explanation, failed to call the witness at trial.'" *Toccaline v. Comm'r of Correction*, 80 Conn. App. 792, 817, 837

[29] It is worth noting that petitioner's present counsel did not produce Ossorio in the petition for new trial proceeding in 2007. It is reasonable to assume that present counsel, whose competence must be presumed, would have produced Ossorio had Georgeann's passing reference to her "beau" prompted him to investigate. Had both the identity and value of the "beau" reference in Georgeann's Grand Jury testimony been as obvious to any and all competent counsel as the habeas court surmised, then surely present habeas counsel would have found a way to either 1) bring this allegedly compelling evidence to the attention of the court hearing the petition for new trial and/or 2) immediately bring a habeas petition on this basis rather than wait the outcome of the petition for new trial proceeding. In fact, if counsel was uncertain whether Ossorio's testimony would qualify as newly-discovered evidence, he could have added a claim asserting that the failure to produce the "beau" constituted ineffective assistance. See *State v. Leecan*, 198 Conn. 517, 541, 504 A.2d 480 (1986) (claim of ineffective assistance may be brought in a petition for new trial proceeding); *State v. Gonzalez*, 205 Conn. 673, 684, 535 A.2d 345 (1987) (same). The fact that experienced habeas counsel did not assert any claim related to Ossorio in the 2007 proceeding, despite a pathway for doing so, seriously undermines the habeas court's conclusions as to how any and all competent attorneys would have handled this vague, passing reference in the Grand Jury transcript.

A.2d 849, 864 (2004); *see also Farr,* 297 F.3d at 658 (defense counsel is not ineffective in failing to track down and interview witnesses where his client never supplied him with the alleged witnesses' names, addresses and the specific information those witnesses might have); *Battle v. Delo*, 19 F.3d 1547, 1555 (8th Cir. 1994) *opinion adhered to as modified on reconsideration,* 64 F.3d 347 (8th Cir. 1995) (rejecting capital defendant's argument that counsel was ineffective in not tracking down potential witness who was mentioned twice in police reports; once by her first name and once by an incorrect last name: "A first name, or an incorrect last name, in a police report can hardly be the basis for an ineffective assistance claim when [the defendant] himself did nothing to assist counsel in locating those who could have helped his defense."), accord *Harris v. Bowersox*, 184 F.3d 744, 756-57 (8th Cir. 1999).

This Court's recent decision, *Gaines v. Comm'r of Correction*, 306 Conn. 664, 51 A.3d 948 (2012) (defense counsel ineffective in not investigating alibi witness) is not to the contrary. In *Gaines*, counsel acknowledged that his client had given him the name of the potential witness as a next door neighbor, one of only two persons he knew in the Bridgeport area, and the sister of a state's witness. In addition, petitioner denied being present at the shooting but told his attorney he could not account for his whereabouts as he was not arrested until five months after the shooting. Under these circumstances, this Court held it was incumbent on the attorney to at least interview the neighbor. Here, by contrast, petitioner, his siblings, and his cousins supplied the police with the alibi shortly after the murder, without ever mentioning Ossorio, and testified at the Grand Jury without mentioning Ossorio. Giving a detailed alibi and supplying the names of those who were present certainly suggests that all the persons who can verify the alibi have been revealed.

Counsel had no reason to go looking for other alibi witnesses when those who claimed to be there never gave any indication anyone else could verify Michael Skakel's presence at Terrien's that evening. In fact, by failing to mention the "beau" even when Sherman asked if there was anyone else who could verify the alibi, petitioner, his cousins, and his brothers essentially told Sherman there was no need to look into the "beau."

Against this backdrop, the habeas court's decision to credit Denis Ossorio's testimony is baffling. It is simply implausible that, if he were there as he claimed, no one would have mentioned seeing him. After all, Ossorio claimed that he watched television and spoke with "the boys." HT. 4/18: 75. Thus, if he is to be credited, he not only saw them, but they certainly saw him. Yet, inexplicably, Jimmy Terrien, Rushton, Jr., John, and Michael Skakel all failed to mention his presence, even when asked if there was anyone else who could support the alibi.

By denying there was anyone else who could verify petitioner's presence at the house that night, petitioner and his family discouraged further investigation. The habeas court's decision to find Sherman ineffective despite petitioner's role in dissuading further investigation runs contrary to *Strickland's* mandate: "[W]hen 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." *Strickland*, 466 U.S. at 691; *accord Williams*, 142 Conn. App. at 753-75.[30]

---

[30] Further, the Terrien residence was not a "three bedroom bungalow" where everyone home on a given night could be expected to bump into anyone else who was present. Testimony from the criminal trial described the Terrien residence, "Sursum Corda", as a "large estate." CT 5/22:10. Jimmy Dowdle (Terrien) acknowledged that it could be considered a "mansion." *Id.* The petitioner, in his tape recorded statement to Hoffman, referred to Sursum Corda as a "castle type place" where "we never got bothered" because

C. The Habeas Court Erred In Finding Prejudice

In order to prevail under *Strickland*, petitioner was required to prove "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' . . . It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceedings.'" *Harrington v. Richter*, 131 S.Ct. at 787 (citation omitted). A reasonable application of *Strickland's* standard to the facts of this case reveals that the habeas court erred in concluding that petitioner's proof met this standard. As mentioned previously, the defense did present petitioner's brothers and cousins in support of the partial alibi. Thus, this is not a situation where the absence of a particular witness deprived a petitioner of a defense. In fact, in light of the strong alibi testimony Sherman presented and the court's charge; *see* CT 6/3: 178; the jury may well

---

Jimmy Dowdle's (Terrien) stepfather was always in New York and his mother "was always drunk in her wing of the house." SE 108, frame #26. App. Pt 2: A-1142. Petitioner also told Hoffman that Sursum Corda was a place where "you could do anything. Your were just left alone." *Id.*, frame #27 Georgeann, in her Grand Jury testimony, stated she was in "her mother's library", which was off the living room. In his testimony in 2002, her brother, Jimmy, described Georgeann as being "in another section of the house." CT 5/22: 16.

Therefore, the important question for counsel, and the one he asked his client, was whether anyone could verify the alibi. Finding out who was present at the estate that night would not answer that question. In addition to Georgeann, who was home but did not see the petitioner, other members of the family may have been home as well, such as Georgeann's siblings, Ann, Alexandra, John, or DesNeiges, or her mother, who was described as a recluse who seldom left the house. *See* CT 5/28: 44. In fact, in a November 5, 1975 police interview, DesNeiges Terrien purportedly stated that she was "home alone in the house and went to bed sometime around 10 p.m. and didn't see her brother return home but she did hear her brother and the Skakel brothers talking." App. Pt 2: A-1473. None of the alibi witnesses ever mentioned seeing Mrs. Terrien, her husband or her other children. By naming only certain persons as having seen them that night, the alibi witnesses essentially denied anyone else had. Under these circumstances then, it was not unreasonable for counsel to assume the "beau," like others likely home that night, never saw the petitioner.

have credited petitioner's alibi witnesses, but found that petitioner murdered Moxley *after* he returned from Terrien's. Or, as the state argued in summation; *see* CT 6/3: 92-95; the jurors may have come to various conclusions about the alibi, or simply decided to draw no conclusions about it at all, and still found petitioner guilty beyond a reasonable doubt. This being so, the habeas court erred in finding petitioner carried his burden of proving a reasonable probability an additional alibi witness would have changed the outcome.

In rejecting this argument, the habeas court opines that the "weightier" evidence supports finding the time of death to be between 9:30-10:00, and even seems to assume that the state shares this view. *See* MOD at 56-57, 60. This assumption is erroneous. By presenting evidence and argument challenging the alibi, the state did not declare its belief as to when Moxley was killed. It was simply trying to give the jury as full a picture of the events on October 30, 1975 as the available evidence offered. A full review of the state's summation can leave no doubt that the state was not taking a position as to the time of death. The state explicitly told the jury it could credit the alibi and still convict. CT 6/3: 8, 20, 92-97. Moreover, the "weightier" evidence may well support a later time frame. After all, it may be argued that at 9:30 or 10 o'clock on mischief night, in a neighborhood full of teens, there were simply too many persons still out and about for the murder to have occurred, unnoticed, during this time period. And, as the state argued at trial, petitioner "threw his alibi to the wind" in his statements to Hoffman and others which point to a later time period.[31]

Thus, contrary to the habeas court's characterization of the state's position; MOD:

[31] It is interesting to note that the evidence newly-unearthed in this habeas proceeding -- Tommy's statement to Throne regarding a second rendezvous with Martha and his assertion that the time line was off -- is also supportive of a later time of death.

56-57; petitioner failed to prove prejudice not simply because the charging document listed a ten hour time period during which Moxley may have been killed, but because there was ample evidence from which the jury may have concluded that petitioner killed Moxley after returning from Terrien's, or concluded that it need not resolve the evidentiary disputes surrounding the alibi and time of death. Under such circumstance, petitioner failed to prove prejudice. *Strickland* prejudice is not proven by the mere possibility the jury may have harbored a reasonable doubt about guilt; *Strickland* requires that the likelihood of a different outcome be substantial, not just conceivable. *Harrington v. Richter,* 131 S.Ct. at 791-92.

The habeas court also failed to consider the many ways in which Ossorio's testimony was subject to impeachment. Although the habeas court chose to credit his testimony, it is far from certain the jury would find it convincing. First of all, the jury may not have viewed him as a "disinterested" witness. Rather, as a former boyfriend of Georgeann's and a neighbor of the Terrien/Dowdle family; HT. 4/18: 74; it may have considered him a close associate of the Skakel family. Moreover, the jury may well have looked askance at his testimony since none of the alibi witnesses mention him in their 1975 police statements or, with the exception of Georgeann's cryptic "beau," in their Grand Jury testimony.

The jury might also find it suspicious that although Ossorio apparently told no one of his ability to corroborate the alibi prior to 2013, he somehow recalled specific details of the evening. In his habeas testimony, Ossorio claimed that, more than 38 years later, he could recall which of the Skakel boys were there that night (he correctly did not name Tommy, David and Steven), what television show they watched and what time it started, and the approximate time he left – all without the assistance of any prior statements, testimony, or

reports to refresh his recollection. HT 4/18: 74-76.

Ossorio's testimony is also open to suspicion in that he never contacted the police in 1975 and never came forward during the 2002 criminal trial, despite living in the area and, by his own admission, following the trial. *Id.*: 78-79. Although he claimed he did not realize the importance of petitioner's alibi, this too opens his testimony to question. If he did not realize seeing the petitioner at Terrien's on October 30, 1975 had any particular significance, one wonders how he could retain such a clear recollection of his presence that night. For this reason, presenting Ossorio may have actually undermined rather than bolstered the alibi: a "brand new" alibi witness, whose credibility could be challenged on many fronts, "popping up" in time for trial may have tainted all the alibi testimony with the foul odor of contrivance.

Further, Ossorio's testimony is at odds with some of the alibi testimony presented at the criminal trial. In fact, it stands in stark contrast to the criminal trial testimony of Rushton Skakel, Jr. As noted earlier, when Sherman asked him who watched *Monty Python* with him at Terrien's that night, he testified "Jimmy Dowdle, my brother John and my brother Michael." CT 5/22: 64. Thus, Rushton, Jr.'s testimony directly contradicts Ossorio's assertion that he watched *Monty Python* with the Skakels that night. This glaring contradiction between Rushton's testimony and Ossorio's would have presented a significant problem for the defense, and may well have weakened the alibi rather than bolster it.

Further, during the criminal trial, Jimmy Dowdle (Terrien) stated that while watching *Monty Python*, the group went back and forth between his bedroom and his brother Johnny's bedroom which were on "either side of the house." CT 5/22: 21. Likewise the

petitioner, in his statement to Hoffman, explained that they smoked pot and "half the crew watched . . . *Monty Python* in Jimmy's room and then he went into Johnny Dowdle's room . . . . the biggest single person's bedroom you'd ever seen." *See* App. Pt. 2: A-1142, Frame 54-55. He, too, described "Johnny Dowdle's room" as "on the other side." *Id.* Frame# 52. Significantly, none of the witnesses from the criminal trial indicated they watched *Monty Python* in the living room off the library where the "beau" was located, or any proximate place from which the "beau" might easily join them. Nor did any of the alibi witnesses or the petitioner in his statement to Hoffman claim that Jimmy's brother, Johnny, was with them that night. Ossorio, by contrast, claimed he was there. HT 4/18: 75. Again, if Ossorio's testimony were presented to the jury, the discrepancies between his testimony and that of the other alibi witnesses could potentially undermine the entire alibi. HT 4/18: 75.[32]

In addition to failing to take into account the myriad ways Ossorio's testimony would be open to impeachment, the habeas court erred in its prejudice determination by not considering the overall strength of the state's case and the relative unimportance of the partial alibi. As argued *supra*, whether the petitioner was guilty did not hinge on a determination of whether he went to Terrien's. Petitioner had, at best, a partial alibi. Therefore, the jury may well have found that he went to Terrien's that night as he claimed, but then, as he also claimed, went looking for Martha upon his return. Because the jury was told by the state in its argument, and by the court in its instructions, that it could accept the alibi and yet find petitioner guilty beyond a reasonable doubt, the petitioner has fallen far short of demonstrating a reasonable probability of a different verdict simply on the basis of

[32] Because of the significant problems Ossorio's testimony brought with it, a reasonably competent defense attorney may well have declined to call him as a witness.

one more alibi witness.

The habeas court's finding of prejudice is based on its assumption that the jury must have rejected the alibi in order to find petitioner guilty, and its conclusion that one additional alibi witness would have convinced the jury to accept the alibi. In this regard, the habeas court notes that during deliberation the jury asked to re-hear the testimony of three witnesses who offered evidence relevant to the alibi – Helen Ix, Andrea Shakespeare Renna, and Julie Skakel. MOD:59. It is significant, however, that the jury also asked to re-hear the testimony of Andrew Pugh, John Higgins, and portions of Dr. Henry Lee's testimony, three witnesses who had nothing to offer with regard to the alibi.[33] CT 6/5: 2. Therefore, the most that can be said is that while the jury may have been interested in rehearing alibi-related testimony, it was interested in rehearing other testimony as well. It is impossible to say more without engaging in speculation.

It is also impossible, without engaging in speculation, to know whether after re-hearing this testimony, the jury decided to reject the alibi, accept the alibi, or whether, as the state suggested in argument, the jury decided to base its verdict on the overwhelming evidence of petitioner's guilt and thus had no need to untangle the disputed alibi testimony. In light of the court's charge and the state's argument in summation, all of these paths were open to the jury and all are consistent with its finding of guilt.

The habeas court's reliance on the length of deliberation as somehow supportive of its finding of prejudice is also misplaced. MOD: 59. First of all, in light of the fact the jury heard almost four weeks of testimony, its deliberations were not lengthy. Further, the habeas court's estimate of four days of deliberation is somewhat inaccurate. MOD: 59. In

[33] The jury later withdrew its request to re-hear Higgin's testimony. CT 6/6:3.

actuality, while the record indicates the jury began deliberation on June 4, and deliberated throughout that day, most of the following day, June 5, was taken up with requested "read back" of testimony. *See* CT 6/4: 1-11; 6/5: 1-14. Similarly, on June 6 the jury heard extensive 'read backs" and a lengthy reinstruction by the court which consumed most of the day. *See* CT 6/6: 3-31. The jury returned its verdict on the morning of June 7. CT 6/7: 2-4. Therefore, the actual time the jury spent deliberating is significantly less than three full days, and probably less than two.

Moreover, part of the court's reinstruction on June 6th included the admonition to the jury that it could accept the alibi and still find the petitioner guilty. CT 6/6: 18, 26. The next morning, June 7, the jury returned its verdict. Therefore, if one were to engage in speculation, one could speculate that upon hearing these instructions a second time, the jury set all the alibi testimony aside and based its decision on petitioner's confessions, admissions, motive, and consciousness of guilt.

The habeas court also erred in failing to consider Ossorio's proposed testimony in light of all the evidence produced at the criminal trial. As recounted in the initial fact statement, pp. 4-21 *supra*, the state had a wealth of evidence establishing petitioner's guilt. Petitioner's access to the murder weapon was, of course, uncontested. That in itself provided a significant link to petitioner. Moreover, this case, unlike most murder cases, contained evidence of three explicit confessions of guilt. Seldom does the state have the benefit of multiple confessions. Rarer still are occasions in which the state has a recorded statement of the accused placing himself at the crime scene on the night of the murder, looking for the victim.

In addition, the multitude of other incriminatory statements petitioner made over the

years, such as his statement to his father that he might have killed Martha, and his statement to Alice Dunn that he might have done it, but if he did he was not in his normal state, and his statement to Zicarelli that he did something awful and he had to either kill himself or leave the country, constitute potent evidence of guilt. The jury also had before it strong evidence of motive arising from petitioner's attraction to Martha, his jealousy of Tommy, and his awareness that Tommy "fooled around" with his "girlfriend" the night she was killed. The gruesome nature of the crime speaks to an intense passion, born of that jealousy and fueled by the LSD and "mind-altering" drugs he told Ridge he was using that night. The jury also had before it substantial consciousness of guilt evidence in the form of petitioner's ever-changing account of his activities that night, from his 1975 claim that after returning from Terrien's he never left the house again, to his Elan-era claims that he was so drunk he does not know what happened, or he does not know if he or his brother killed Martha, to his recitation of the night's events in exquisite detail for Richard Hoffman in 1997. This evidence, considered as a whole, is an overwhelming testament to petitioner's guilt. In light of all this, it is not reasonably probable that the jury, hearing one more essentially cumulative witness, on a factual matter it did not have to resolve, would have acquitted.

IV. THE HABEAS COURT ERRED IN FINDING DEFICIENT PERFORMANCE AND PREJUDICE WITH REGARD TO THE 2007 NEW TRIAL TESTIMONY OF SIMPSON, JAMES, AND GRUBIN

The habeas court found petitioner's defense team ineffective for failing to obtain additional evidence with which to impeach Gregory Coleman, whose testimony was offered on behalf of the state at trial. Specifically, the habeas court found trial counsel was ineffective for failing to locate and present the testimony of three former residents of Elan:

Alton Everett James III, Cliff Grubin, and John Simpson. In finding both deficient performance and prejudice with regard to this claim, the habeas court erred.

The court's determination of deficient performance is based on its erroneous assumption that counsel decided not to search for these three persons. The habeas court had no evidence before it that would support this assumption. Indeed, Sherman, Throne and their primary investigator, Vito Colucci, all testified that Sherman directed Colucci to look for these persons. The habeas court's determination, therefore, that it was a strategic error for Sherman not to attempt to locate these persons is clearly erroneous. Further, there is no evidence in this record from which to make any determination as to the adequacy of the investigation Colucci undertook. Therefore, petitioner failed to carry his burden of proof on the first prong of *Strickland* and the habeas court erred in finding otherwise.

With regard to its prejudice analysis the court 1) ignores the fact that Coleman testified to only one of the three direct confessions offered by the state at trial, curiously omitting any reference to Geranne Ridge's impactful testimony; 2) ignores the fact that Coleman was corroborated by Jennifer Pease and Elizabeth Coleman; 3) overstates the importance of Simpson, Grubin, and James' testimony while minimizing its inculpatory potential; and 4) erroneously disregards Judge Karazin's determination that this testimony is not material and would not have resulted in a different verdict. When this claim is properly assessed under *Strickland's* demanding standard, it is apparent that the habeas court erred.

A. Facts

1. The 2002 Criminal Trial

As recounted, *supra*, Gregory Coleman testified that while guarding petitioner upon

his return from a failed escape attempt, petitioner bragged he had killed a girl with a golf club because she spurned his advances. Petitioner also stated the golf club broke and he returned two days later and masturbated on the body. See CT 5/17: 137-38.

In addition, petitioner had bragged that he would get away with murder because he was a Kennedy. Further, petitioner admitted to Coleman that his family had placed him in Elan to remove him from the reach of the police investigation. CT 5/17: 141-225. Coleman stated that this conversation occurred about three weeks after Coleman's October 1978 arrival at Elan. CT 5/17: 132-34.

Coleman's testimony was buttressed at trial by two witnesses: Jennifer Pease and Elizabeth Coleman. Jennifer Pease testified that while she and Coleman were both still Elan residents, Coleman told her Skakel had admitted that he had beaten a girl's head in with a golf club and killed her. CT 5/29: 103-108. Coleman also told her that Skakel thought he could get away with it because he was related to the Kennedys. *Id.*: 108. Greg Coleman's widow, Elizabeth Coleman, testified that, shortly after first meeting her husband in 1986, he had recounted attending a school named Elan where he met a youth named Mike Skakel who admitted having murdered a girl with a golf club. CT 5/20: 89-93.

As mentioned previously, Coleman's testimony from the hearing in probable cause was admitted during the criminal trial. Sherman's cross examination of Coleman at that proceeding extended over 130 pages.[34] He attempted to impeach Coleman with his prior incarcerations and criminal history, allegedly inconsistent statements, the possible effects of drug and alcohol abuse on his memory, his previous admission to mental hospitals, his injection of heroin shortly before testifying before the Grand Jury, television shows he had

[34] *See* CT 4/18/01: 98-131; CT 4/19/01: 2-91, 109-121.

seen profiling this case, the fact that he was suffering from methadone withdrawal during the first day of his testimony, whether he was expecting a deal in exchange for his testimony, the fact that he had asked Inspector Frank Garr for $1200 to help him transition out of prison, his delay in reporting the petitioner's statement to authorities, and whether he was expecting any benefits from testifying. *See* CT 5/17:142-96; CT 5/20: 9-32, 49-60.[35]

Sherman also asked Coleman who was guarding Skakel with him on the night he confessed. At first, Coleman stated that he could not remember. CT 5/17: 156-57. As Sherman continued to press, Coleman stated that it may have been either Simpson, James or "Rueben." He did not state that the other guard overheard petitioner's confession; only that it was likely someone was guarding Skakel with him that night. *Id.*[36]

---

[35] Sherman's billing records indicate that he spent more than 20 hours preparing for Coleman's cross examination at the HPC. *See* PE 120: 3/29/01, 4/2/01, 4/11/01, 4/16/01, 4/18/01, 4/19/01, 4/20/01; *see also* HT 4/18: 53.

[36] [Sherman] All right; did they ever ask you was there anybody else, was there anybody else around when Michael Skakel confessed to you?

[Coleman] A. Yes.
Q. What did you say?
A. There was one other night staff. Do you want me to read it?
Q. Just does this refresh your recollection?
A. Yes.
Q. What did you say?
A. There was always usually someone there.
Q. There was always somebody there, who was there?
A. I don't know.
Q. Did anybody ever confess murder to you before?
A. No.
Q. Wouldn't you kind of remember who was there?
What were you doing, were you standing?
A. I gave them the names of three people.
Q. What people?
A. John Simpson, Cliff Reubin or Everett James.
Q. And, who are these guys?
A. They were residents with me.
Q. Have you seen them lately?

2. The 2007 Petition For New Trial Proceeding

a. Facts relating to James, Grubin, and Simpson

Prior to the 2007 Petition for New Trial proceeding, petitioner's new investigator, Keith Weeks, located James, Simpson, and Grubin. The following evidence was presented to Judge Karazin:

i. Alton Everett James, III

James testified, through his deposition, that he attended Elan from late 1978 until late 1979. He remembered guarding the petitioner on more than one occasion. In fact, he stated that he recalled guarding him "many times." PNE 48: 28.

He stated that he had no specific recollection of guarding the petitioner with Coleman, although he considered it likely that he and Coleman would have guarded Skakel together at some point. PE 48: 16. James described his relationship with Skakel as friendly, noting that they came from "similar backgrounds." PNE 48: 23. James indicated that he and Skakel spent a lot of time together while at Elan. *Id.*

He further stated that while he never heard Skakel confess, the Moxley homicide was discussed continuously during his stay at Elan. PNE 48: 15. James recalled Skakel being confronted in both therapy sessions and in a general meeting. PE 48 at 15. James recalled Skakel's usual response to be "I don't know." PNE 48: 15.

A. I haven't seen anybody.
Q. Do you know if they are witnesses here?
A. I haven't seen anybody.
Q. Are these three people who heard these confessions?
A. I believe one of them was with me that night.
Q. The night that you were guarding him?
A. Yes .
CT 5/17: 156-57.

ii. Cliff Grubin

Cliff Grubin testified that he attended Elan from September or October 1978 until June of 1980. NT: 7. He recalled a general meeting that occurred shortly after he arrived at Elan. *Id.* He stated that petitioner was confronted repeatedly at the meeting about "the killing of this woman." *Id.*: 8. Grubin asserted that Skakel never confessed, despite being "pummeled" in a boxing ring. *Id.* Grubin stated that he and the petitioner were friends at Elan. *Id.* Grubin did not recall ever guarding the petitioner with Coleman. *Id.*: 9.

On cross examination, Grubin claimed that he only remembered one time he asked petitioner about his involvement in the murder. *Id.*: 17. He claimed that petitioner expressed "concern about one of his brothers." *Id.*: 17. Grubin denied that he had told Weeks, petitioner's investigator, that petitioner stated to him "several times" while they were at Elan and afterward, that his brother Tommy was the actual killer. *Id.*: 18. He also denied telling the investigator that he would never repeat that revelation in a court of law. *Id.*; *see also* NT 4/24: 21.

iii. John Simpson

In his deposition, John Simpson testified that he attended Elan from October 1978 until February of 1980. PNE 47: 9-10. Simpson testified that he never heard Skakel confess. PNE 47: 17-19.

Simpson recalled that after he and Skakel finished the program at Elan and were working as staff members, they shared a "couple of beers" one day. Simpson asked Skakel about the murder. Simpson stated that petitioner had "related the story of Martha Moxley and what had happened in Greenwich and how he had been a suspect of it." Simpson claimed that when he asked Skakel straight out, he "went through all of it, you know, about

the golf club and how she had been killed and all that." Skakel claimed he did not kill her, but stated that "we were drinking and partying that night. There were, you know, times that I may not, you know, remember. . . but I certainly don't remember doing anything like that." PNE 47: 21.

Simpson stated that, although when first interviewed by Weeks in July 2005, he could not recall guarding Skakel with Coleman, upon further reflection, he did recall an instance in which that occurred. PNE 47: 22-3. Simpson explained that he now recalled guarding Skakel one night with Coleman:

> It was on the stage at Elan 3. I don't recall if I was doing the nightly report – which I believe I was. And Michael and Greg were to my left, and all of a sudden Greg just went, "I can't believe it.' And I said, "What?" He goes, "He just admitted that he killed this girl." . . . Well, I just, – I just looked at Michael, and I said, "Did you just tell him that you killed this girl?" And Michael said, "No."
>
> And so I looked back at Greg, and I said, "Greg, what are you talking about? He just said that he didn't say that he killed this girl." Greg goes, "Well he didn't answer yes or no, but he gave one of those" – and for lack of a better term, Michael used to have this shit-eating grin on his face sometimes, and Greg said that's what he had.
>
> And I said, "But Greg, that unto – "he didn't say anything. How could you say yes, he just admitted it? And Greg said, "Well it was his reaction, the fact that he didn't say no." And I was, like, "Well that doesn't – "that doesn't mean that he said that he had killed the girl."

PNE 47: 23-24.

Importantly, Simpson admitted that he is deaf in his left ear, and both Skakel and Coleman were to his left. PNE 47: 26. He explained that his deafness made it "unlikely" he would hear a conversation to his left. PNE 47: 26. In addition to acknowledging his deafness, Simpson also stated that he was not paying attention to Coleman and Skakel because he was doing the nightly report, which had to be completed with "great detail."

PNE 47: 49.

3. Judge Karazin's Findings

In his Memorandum of Decision, Judge Karazin first determined that this evidence was not newly-discovered because all three witnesses could have been found prior to trial "by the same methods employed to find them after trial." *Karazin*, MOD: 7; App. Pt 2: A-1106 (memorandum reproduced).

Judge Karazin then considered the materiality of the testimony offered by these witnesses. He concluded that neither James nor Grubin "offers much that is beneficial to petitioner that is not cumulative of other Elan testimony at trial." *Karazin* MOD: 8. Judge Karazin noted that although both James and Grubin stated they had never heard the petitioner confess, this testimony was duplicative of the testimony of several defense witnesses at trial. Because it was thus cumulative the court found it unlikely to lead to an acquittal on retrial. *Id.*[37]

As for Simpson, Judge Karazin found his testimony provided only "minimal impeachment evidence regarding Coleman." *Id.*: 9. In particular, the court noted that both petitioner and Coleman were to Simpson's left, and Simpson is deaf in his left ear. The court also noted that Simpson was writing the nightly reports and hence not focused on the others' conversation. *Id.*

---

[37] The court also noted that both James' and Grubin's credibility is undermined somewhat by their admitted friendship with petitioner at Elan. *Karazin*, MOD: 8. In addition, the court found Grubin's credibility "further undermined by his admission to Weeks that he would not testify truthfully if asked what petitioner told him about the murder." *Id.*: 9. The court noted that in fact, "when asked on cross examination, Grubin insisted petitioner merely expressed concern for one of his brothers. This stands in contrast to his statement to Weeks that Skakel told him several times, in private, while at Elan and afterward, that his brother Tommy killed Moxley." *Id.*: 9.

In addition, Judge Karazin found it significant that petitioner told Simpson he had been drinking and partying the night of the murder and "there were . . . times that I may not, you know, remember . . . but I certainly don't remember doing anything like that." The court found this inculpatory as it stood in stark contrast to his 1975 statement to the police and his masturbation story, both of which he had related in detail and with no assertion of impaired recall. *Id.*

Finally, the court found that Coleman's testimony had been corroborated at trial by both his widow, Elizabeth Coleman, and a fellow Elan resident, Jennifer Pease. *Id.*: 10. It observed that "[t]he evidence offered to impeach Coleman is far from convincing, in view of the case presented by the state at trial." *Id.* In particular, the court noted that Coleman's testimony was only one of the direct confessions admitted below. *Id.*

In light of all this, the court concluded "when the limited impeachment value of the new evidence is considered in view of the strong evidence of guilt presented at trial, it is apparent that it would not lead to an acquittal on retrial." *Id.*

On appeal, this court affirmed Judge Karazin's determination that this evidence was not newly-discovered. *Skakel v. State*, 295 Conn. at 516.

4. Evidence At The Habeas Hearing

At the habeas hearing below, Sherman, Throne and Colucci all testified that Sherman directed Colucci to try to find the three persons named by Coleman. HT 4/16: 69-70; HT 4/17:108 (Sherman); HT 4/17: 81 (Colucci); HT 4/23: 15-16 (Throne). Sherman further stated that he asked Colucci to obtain statements from these three persons when he found them. HT 4/26: 105. Colucci testified that he found James but never spoke to him. He admitted that he was unable to find either Grubin or Simpson. HT 4/19: 81-82; 100-103. On

cross, Colucci acknowledged that he was aware that when petitioner's new investigator located Grubin, he was living in Ibiza, Spain. HT 4/19: 101. In addition, Colucci stated that he found literally thousands of "John Simpsons" in his search, and tried to "match it up by date of birth." *Id.* Colucci recalled Week's testimony in the new trial proceeding that, although he managed to find Simpson, it was the "most difficult find he'd ever gone through." *Id.*: 102. Other than these scant references to his unsuccessful search, Colucci provided no information as to the steps he took in conducting his search for these men.

Sherman testified that he believed it was worth making the effort to find James, Simpson, and Grubin but never believed, and still does not believe, their testimony would have made a difference at trial. HT 4/16: 69. Sherman also stated that his understanding of the testimony from the petition for new trial proceeding (which he did not observe) was that "one person said he was there, but it wasn't very helpful to the [petitioner] and the other two were not helpful at all." HT 4/17: 107-08.

In addition, Sherman testified that his client never advised him to find Simpson or Grubin or James. Nor did petitioner tell Sherman there was another person present when Coleman guarded him who may be able to cast doubt on Coleman's testimony. *Id.*: 106-07. In addition to never suggesting Sherman find Simpson or Grubin or James, petitioner never even corrected Coleman's probable cause testimony in which Coleman incorrectly reported Grubin's name as "Reuben". HT 4/26: 105-6. Correcting Grubin's name may have significantly aided Colucci in his search.

Near the close of the habeas trial, petitioner offered the prior testimony of several witnesses from the 2007 petition for new trial proceeding, including James, Simpson and Grubin, as substantive evidence. The Commissioner objected because none of these

witnesses had been shown to be unavailable and hence their prior testimony was not admissible.[38] *See* Conn. Code of Evid. §8-6. With regard to Simpson and James, the habeas court agreed that petitioner had failed to establish their unavailability.[39] Nevertheless the court indicated that unless the Commissioner withdrew his objection, it would extend the proceedings for an indefinite period of time to allow petitioner to belatedly gather these witnesses. HT 4/30:10.[40]

Given the habeas court's *sua sponte* offer to spare petitioner the consequences of his dereliction in not either securing the attendance of these witnesses or satisfying his burden of proving their unavailability, and in recognition of the fact that admitting the prior testimony was the most efficient way to proceed, the Commissioner withdrew his objection

---

[38] On April 26, 2013, petitioner presented the testimony of another investigator, Michael Uvardy, in support of his burden of proving the unavailability of the 2007 witnesses whose testimony he sought to introduce. Uvardy testified that he had first attempted to reach these witnesses the day before his testimony. Uvardy stated that in trying to contact the persons petitioner's counsel sought, he had mixed results. He explained that he was either unable to reach them, or, upon reaching them was told they would have been unable to come to court due to family and/or work obligations. *See* HT 4/26: 173-76. He admitted that no attempt had been made to contact these witnesses prior to "yesterday". He further admitted that he had not asked those he had spoken with whether they may have been able to come to court with appropriate notice. HT 4/26: 176-77.

[39] The court made a different ruling as to Grubin, finding him unavailable because petitioner's investigator stated he was living in Spain. HT 4/30: 10.

[40] [COMMISSIONER'S ATTORNEY]: Your Honor, if I could preserve our objection, as I've stated it as to Mr. Simpson. The state believes he's not been shown to be unavailable, that he's-

THE COURT: No. You can't have it both ways. You're going to say rather than-'cause I'm inclined to give Mr. Santos the opportunity to bring James and Simpson here. So you've got to fish or cut bait on those two people. You either say it's okay, I can take their testimony for the substance of their testimony or you don't agree and I'm going to give Mr. Santos the opportunity to bring them in here. To say we won't bring him in but we want to preserve our objection leaves the petitioner basically in abyss with respect to those two witnesses. Because at that point they then don't bring them in at risk and then at some point on appeal it's taken away. So you either object or you don't.
HT 4/30: 10.

to the testimony of James and Simpson. HT 4/30: 10.[41]

5. The Habeas Court's Resolution Of This Claim

In its Memorandum of Decision, the habeas court concluded that Sherman's "decision not to pursue Simpson, James, and Grubin reflected a significant and impactful lack of judgment." MOD: 63. The court characterized Sherman's testimony as indicating that he believed "he so completely destroyed Coleman's credibility on cross examination that he believed no reasonable jury would credit his tale." MOD at 63. The court agreed that Sherman's cross examination showed "vigor" and was effective in many respects. MOD at 63-64.

The court then considered the testimony of Simpson, Grubin and James from the petition for new trial proceeding. The court reviewed Judge Karazin's findings from the petition for new trial, and indicated it did not consider itself constrained by those findings. In so doing, the habeas court considered Judge Karazin's conclusion that Simpson's testimony was of only limited impeachment value and was insufficient to warrant a new trial "dicta" because Judge Karazin had also ruled that petitioner could have discovered these three witnesses prior to the criminal trial with "due diligence." MOD at 69-70. The habeas court also held that the doctrine of collateral estoppel does not apply "in these circumstances" citing *Williams v. Comm'r of Correction,* 100 Conn. App. 94, 104, 917 A.2d

[41] The Commissioner nevertheless continued to object to the court's findings of unavailability of Carl Wold and Barbara Bryant, two other witnesses from the petition for new trial proceeding. The court did not find petitioner's investigator, Keith Weeks, unavailable despite the fact he lived in Seattle. The court, without objection, found two persons who had died since the petition for new trial proceeding, Charles Morganti and Crawford Mills, unavailable. HT 4/30: 1-15. Therefore, in addition to Simpson, James and Grubin, the court admitted the prior testimony of Wold, Barbara Bryant, Morganti, and Mills. The court did not admit the prior testimony of Keith Weeks.

555, *cert. denied*, 282 Conn. 914, 924 A. 2d 140 (2007). MOD: 70.

The habeas court summarized its conclusions as follows:

> In the court's view, the testimony of these witnesses was of great significance in rebutting Coleman. And Coleman, in turn, was a key state's witness in support of the state's claim that the petitioner made inculpatory admissions while at Elan. Attorney Sherman's failure to investigate and present the testimony of Simpson, James, and Grubin left the core of Coleman's testimony only tangentially challenged. This lapse in judgment deprived the petitioner of the effective assistance of counsel. Moreover, Attorney Sherman's failure prejudiced the petitioner. With the testimony of Simpson, James and Grubin, there is a reasonable likelihood that Coleman's testimony would have been discredited, substantially weakening the state's prosecution. In the absence of credible testimony from Coleman tying the petitioner to the murder, there is a reasonable likelihood that the outcome of the trial would have been different.

MOD: 71 (footnote omitted).

B. This Record Contains No Evidence To Support The Habeas Court's Determination Of Deficient Performance

As indicated above, the court premised its determination of deficient performance on the faulty assumption that Sherman decided not to look for these three persons. The court characterized this as a "strategic error." MOD: 63.

There is no evidence to support this determination. In fact, all the evidence is to the contrary. Sherman, Throne and Colucci all testified that Sherman directed his primary investigator, Vito Colucci[42], to find these three persons and obtain statements. The court's finding of deficient performance, therefore, is premised on a clearly erroneous factual finding. See *Orcutt v. Comm'r of Correction*, 284 Conn. 724, 742, 937 A.2d 656, 666 (2007) ("[a] finding of fact is clearly erroneous when there is no evidence in the record to support it ... or when although there is evidence to support it, the reviewing court on the entire

[42] As noted previously, petitioner's criminal trial defense team hired three sets of private investigators – Colucci's firm, a firm in Boston, and a firm in the Midwest.

evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.)).

Further, although it appears the habeas court simply ignored Sherman, Throne, and Colucci's testimony rather than explicitly rejecting it, either way its factual finding lacks support in this record. That is, even if the court had chosen not to credit these three witnesses on this point, it would not be free to find the opposite fact established. *See State v. Hart*, 221 Conn. 595, 605, 605 A.2d 1366 (1992). Therefore, even if the court had rejected all three witnesses when they testified that Sherman had directed Colucci to find these men, it could not conclude that the opposite was true. There being no evidence to support the court's conclusion that Sherman chose not to investigate the names given by Coleman, there is no basis on which to find Sherman's performance deficient.

Moreover, not only is there no evidence to support the court's finding, there is no evidence upon which to judge the sufficiency of Colucci's efforts in trying to locate these men.[43] Petitioner adduced no evidence of the steps taken by Colucci in his quest. This

---

[43] To the extent the habeas court's finding of deficient performance is based on this Court's view of the evidence from the petition for new trial proceeding, that reliance is misplaced. See MOD: 69. In particular, its reliance on this Court's statement in its 2010 opinion, *Skakel v. State*, 295 Conn. at 513, that "No effort was made to locate Simpson or Grubin prior to or during trial" is in error. MOD: 69 (emphasis in original). Judge Karazin made no such finding and this court, as an appellate tribunal, was not competent to do so on its own. *Lapointe v. Comm'r of Correction*, 67 Conn. App. 674, 679, 789 A.2d 491, 495, *cert. denied* 259 Conn. 932, 793 A.2d 1084 (2002) ("No citation is needed for the fundamental principle that as an appellate tribunal, this court cannot find facts."). While Judge Karazin noted Colucci's testimony in that proceeding (which differed from his testimony below) that he was directed to find only James; *Karazin,* MOD: 7; Judge Karazin also noted Sherman's testimony that he directed Colucci to find all three. *Karazin*, MOD: 5, 7. Judge Karazin did not resolve this dispute by crediting one account over the other. *Karazin*, MOD: 5, 7. Therefore, this Court, on appeal, had no bases for doing so. Further, this Court's statement in its 2010 opinion should have no bearing in this proceeding, where all the testimony indicated Colucci was directed to find all three men, and Colucci's 2007 testimony to the

record reveals only that the defense team attempted to find them; it does not reveal the steps taken by Colucci to comply with Sherman's directive other than his attempt to match "thousands" of persons named John Simpson with an appropriate date of birth.[44] As noted

---

contrary was not admitted as substantive evidence.

For the same reasons, the habeas court's reliance on this Court's assertion that "Sherman apparently concluded, . . . , that cross-examination of Coleman at trial would be sufficient to discredit him, as he justified his lack of direction to Colucci about locating these witnesses by the fact that he "didn't anticipate that ... Coleman would be dead at the [time of] trial ... [and] believed that the jury would see [him]" is similarly erroneous. MOD: 69, see *Skakel v. State*, 295 Conn. at 513. This assertion is not based on any facts specifically found by Judge Karazin, and, at any rate, should carry no weight in this proceeding where the prior testimony was not incorporated.

[44] Judge Karazin's determination in the petition for new trial proceeding that these witnesses could have been found in 2002 using the same methods which succeeded in 2005 does not require a finding of ineffective assistance of counsel. It is clear that a lack of diligence in uncovering allegedly newly-discovered evidence is insufficient to establish an investigation which falls below an objective standard of reasonableness: "[T]he hurdle a petitioner must leap to demonstrate that his counsel failed to investigate adequately in the context of an ineffective assistance of counsel claim is higher than the hurdle the petitioner must leap in demonstrating that he conducted a reasonable investigation in the context of demonstrating due diligence in a petition for a new trial made on the basis of newly-discovered evidence." *Williams*, 100 Conn. App. at 104.

Moreover, even if considered, Judge Karazin's prior determination is insufficient to prove counsel's performance fell below an objective standard of reasonableness. Judge Karazin determined that these three witnesses could have been discovered in 2002 using the same methods petitioner's investigator employed in preparation for the 2007 trial. *Karazin* MOD: 5-7. In so doing, Judge Karazin did not pass on the professional competence of criminal trial counsel's investigatory efforts.

Further, his determination was limited to lack of diligence; it did not encompass all the factors that counsel might reasonably consider when deciding whether enough effort has been put into searching for additional witnesses. *See Strickland*, 466 U.S. at 691 (recognizing that reasonable professional judgment can support limitations on investigation). Here, *Strickland's* presumption requires a finding that Sherman made reasonable efforts to track down these witnesses. See *Burt v. Titlow,* 134 S.Ct. at 17. Petitioner has presented nothing that would undermine that presumption.

According Sherman's efforts the presumption of competence is not only required, but entirely reasonable. It must be remembered that at the time he directed Colucci to find these persons Sherman could not know whether their testimony would produce anything of significance, and, given the fact his client did not urge him to find them, Sherman may well have suspected it would lead to damaging evidence. Consequently, reasonably believing that his investigator had expended sufficient effort in this regard, counsel was entitled to

previously, "[i]t 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.'" *Burt v. Titlow*, 134 S.CT at 17. Therefore, because petitioner failed to carry his burden of proving deficient performance, and because under *Strickland* petitioner must establish *both* deficient performance and prejudice in order to prevail, this Court need go no further in rejecting this claim.

C. If Considered, The Habeas Court Erred In Finding Prejudice

1. The Habeas Court Erred In Discarding Judge Karazin's Determination That The Testimony Offered By James, Simpson, And Grubin Was Not Material And Would Not Have Led To A Different Verdict

As respondent asserted in its Return and argued in its Motion for Summary Judgment on the grounds of collateral estoppel, its pre-trial brief, post-trial brief, and throughout the habeas trial, collateral estoppel principles should have prevented the relitigation of matters determined against the petitioner in the 2007 new trial proceeding. The error by the habeas court in permitting petitioner to place these matters once more in dispute has resulted in an inconsistent assessment of the materiality of identical testimony by two superior court judges. Thus, one of the evils collateral estoppel principles are designed to prevent – inconsistent determinations which undermine the integrity of the judicial system—has come to fruition.

"The common law doctrine of collateral estoppel, or issue preclusion, embodies a

---

decide that further efforts would have been futile, or were unnecessary. *Strickland*, 466 U.S. at 691. If any attempt is made on appeal to judge the sufficiency of Sherman's efforts, it must take into account counsel's lack of a crystal ball, and the fact that counsel's time and effort were necessarily directed at all facets of preparing petitioner's defense, not laser-focused on refuting a single witness.

judicial policy in favor of judicial economy, the stability of former judgments and finality." *State v. McDowell*, 242 Conn. 648, 655, 699 A.2d 987 (1997). "Collateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Id.*, *quoting Ashe v. Swenson,* 397 U.S. 436, 443, 90 S.CT 1189, 25 L.Ed.2d 469 (1970). "Issue preclusion arises when an issue is 'actually litigated and determined by a valid and final judgment, and that determination is essential to the judgment.'" *State v. McDowell*, *supra,* 655, *quoting Scalzo v. Danbury*, 224 Conn. 124, 128, 617 A.2d 440 (1992).

"For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . . An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined . . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered . . . ." *Gray v. Weinstein*, 110 Conn. App. 763, 772-73, 955 A.2d 1246 (2008) *quoting Lafayette v. General Dynamics Corp.,* 255 Conn. 762, 772-73, 770 A.2d 1 (2001).

"'[T]he decision whether to apply the doctrine of collateral estoppel in any particular case should be made based upon a consideration of the doctrine's underlying policies. . . . These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation. . . .' (Internal quotation marks omitted.)

Cumberland Farms, Inc. v. Groton, 262 Conn. 45, 59, 808 A.2d 1107 (2002)." *In re Ross*, 272 Conn. 653, 662, 866 A.2d 542 (2005). All of these interests were undermined by allowing the petitioner to contest, yet again, factual matters that had been litigated and decided against him in a previous judgment.

As indicated *supra*, Judge Karazin determined that neither Grubin nor James offered anything of any significance. As to Simpson, Judge Karazin found that he corroborated Coleman to some extent, and the impeachment he offered was minimal. Further, he found that if offered at trial Simpson's testimony would have provided the state with two additional inculpatory statements by the petitioner. Judge Karazin concluded, therefore, that this testimony was neither material nor reasonably likely to lead to an acquittal on retrial. *Karazin*, MOD: 8, 9.

In this proceeding, the habeas court, *considering transcripts of the identical testimony passed on by Judge Karazin*, came to a dramatically different conclusion. The habeas court considered these witnesses to be of "great significance in rebutting Coleman." MOD: 71. The habeas court further opined that the combined testimony of Simpson, James and Grubin created a "reasonable likelihood that Coleman's testimony would have been discredited" and that "[i]n the absence of credible testimony from Coleman tying petitioner to the murder, there is a reasonable likelihood that the outcome of the trial would have been different . . . ." MOD: 71 (footnote omitted).

The habeas court erred by permitting petitioner to put the impeachment value and materiality of this testimony once more in dispute, and by refusing to take Judge Karazin's prior determinations as a starting point for considering any claim based on this identical testimony.

In both the prior proceeding and this, petitioner was required to establish the materiality of the testimony offered by Simpson, Grubin and James. Under the *Asherman* test which governed the new trial proceeding, a petitioner seeking a new trial on the basis of newly-discovered evidence must prove that: "(1) the proffered evidence is newly-discovered, such that it could not have been discovered earlier by the exercise of due diligence; (2) it would be material on a new trial; (3) it is not merely cumulative; and (4) it is likely to produce a different result in a new trial." *Asherman v. State*, 202 Conn. 429, 434, 521 A.2d 578 (1987). *Strickland* prejudice similarly rests on a determination of materiality: it derives from the materiality component of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). See *Strickland v. Washington,* 466 U.S. at 694 ("[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution."). Because a finding on the issue of materiality is common to both proceedings, Judge Karazin's determination that petitioner had failed to prove the materiality of the testimony of James, Grubin and Simpson, should have precluded a contrary determination here. Petitioner should not have been permitted to contest Judge Karazin's resolution of that issue in this proceeding in the hopes of convincing a different judge to come to a different conclusion. In addition, Judge Karazin's subsidiary determinations that Simpson's testimony partially supports Coleman and is of only limited impeachment value; *Karazin*, MOD: 8, 9; should have been given binding effect in this proceeding. In short, petitioner should have been estopped "from making assertions or denials to the extent they are inconsistent with the prior determination." Richardson, Eli J. *Taking Issue with Preclusion: Reinventing Collateral Estoppel*, 65 Miss.L.J. 41, 55 (1995).[45]

[45] Principles of collateral estoppel should have also governed the habeas court's

The habeas court put forth two reasons for rejecting respondent's collateral estoppel argument. First, it found Judge Karazin's finding of the insignificance of the testimony to be *dicta*, because he also determined that petitioner had not established that it was newly-discovered. Second, it found that collateral estoppel does not apply in this circumstance, citing *Williams,* 100 Conn. App. 94; *see* MOD: 69-71.

Turning to the latter consideration first, the habeas court erred in finding *Williams* dispositive of respondent's claim. In *Williams,* the Appellate Court concluded that the legal standards of "due diligence," in the context of a petition for new trial, and "deficient performance" in a claim under *Strickland* are not identical. *Id.* at 103-104. It held, therefore, that the petitioner's failure to establish due diligence in a petition for new trial proceeding does not entitle him to prevail on the performance prong of *Strickland.* Id.[46]

---

consideration of 1) the claim that trial counsel was ineffective in allegedly not obtaining a copy of the composite sketch; 2) the claim that counsel was ineffective in not presenting Bryant's allegations; and 3) the claim that counsel was ineffective in not producing evidence regarding Len Levitt's book. Respondent will discuss the role of collateral estoppel with regard to the first two issues *infra*. Because the habeas court found petitioner failed to prove either deficient performance or prejudice with regard to Levitt's book, respondent is not aggrieved by the habeas court's failure to accord preclusive effect to Judge Karazin's determinations that 1) there was no book deal at the time of trial, and 2) there was no financial motive or bias on the part of Inspector Frank Garr, and 3) there was no wrongdoing on the part of Inspector Frank Garr. Therefore, while respondent strongly disagrees with the manner in which the habeas court resolved this claim, it has no occasion to brief that disagreement herein.

[46] The soundness of this determination is easily demonstrated by considering the role *Strickland's* presumption of competence plays in evaluating the performance of trial counsel. Under *Strickland,* "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' *Strickland v. Washington,* 466 U.S. at 689. Thus, even where it is found that a diligent investigation may have uncovered "new" evidence, a habeas court may nevertheless conclude or presume that petitioner's counsel had a sound strategic reason for not conducting the investigation, or that counsel exercised reasonably competent judgment in deciding not to expend time and effort investigating, or

In *dicta*, the *Williams* court also discussed the difference in a petitioner's burden of proving the likelihood of an acquittal on retrial in a petition for new trial proceeding and his burden of proving prejudice in a habeas proceeding. The court concluded that the different legal standards in the two proceedings means that a failure to prove prejudice in a petition for new trial will not necessarily mean a petitioner cannot prevail in establishing ineffective assistance of counsel. *Id.* at 106. However, this observation, while true as far as it goes, overstates the difference between the governing standards. As the United States Supreme Court observed 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 more-probable-than-not standard in 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. citing Strickland*, 466 U.S. at 693, 697.

Here, neither the petitioner nor the habeas court have identified anything that places this case in such an extremely rare category of cases. Nor has the habeas court or petitioner offered any justification for discarding Judge Karazin's determination that the testimony of James, Grubin, and Simpson is unlikely to result in a different verdict on retrial. Surely the justification for departing from a prior determination, resting on identical evidence, must rest on something other than the predilections of the second judge.

In addition to erroneously according no deference to Judge Karazin's assessment of prejudice, the habeas court erred in rejecting Judge Karazin's specific findings that: 1) Grubin and James' testimony is cumulative and is not material; 2) Simpson's testimony partially corroborates Coleman; 3) Simpson's testimony is of only limited impeachment

---

that further investigation was unnecessary.

value; and 4) whatever value Simpson's testimony offers is offset by the two additional inculpatory statements included in his testimony. *Karazin*, MOD: 8-9. In addition, the habeas court should have deferred to Judge Karazin's determination that the state's evidence of guilt was strong, Coleman was corroborated during the criminal trial by both Elizabeth Coleman and Jennifer Pease, and Coleman's testimony was only one of the explicit confessions the jury considered. *Karazin*, MOD:8-9. The habeas court erred in not deferring to these prior determinations, or, at a minimum, not justifying its departure from these determinations by reliance on new or different evidence than that considered by the prior fact-finder.

In addition to its reliance on *Williams*, the habeas court determined it was not bound by Judge Karazin's contrary findings because they were embedded in an alternative holding of the court and because this Court, on appeal, decided the claim by affirming this alternative holding. MOD: 69-70.

Neither the fact that Judge Karazin ruled in the alternative nor the fact that this court upheld one basis without expressing an opinion on the other, detracts from the preclusive effect of Judge Karazin's findings. According to the Restatement (Second) of Judgments §13, a judgment is final for collateral estoppel purposes when it is "sufficiently firm to be accorded conclusive effect." This section embodies the "common sense point that [a] conclusive carry-over effect should not be accorded a judgment which is considered merely tentative in the very action in which it was rendered. On the contrary, the judgment must ordinarily be a firm and stable one, the 'last word' of the rendering court – a 'final' judgment." *Id.*, Commentary.

There can be no doubt that Judge Karazin's memorandum of decision denying the

petition was final for purposes of the application of collateral estoppel. His findings therein were conclusive; there was nothing tentative about them. Further, neither a pending appeal nor an appeal affirming the judgment eradicates the preclusive effect of the trial court judgment. See *Enfield Federal Savings & Loan Assn. v. Bissell*, 184 Conn. 569, 573, 440 A.2d 220 (1981); *LeBow v. Rubin*, 95 Conn. App. 454, 467, 897 A.2d 136, *cert. denied*, 280 Conn. 933, 909 A.2d 960 (2006); *Salem Park, Inc. v. Town of Salem*, 149 Conn. 141, 144, 176 A.2d 571 (1961).

Moreover, the fact that Judge Karazin ruled on all prongs of petitioner's burden under *Asherman* does not render his determination on one aspect of that burden "unnecessary" for purposes of collateral estoppel. "The requirement that a preclusive finding must have been necessary to a judgment is rooted in principles of fairness." *Jean Alexander Cosmetics, Inc., v. L'Oreal USA, Inc.,* 458 F.3d 244, 250 (3d Cir. 2006). The Court in *Jean Alexander* went on to explain that:

> "'[P]arties should be estopped only on issues they actually deem important, and not on incidental matters.' *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.,* 453 F.2d 1177, 1183 (3d Cir.1972). Because litigants are likely to view an issue that is necessary to the resolution of a case as important and to litigate it vigorously, it is fair to give such a determination preclusive effect. *See Wickham Contracting Co., Inc. v. Bd. of Educ. of City of New York,* 715 F.2d 21, 28 (2d Cir.1983) (noting that the necessity rule ensures that "parties to litigation have sufficient notice and incentive to litigate matters in earlier proceedings which may bind them in subsequent matters"). The necessity requirement also ensures that preclusive effect is not given to determinations that did not 'receive close judicial attention,' *Commercial Assocs. v. Tilcon Gammino, Inc.,* 998 F.2d 1092, 1097 (1st Cir.1993), or that were unappealable by virtue of being incidental to a decision, *see* Restatement (Second) of Judgments § 27 cmt. h. *See also Pettaway v. Plummer,* 943 F.2d 1041, 1044 (9th Cir.1991) ("The primary purpose of the rule that prior resolution of an issue will have collateral estoppel effect only if it was necessarily decided is to ensure that the finder of fact in the first case took sufficient care in determining the issue." [overturned on other grounds); *Hicks v. Quaker Oats Co.,* 662 F.2d 1158, 1168 (5th Cir. Dec.1981) ('[A]n immaterial issue may not have been afforded the same careful deliberation

> and analysis as an issue necessary to the judgment . . . . [and] a decision on an immaterial issue provides the losing party with no incentive to contest an erroneous decision by appeal.'); 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4421, p. 539 (2d ed.2002) (recounting these '[t]wo common explanations' for the necessity requirement)."

Jean Alexander, 458 F.3d at 250.

The materiality of the testimony of Simpson, James and Grubin was hotly-contested before Judge Karazin; it was central to the issue before him, and its determination was afforded his careful deliberation and analysis. There is no reason, therefore, not to accord his findings preclusive effect. To do otherwise will encourage litigants to repeatedly place matters in dispute in the hope of a different outcome before a different judge. Petitioner's success in securing a different determination here cannot but undermine the public's confidence in the judicial system, and make a mockery of the finality to which the state, the taxpayers, and the victims are entitled.

2. The Habeas Court Erred In Finding Prejudice

In addition to erroneously finding deficient performance in the absence of any evidence to support such a finding, the habeas court erred in finding prejudice. As Judge Karazin found, and the habeas court agreed; MOD: 70; there is little in the testimony of Everett James and Cliff Grubin that is not cumulative to the testimony of other Elan residents at trial. Both James and Grubin testified that they had never heard the petitioner confess to the murder. PNE 215: 15; PT 4/24: 11. That testimony echoes the testimony of several defense witnesses at trial. See CT 5/23: 119-123 (Sarah Peterson); CT 5/23: 175, 187 (Michael Wiggins); CT 5/23: 209 (Donna Kavanaugh); CT 5/24: 15 (Angela McFillin).[47]

[47] In addition to being cumulative, the probative value of the testimony of James and Grubin, as well as the testimony of Elan witnesses at trial, asserting that they did not hear

As such, the testimony of James and Grubin is cumulative and insufficient to establish a reasonable probability of a different verdict[48]

As for John Simpson, his testimony partially impeaches, but also partially supports Coleman. While he did not hear petitioner brag to Coleman that he killed Moxley, he stated that both men were to his left, and therefore, his deafness prevented him from hearing their conversation. PNE 213: 25. Further, he recalled that he was writing the nightly reports, a task which required attention to detail and would thus have kept him from focusing on the others' conversation. PNE 213: 23-24, 49.

In addition, while Simpson claimed Coleman did not repeat petitioner's confession when Simpson asked, there are many explanations for this which would not undermine Coleman's testimony. First, it may be that Simpson and Coleman are relating two different

---

petitioner confess, is negligible. In any criminal case, the defense could fill the courtroom with persons to whom the defendant did not confess. It is hard to see how that undermines the credibility of witnesses who testify that he did confess. This is especially so in this case where the state never asserted that petitioner made a public announcement of his guilt. As the state argued in summation, the state never claimed the petitioner confessed at the infamous general meeting or before any large gathering of numerous witnesses. *See* CT 6/3: 19-20.

[48] Grubin's testimony in particular was problematic as he was open to impeachment with the statement he made to petitioner's investigator. Contrary to his testimony at the new trial proceeding that he had no contact with petitioner after Elan, he told petitioner's investigator he had many conversations with petitioner during *and after* their time at Elan. During these conversations, petitioner told Grubin his brother Tommy murdered Moxley. In relating this to petitioner's investigator, however, Grubin stated that he would never repeat this information in a court of law. Judge Karazin concluded that Grubin's admission to Weeks, that he would not testify truthfully if asked what petitioner told him about the murder, undermines his credibility. *Karazin*, MOD: 9. The habeas court disregarded this credibility determination, determining it was free to do so because judges may "reasonably and respectfully disagree over the meaning of statements captured in a record." MOD: 66 n. 42. In this, the court is simply wrong. Judge Karazin's credibility determination made on the basis of testimony he observed was not subject to review by a second court looking at a cold, printed record. As with other matters discussed, *supra*, the habeas court erred in considering itself free to discard Judge Karazin's findings.

events. As James related in his new trial testimony, he and his fellow residents had many opportunities to guard petitioner. PNE at 14. It may be that Coleman was guarding Skakel with someone else when the conversation he described took place. Coleman was, after all, uncertain who was with him that night. In fact, given the conversation Simpson reports, it is *unlikely that Simpson is referring to the same event as Coleman.* Coleman, it must be remembered, stated that petitioner's confession occurred just weeks after Coleman's October 1978 arrival at Elan. Coleman was guarding petitioner after he had been returned from his first escape attempt, in the fall of 1978, and before his first general meeting.[49] At that point, Coleman knew nothing about the murder of a girl in Greenwich. CT 5/17: 158. Indeed, as other Elan witnesses testified at trial, there was no discussion of the murder prior to petitioner's first general meeting. CT 5/16: 69-70, 75, 78, 127 (Seigan); CT 5/17: 59 (Dunn); CT 5/24: 40-41 (McFillan). Yet, the conversation Simpson recalls appears to assume that he and Coleman were both aware of the murder of "this girl." See PNE 47: 23-24. *It is therefore likely that Simpson is recalling a later occasion on which he and Coleman guarded Skakel.*

Even if Simpson and Coleman are referring to the same event, Coleman may not have wanted to share petitioner's revelation with Simpson, deciding instead to downplay the actual exchange. Or Simpson could be mistaken in the reply he remembers Coleman making. In any event, as Simpson acknowledged, his deafness prevented him from hearing what petitioner actually said to Coleman. Moreover, even if it did not corroborate Coleman in all respects, Simpson's testimony did indicate a discussion between Coleman and the

[49] Testimony from the criminal trial indicated petitioner was the subject of more than one General Meeting. 5/23: 118.

petitioner regarding petitioner's responsibility for murdering a "girl."

Judge Karazin thus reasonably concluded that "[t]he evidence offered to impeach Coleman is far from convincing, in view of the case presented by the state at trial." *Karazin*, MOD: 10. In addition, Judge Karazin concluded that "when the limited impeachment value of the new evidence is considered in view of the strong evidence of guilt presented at trial, it is apparent that it would not lead to an acquittal on retrial." *Id.* Even if the habeas court was not legally tethered to Judge Karazin's assessment, it nevertheless erred discarding Judge Karazin's reasoned and reasonable view of this evidence.

Not only did Simpson provide only minimal impeachment of Coleman, but he also provided the state with additional evidence it may have used against petitioner. First, petitioner's purported "shit eating grin" when asked if he killed "the girl" could be viewed as an adoptive admission or an admission by conduct. *See e.g. State v. Leecan*, 198 Conn. 517, 522, 504 A.2d 480 (1986) (Connecticut follows the general rule that "when a statement, accusatory in nature, is made in the hearing and presence of an accused, is not denied or explained by him, it may be received into evidence as an admission on his part."); *Ovation Plumbing Inc. v. Furton*, 33 P.3d 1221 (Colo. App. 2001), *as modified on denial of reh'g.* (Sept. 6, 2001) ("laughing at an accusatory statement can be nonverbal conduct showing an adoption of the statement and is admissible in evidence"); *State v. Pierce*, 277 Conn. 42, 73-74, 890 A.2d 474 (2006) (by not objecting to inculpatory statements made in his presence "defendant is deemed to have adopted them as his own"); *State v. Swinton*, 268 Conn. 781, 791, 847 A.2d 921 (2004) (noting incriminating nature of evidence that defendant "grinned and laughed" when asked what it was like to rape and kill a woman). Petitioner's reaction, therefore, if considered by the jury, may reasonably have been viewed

as one more admission by the petitioner.

Second, Simpson testified that, rather than sticking to his 1975 alibi where he professed to know where he was and what he did that night, or corroborating his later claims to Hoffman and others that he had left the house and masturbated in a tree on the Moxley property, the petitioner told Simpson that he had been drinking and partying and "there were. . . times that I may not, you know, remember . . . . but I certainly don't remember doing anything like that." PNE 213: 21.

Third, the petitioner apparently told Simpson he was a suspect in the murder. See PNE 213: 21, 48. Yet as Detective James Lunney testified in the original trial, the petitioner was not a suspect during that time period. CT 5/29: 166. It is significant that petitioner thought of himself as a suspect when the police did not consider him so. *See State v. Henning*, 220 Conn. 417, 422-23, 599 A.2d 1065 (1991); CT 6/3: 129-30. In assessing prejudice, therefore, the habeas court erred in both overstating the importance of Simpson's testimony and in failing to consider its potential "downside."

An additional way in which the habeas court overstates the value of Simpson, James and Grubin's testimony is by erroneously asserting that Coleman claimed one of these persons overheard petitioner's confession. MOD: 70. The habeas court found their testimony "singularly important" in that they purportedly contradicted "Coleman's testimony that one of them heard the petitioner's narration of killing the victim." *Id.* Yet, as the excerpt of Coleman's testimony recounted above; *see* n.36 *supra;* indicates, Coleman did *not* claim any of these persons overheard petitioner's confession. In fact, when initially asked by Sherman if he was claiming these persons overheard the confession, Coleman responded, "I believe one of them was with me that night." CT 5/17:156-57. Later in Sherman's cross-

examination when he revisited the issue of who was with Coleman the night petitioner confessed, Coleman reiterated that he did not remember who he worked with that night and explicitly stated, "I don't know if the other person specifically heard this talk between me and him." CT 5/17: 191. Therefore, the habeas court's conclusion that these witnesses, each of whom stated they had never heard petitioner confess, "directly contradict[ed] Coleman in a way no other witness could" rests on misapprehension of Coleman's testimony.[50]

The habeas court also makes mention of certain statements by Grubin, James and Simpson regarding their assessment of Coleman's credibility. *See* MOD: 65, 66, 68. Although it is unclear whether the habeas court factors these statements in to its prejudice analysis, any attempt to do so would be erroneous. During the criminal trial, Attorney Sherman attempted to elicit testimony from former Elan residents regarding their opinion of the credibility of Coleman and/or Higgins. *See* CT 5/23: 129-32, 178. Although Sherman succeeded in getting some testimony of this nature before the jury, the state began

[50] As the section of the transcript referenced above indicates, the habeas court's assertion that Coleman testified, on two occasions, that the third person heard his conversation with the petitioner is erroneous. *See* MOD: 62, n. 38. No substantive evidence to that effect was presented to the jury. Although Coleman did make such a claim when he testified before the Grand Jury, the excerpt of his Grand Jury testimony containing that assertion was admitted at trial because it contained prior consistent statements regarding petitioner's confession. Therefore, that testimony was not admitted as substantive evidence during the criminal trial. *See* CT. 5/20: 71 (cautioning jury to use the testimony it is about to hear for credibility purposes only, not as substantive evidence) 86 (Coleman states other person present "had to" hear it). Because that particular claim by Coleman was *not* consistent with his testimony, it probably should have been excerpted from the transcript pages offered.

Nevertheless, even if the jury considered Coleman's Grand Jury assertion that the other person present "had to" hear petitioner's confession, its probative value as substantive *or* impeachment evidence is nil. The jury's collective common sense would tell them that a witness is not competent to testify as to what another person heard. Therefore, the habeas court grossly overstates the value of any purported contradiction on this minor point.

objecting to further attempts to elicit such opinions. The state argued that since the witnesses had had no contact with Coleman and/or Higgins since they were all teenagers, they had no legitimate basis on which to form an opinion of the credibility of Coleman and/or Higgins at the time of their testimony. CT 5/24: 18-30. The criminal trial court agreed and sustained the state's objection. *See* CT 5/24: 30. There is no reason to think the court would have done otherwise had Sherman offered similar testimony from Simpson, Grubin or James, regarding the credibility of Coleman and/or Higgins.

The habeas court also erred in failing to consider the substantial corroboration of Coleman at trial. Jennifer Pease, who was an assistant branch manager for the Department of Motor Vehicles in Portland, Maine at the time of her testimony, stated that Coleman told her, while they were both still students at Elan, that petitioner had admitted he killed a girl with a golf club. CT 5/29: 100, 103-9. Elizabeth Coleman likewise testified that her husband had told her about the confession in 1986. CT 5/20: 91. These prior consistent statements, together with the uncertainty as to whether Simpson's testimony actually addresses the same event, and the fact Simpson could not hear the actual exchange between Coleman and the petitioner, significantly weakens whatever impeachment value Simpson's testimony holds.

Not only is the evidence that petitioner suggests impeaches Coleman far from convincing, its significance shrinks further still in light of the strong case presented by the state at trial. Coleman's testimony, it must be remembered, was only one of three explicit confessions admitted below. See T. 5/17: 133-38 (Gregory Coleman); T. 5/16: 179-182 (John Higgins); T. 5/21: 32 (Geranne Ridge). The tape recorded statement of Geranne

Ridge is particularly compelling. *See* PE 67 (transcript of audio tape).[51] Ridge's taped statement is highly credible because it was recorded without her knowledge while she was speaking to a trusted friend, Matthew Attanian, on the telephone.

In the recorded statement, Ridge is telling her friend, Attanian, about her meeting that day with a law enforcement officer seeking information about her contacts with the petitioner. When she explains to Attanian that she declined to tell the officer everything petitioner had said to her in 1997, such as his statement about "masturbating in a tree," Attanian interrupts and asks her to explain. She expresses surprise that she has not already told Attanian the full story, and then states that this is the "real story." PE 67, Frame #13. She tells Attanian that petitioner admitted he "hit her with a golf club." PE 67, Frame #7, #11. She then begins to describe the petitioner's detailed admission of the crime. In her taped statement, when Ridge begins to tell her friend what petitioner told her during a party at her house in 1997, Ridge attempts to omit names and refers to the petitioner as "John Doe":

[Ridge]: "Um, John Doe was um watching this particular girl through her bedroom window, changing. And he was up in a tree masturbating, 'cause he liked her. She went and had sex with his brother Tommy that same night, while he was outside smoking pot and doing LSD and acid and really big-time drugs, mind, you know, altering drugs. After he found out that, that his, that John Doe's brother had sex with this girl, he got so violent and he was so screwed up, he did that to her."
[Attanian]: Wow. And he told you he did that?
[Ridge]: Yes . . .

[51] The court reporter did not transcribe the audio tape heard by the jury; therefore, Ridge's statement does not appear in the trial transcript. Nevertheless, Ridge's audio statement and a transcript of that statement were admitted as full exhibits in the criminal trial and are available to this Court as PE 67 and PE 68. The transcript is included in the respondent's appendix at App. Pt 2: A-1210. In addition, both the transcript and the audio recording are available in the state's Evidence Presentation program. *See* EPP/MainMenue/Audio/Geranne Ridge.

PE 67, Frame #14-16; *see also* Frame #57, 61, 184; App. Pt 2: A-1210 *et. seq.*

When Attanian asked why the petitioner would be saying this with "perfect strangers" in the room, Ridge explained: "'Cause he was drunk and he was high. And I don't know what else he was on. He kept going into the bathroom so I think he could have been on coke, too." *Id.* Frame #104. Further, Ridge stated that petitioner admitted his guilt has been "eating away at him and that's why he's been abusing drugs and has turned to alcohol . . ." *Id.*, Frame #106. Ridge's statement, therefore, not only corroborated Coleman's testimony, it provides some of the strongest evidence of the petitioner's guilt. Curiously, despite the significance of Ridge's statement, the habeas court fails to acknowledge its existence.

The habeas court also fails to give due regard to John Higgin's equally compelling testimony in assessing prejudice. Higgins, as noted *supra*, testified that when he and petitioner were on "night owl" duty one night, they were sitting on a porch talking. Part of the conversation involved the reasons each of them were in Elan. In the course of this conversation, petitioner became emotional and began to talk about the murder. Sobbing, he began saying he didn't know if he did it, then that he must have done it, and finally admitted he killed Moxley. *See* CT 5/16: 179-82.

In addition to the three direct confessions, the state presented evidence of other inculpatory statements that the petitioner made to eleven additional witnesses, many of whom were unconnected to each other. See *supra* at 4-21. What is significant about these admissions, in addition to their impressive number, is that, for the most part, they dovetail with other evidence in the case. For instance, petitioner's statement to Elizabeth Arnold that his brother stole his girlfriend the night of the murder corroborates his statement to Ridge, as well as evidence of petitioner's infatuation with Martha, and Tommy's flirtatious behavior

that evening. The petitioner's claim to Meredith, Pugh, Ridge and Hoffman that he masturbated in a tree on the Moxley property, corroborates his statement to Coleman that he masturbated on the body.[52] Coleman's testimony is also corroborated by the bloody smears on the victim's thighs which Dr. Henry Lee described as consistent with hands trying to push her legs apart. *See* CT 5/8: 149; CT 6/3: 17-18, 93-94, 112-13, 132-33.

In order to prevail on his claim, the petitioner was required to show that but for his trial counsel's failure to present additional evidence to impeach Coleman's testimony, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694. Here, given the prior determinations by Judge Karazin, the questionable value of the proposed new testimony, the degree to which Coleman's testimony was corroborated by other evidence at trial, and the overall strength of the state's case, the habeas court erred in finding petitioner had met his burden.

V. THE HABEAS COURT ERRED IN FINDING PETITIONER'S DEFENSE TEAM DEFICIENT IN ITS PRESENTATION OF THE THIRD-PARTY DEFENSE CONCERNING KENNETH LITTLETON, AND IN NOT PRESENTING A THIRD-PARTY DEFENSE CONCERNING TONY BRYANT

The habeas court determined that petitioner's defense team rendered deficient performance with regard to the presentation of the third-party defense regarding Littleton, and in not uncovering a third-party defense regarding Bryant. Despite its criticism of counsel, however, the court concluded that petitioner had failed to carry his burden of proving prejudice with regard to these claims. MOD: 22, 31.

[52] In fact, this detail, as well as Coleman's awareness that the club broke during the assault, may have convinced the jury to credit Coleman despite Sherman's impressive cross examination. Coleman had no connection to Ridge, Meredith, Pugh or Hoffman, the other persons to whom petitioner mentioned masturbating that evening. In addition, no evidence has ever been produced indicating how Coleman would have known the club broke if not told so by the killer, i.e., the petitioner.

As to both the Littleton and Bryant claims, the habeas court erred in faulting the defense team for not pursuing matters readily cognizable as of no benefit to the defense. By nevertheless finding counsel professionally incompetent for not adequately pursuing these matters, the court failed to cloak the team's decisions and its allocation of resources with the presumption of reasonable competence required by *Strickland*.[53]

A. The Habeas Court Erred In Finding The Defense Team's Handling Of The Littleton Defense Below The Standard Of Reasonable Competence

The habeas court found fault with two aspects of defense counsels' presentation of the third-party culprit defense centered on Littleton: 1) the court faulted the defense team for not obtaining a copy of the Morganti sketch and 2) the court found fault with Attorney Sherman's comments in summation. MOD: 20-27. The Commissioner will deal with the issue regarding the sketch here; his response to the summation claim is found in Section IX, *infra*.

1. Facts

a. The 2002 criminal trial and direct appeal

Included in the pretrial disclosure provided to petitioner's defense team were several investigative reports referring to a conversation Special Officer Charles Morganti had with a young man walking in the Belle Haven neighborhood the night of the murder. These reports referenced a composite sketch Morganti prepared of the person he encountered. *See* App. Pt 2: A-1456. No evidence regarding Morganti's meeting or the sketch was introduced at

[53] As will be discussed further *infra*, this claimed deficiency is one of a number of alleged deficiencies that the habeas court, later in its decision, suggests might lend support for habeas relief under a "cumulative error" theory of prejudice; *see* Section XI *infra*; even though the court found that there was no prejudice from this alleged deficiency standing alone. MOD: 81. Consequently, the respondent addresses this issue to extent it has any relevance to this alternate basis for relief.

trial.

An issue regarding the Morganti sketch first arose shortly after the verdict in 2002. New counsel, i.e., petitioner's current habeas counsel, requested a copy of the sketch from the state and one was promptly provided. During a post-verdict hearing, petitioner argued that the sketch had been suppressed. CT 8/28: 34-42; *see also* CT 8/28: 66-72. The trial court (*Kavanewsky*, J.) rejected that claim, inasmuch as Attorney Sherman conceded that he had all the reports which referenced the sketch and thus was on notice of its existence. CT 8/28: 89-91.

On appeal, this Court, while assuming for purposes of appeal that the sketch was not provided to the defense, nevertheless concluded that the facts "fully support[ed] the trial court's determination that the defendant failed to establish that the state suppressed the composite drawing within the meaning of *Brady*." *State v. Skakel*, 276 Conn. 633, 707, 888 A.2d 985 (2006). The court reasoned that "*Brady* is designed to assure that the defendant is not denied access to exculpatory evidence known or available to the state but unknown or unavailable to him. . . . . It is not intended either to relieve the defense of its obligation diligently to seek evidence favorable to it or to permit the defense to close its eyes to information likely to lead to the discovery of such evidence." *State v. Skakel*, 276 Conn. at 702. Thus, since defendant concededly knew of the sketch, this court found it was incumbent on counsel to take steps to obtain a copy if it was not among the materials provided to the defense team by the state.

b. The 2007 petition for new trial proceeding and appeal

In the 2007 trial on petitioner's petition for new trial, the issue of the sketch was again litigated. Attorney Sherman, when asked if he received any sketches prior to or

during trial, responded: "I don't think so." NT 4/19: 168. When asked what use he would have made of the Morganti sketch if he had received it, Sherman responded that he would have attempted to introduce the sketch, and let the jury decide if it looked like Littleton. *Id.*: 171. In its memorandum of decision, the court (*Karazin*, J.) made two findings: First, it found the sketch was not "newly-discovered" as required to prevail in that proceeding because petitioner had knowledge of the sketch prior to trial. *Karazin* MOD: 23. Second, the court found petitioner had failed to prove that the sketch resembles Littleton, which of course, was a first step toward establishing that the sketch was material. *Id.* The court also determined that even assuming the sketch resembles Littleton, "petitioner has not proven that it is material and likely to lead to an acquittal on retrial." *Id.* On appeal, this Court affirmed the lower court's determination that petitioner had failed to establish this evidence was newly-discovered. *Skakel v. State*, 295 Conn. at 521.

c. The habeas proceeding

At the underlying habeas trial, Sherman testified he and that all other members of the defense team read the discovery documents delivered to them by the state. HT 4/16: 36-37. Sherman stated that he and other members of the team also went to the state's attorney office and looked through the file. *Id.*: 42.[54] Sherman recalled references to the sketch in the discovery provided to him. *Id.:* 37. He also stated he filed at least two discovery motions which requested sketches, among other items. *Id.*: 37. He did not recall, however, seeing the sketch either among the 1800 pages of photocopied documents

[54] Jason Throne corroborated both of these statements. He testified that both he and Sherman read the discovery material. He also recalled at least two instances in which members of the defense team came to the state's attorney's office to view discovery material. Further, he recalled spending a number of days with Attorney Mark Sherman reviewing and copying tapes made available by the state. HT 4/23: 9-10, 30.

provided to him or in the other materials the state made available to him. HT 4/17: 78. Nor did he recall having a conversation with anyone from the state's attorney's office in which he specifically requested the Morganti sketch. *Id.*: 39.

Sherman recognized, however, that there was never anything to connect the man in the sketch to the murder. CT 4/17: 92. He also acknowledged that, according to the police reports, Morganti prepared the sketch of the man he had spoken with at around 8 o'clock rather than a second man Morganti saw around 10 that night. Sherman noted that the ten o'clock man was walking away from Morganti, in the dark, and about 100 yards away, thus making it impossible for Morganti to have seen his face. *Id.*: 89.

Sherman also acknowledged that it was apparent to him the person Morganti saw at around 8 p.m. was Carl Wold. HT 4/17: 90. The reports he read prior to trial indicated that Morganti and Wold's description of the encounter dovetailed as to location, content of the conversation, and the clothing worn by Wold. *Id.*: 80-83; *see also* App. Pt 2: A-1456-67. Sherman also acknowledged that Littleton could not be the person Morganti saw at 8 p.m., as the trial evidence indicated Littleton was at the Belle Haven club with members of the Skakel family until 8:30 or 9:00 that evening. *Id.*: 92-93.

Although Sherman reiterated his prior testimony that if he had the sketch, he would have shown it to the jury because it does not resemble the petitioner, but rather looks like "Ken Littleton or someone else" *Id.*: 46; he acknowledged that if he had done so, he would anticipate the state producing Charles Morganti and Carl Wold to establish the true identity of the man depicted in the sketch. HT 4/17: 98-99.

d. The habeas court's resolution of this issue

The habeas court determined that it need not make an independent determination

on *Strickland's* first prong, reasoning that this Court, on direct appeal and in the appeal of the trial court's denial of the petition for a new trial, already had determined deficient performance under the first *Strickland* prong. MOD:22. The court concluded, nevertheless, "that it was not convinced that the sketch would have been helpful to Attorney Sherman in pursuing a third-party culpability claim regarding Littleton." MOD: 22. The court found it "reasonable to conclude that Morganti's input came from his earlier face-to-face meeting with the person and not his later 10 p.m. sighting of a person from a distance of approximately one hundred yards and walking in a direction away from his location. Under those circumstances, it is difficult to envision how Morganti could have determined any of the facial characteristics of the person sighted at 10 p.m., leading the court to believe the sketch was likely based on Morganti's 8 p.m. face-to-face meeting." MOD: 22-23. The court continued:

> But we know, from police reports, that the individual Morganti met at approximately 8 p.m. was Carl Wold. We know as well, that the individual seen at approximately 10 p.m. was most likely not Wold on the basis of strong evidence that Wold satisfied the police that once he returned home from his earlier walk, he did not go outside again during the evening. We are left, therefore, not knowing whom Morganti espied near the Skakel home at approximately 10 p.m. but with the likelihood that the availability of a sketch prepared on the basis of an earlier sighting of Wold would be of no use in attempting to point the finger in Littleton's direction.

MOD: 23.

2. The Habeas Court Erred In Finding Petitioner's Defense Team Deficient

a. The habeas court erred in reasoning that this court, either on direct appeal or on appeal from the denial of the petition for new trial, determined that counsel was deficient, under the first prong of *Strickland*, in failing to pursue the Morganti sketch

The habeas court erred in assuming that either this Court's resolution of petitioner's

Brady claim on direct appeal, or its rejection of his claim that the sketch was newly-discovered in the appeal from the new trial proceeding, resolved the issue of counsel's deficient performance under *Strickland*.

On direct appeal, this Court addressed the issue of whether the sketch was suppressed. In rejecting that claim, this Court affirmed Judge Kavanewsky's finding that Sherman knew of the sketch's existence. Similarly, in the appeal from the denial of a new trial, this Court affirmed Judge Karazin's finding that the sketch was not newly-discovered because petitioner knew of its existence and could have obtained it with due diligence. *Skakel v. State*, 295 Conn. at 521. Thus, the Commissioner does not dispute that these factual issues – whether Sherman knew of the sketch's existence and whether it could have been obtained with due diligence – were beyond relitigation before the habeas court and were facts that the court was required to accept as true, under the doctrine of collateral estoppel. See *In re Ross*, 272 Conn. at 661-63 (considering bases for applying collateral estoppel).

However, neither of these facts conclusively establishes whether counsel's decision to forgo securing the sketch constituted deficient performance, under the Sixth Amendment as explicated in *Strickland*. That constitutional issue, separate and distinct from the issues addressed in both the direct appeal and on appeal from the petition for new trial, required resolution of a host of factual and legal issues, as well as distinct considerations set forth in *Strickland* and its progeny, that go well beyond a mere determination of whether counsel knew of the sketch's existence and could have obtained it with due diligence *had he decided to do so*. It is this last issue – the reasonableness of his decision not to do so – which is the linchpin of his Sixth Amendment claim and an issue which has never been

presented, addressed or resolved in either previous appeal. *See Williams v. Comm'r of Correction*, 100 Conn. App. at 107 (counsel's duty to conduct reasonable investigation may form linchpin issue in ineffective counsel claim).

Consequently, the habeas court erred in ruling that Sherman was deficient in failing to pursue the Morganti sketch simply because of this Court's prior decisions in the petitioner's direct appeal and on appeal from the denial of his petition for new trial.

b. The petitioner failed to demonstrate that any reasonably competent attorney would have been constitutionally required to pursue the Morganti sketch

Because this Court's prior decisions were not dispositive, the petitioner bore the burden of establishing that any reasonably competent attorney would have been obligated to obtain a copy of the Morganti sketch, and present it to the jury, in order to have provided constitutionally adequate assistance to the petitioner in this case.

The habeas court correctly concluded that the Morganti sketch would have been of no help in pointing the finger at Littleton. MOD: 22.[55] Given this determination, which was based on the same police reports and discovery materials considered by petitioner's defense team, it is puzzling why the court, if it were properly applying the presumption of competence required under *Strickland*, failed to assume the defense team possessed the same powers of discernment as the court – that they would see the sketch was of no import and therefore not worth pursuing further.

On the contrary, it is clear that the habeas court misapplied the mandates of *Strickland* and *Harrington* by refusing to presume that competent counsel, like the habeas

[55] The habeas court stated: "Notwithstanding this lapse, this court is not convinced that the sketch would have been helpful to Attorney Sherman in pursuing a third-party culpability claim regarding Littleton." MOD: 22.

court itself, rightly may have determined that pursuit of the sketch would lead to nothing useful and, therefore, reasonably could have chosen to forgo further investigation into this meaningless diversion of time and resources. Competent counsel "can avoid activities that appear 'distractive from more important duties'," *Harrington v. Richter*, 131 S.CT 770, 789 (2011), *citing Bobby v. Van Hook*, 558 U.S. 4, 11, 130 S.Ct. 13 (2009) (*per curiam*). Instead, "[c]ounsel was entitled to formulate a strategy that was reasonable at the time and to balance the limited resources in accord with effective trial tactics and strategies." *Id.*: 789. Here, the habeas court erred in not employing a strong presumption that "counsel's attention to certain issues to the exclusion of others reflect trial tactics rather than 'sheer neglect.' *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam)" *Id.*: 790.

Furthermore, although Sherman, when confronted with the sketch at the habeas proceeding, expressed a *post hoc* belief that he would have chosen to present the sketch to the jury, notwithstanding the dubious relevance of the person depicted in that sketch to the murder and his belief that the state easily could have neutralized its value by producing the testimony of Morganti and Carl Wold; HT4/17:46, 98-99; the High Court has made clear that such second-guessing is no more a proper gauge of counsel's ineffectiveness when it is engaged in by prior counsel himself than it is when engaged in by the reviewing court. For example, in *Harrington v. Richter*, 131 S.Ct. 770, 790 (2011), the Court of Appeals, in its prior decision, had dismissed any strategic considerations beyond those expressly testified to by counsel because such considerations were not supported by prior counsel's testimony. *Harrington*, 131 S.Ct. at 790. The Supreme Court criticized the Court of Appeals for doing so, reasoning that it is improper for a court to fail to consider the full panoply of objectively reasonable justifications for counsel's actions, regardless of whether the

reviewing court is convinced that counsel was consciously motivated by such considerations. The Court indicated that, in evaluating the objective reasonableness of counsel's performance, it is not the reviewing court's function to

> [i]nsist [that] counsel confirm every aspect of the strategic basis for his or her actions. There 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, 157 L.Ed.2d 1 (2003) (per curiam). *After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome.* ***Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind**.

Harrington, 131 S.Ct. at 790 (emphasis added). Therefore, *Strickland's* command that a court indulge a strong presumption that all significant decisions were made in the exercise of reasonable professional judgment requires more than giving the attorneys the "benefit of the doubt." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1407 (2011). Rather, *Strickland* requires the court to affirmatively entertain the "range of possible reasons counsel may have had for proceeding as they did." *Id.*

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time*." (Emphasis added.) *Strickland*, 466 U.S. at 689. In this case, Sherman testified that, at the time he was preparing the defense in this case, he reached the same conclusion relative to the Morganti sketch that the habeas court later reached as well, i.e., that the sketch depicted Carl Wold. HT 4/17: 90. Thus, notwithstanding Sherman's *post hoc* reconsideration on the witness stand as to what he might have done differently if he had obtained the sketch, the fact remains that, *at the time*, it was perfectly reasonable for him to

decide that nothing was to be gained by attempting to lead the jury down this wrong, and ultimately unhelpful, road.

Upon reading the reports that were disclosed to him prior to trial, Sherman had good reason to consider the sketch insignificant. It must be remembered that the sketch is nothing more than the image of a man Morganti saw walking on Field Point Road the night of the murder. It is *not a sketch of someone seen murdering the victim or of someone who has ever been connected to the murder in any respect.* The murder took place in a residential neighborhood in which hundreds of people live. There is nothing unusual about someone walking on the streets of such a neighborhood during the evening hours.

Further, because upon reading the police reports disclosed to the defense, reasonably competent counsel could have concluded, – as did the habeas court itself – that neither the encounter with Carl Wold nor the sketch would ultimately be of any meaningful assistance to the defense, Sherman's failure to notice it, or failure to make further efforts to obtain it if it was not among the state's disclosure, cannot be deemed ineffective assistance.[56] "While it is incumbent on a trial counsel to conduct a prompt investigation of the case and explore all avenues leading to facts relevant to the merits of the case . . . counsel need not track down each and every lead or personally investigate every evidentiary possibility. . . ." (Internal citation and quotation marks omitted.) *Torres v. Comm'r of Correction*, 84 Conn. App. 561, 566-67 (2004).

---

[56] The state has maintained that the sketch was among the materials made available to the defense during discovery. Although Sherman testified he has no recollection of having seen the sketch prior to trial, it may be that it was a matter of such obvious insignificance that it left no impression on him. Further, it should be noted that, on direct appeal, this Court did *not* determine that the sketch was not disclosed prior to trial, but merely assumed so for purposes of appeal. *State v. Skakel*, 276 Conn. at 701.

3. Petitioner Failed To Prove Prejudice

Even if defense counsel can be found deficient for failing to pursue the Morganti sketch, the habeas court correctly concluded petitioner failed to carry his burden of proving prejudice. First of all, as argued *supra*, collateral estoppel should have estopped petitioner's second attempt to establish that the sketch resembles Littleton. Judge Karazin expressly found that petitioner failed to prove such a resemblance in the 2007 trial. *Karazin* MOD: 23. That determination should have precluded further litigation on this point.

Nevertheless, as the habeas court correctly found, the circumstances surrounding the sketch's creation make any coincidental resemblance to Littleton of no moment. Further, the reasons recounted above as to why the sketch would have been of no help to petitioner fully demonstrate that its absence from the trial did not result in *Strickland* prejudice. Petitioner failed to carry his burden of showing a reasonable probability of a different outcome had the sketch been used at trial. Moreover, had the sketch been used at trial, the state would have rebutted any suggestion that it was a sketch of Littleton through the testimony of Morganti and Wold. Under these circumstances, there is no basis on which to find prejudice.

B. The Habeas Court Erred In Finding The Defense Team Deficient For Failing To Follow Up On The Bryant Allegations

The habeas court determined that petitioner's defense team rendered constitutionally deficient representation by not investigating allegations made by Gitano ("Tony") Bryant which implicated Adolph Hasbrouck and Burton Tinsley in Moxley's murder. In so doing, the court found that Sherman had notice of the allegations prior to trial and that it was incumbent on him to investigate them. MOD: 29-30. The habeas court concluded, however, that investigating these allegations would not have brought any benefit to

petitioner's defense. MOD:31.[57]

In finding petitioner's counsel deficient in this respect the court committed several errors.[58] First, it erred in permitting petitioner to relitigate the factual issue of when the defense team became aware of Bryant's identity and his allegations. This factual issue already had been decided in the 2007 petition for new trial proceeding, wherein the petitioner took a directly contrary position, and the prior court concluded that the Bryant allegations were unknown to Sherman and could not have been discovered before trial with due diligence.

Second, even if the habeas court properly allowed the petitioner to relitigate this factual issue, hoping to obtain a finding directly contrary to that for which he successfully advocated in the petition for new trial proceeding, the habeas court further erred in finding deficient performance by Sherman on the basis of this new factual finding. Specifically, even if the habeas court correctly credited Marjorie Walker Hauer's surprise habeas testimony that she told Sherman about Bryant's allegations prior to trial, the court erred in finding Hauer's scant information, coming as it did on the eve of trial, sufficient to trigger an obligation to investigate. Further, the court erred in not affording due deference to the long-formulated strategy to target Littleton as the sole third-party suspect and also in finding Sherman constitutionally deficient for failing to pursue an investigation that even the habeas court believed would have led to nothing useful.

---

[57] The habeas court concluded: "That said, the court is not satisfied that reasonable investigation of Bryant's tale would have brought any benefit to the petitioner's defense." MOD: 31.

[58] See footnote 53, supra.

1. Facts Pertaining To This Claim

a. Facts from the 2007 trial and appeal

No evidence regarding Gitano Bryant or his allegations was introduced in the 2002 criminal trial. Bryant's allegations, however, were the primary focus of the 2007 trial on petitioner's claim of newly-discovered evidence. In that proceeding, in which petitioner attempted to establish that the Bryant allegations were "newly-discovered" and could not have been uncovered prior to trial with the exercise of due diligence, *all of the evidence offered by both sides* supported this determination. Indeed, the state did not contest the petitioner's proposed findings of fact, which included the following:

> In the present case, the evidence of Tony Bryant's allegations against Adolph Hasbrouck and Burton Tinsley could not have been discovered earlier by the exercise of due diligence. . . .

Petitioner's 7/16/07 Proposed Findings of Fact and Conclusions of Law In Support of Count One of Petitioner's Revised Substituted Petition for New Trial at 96 (reproduced in App. Pt 2: A-1543). Petitioner's representations to Judge Karazin as to what facts he should find concerning this issue continued:

> When Tony Bryant finally did reveal what he knew about Martha Moxley's murder during the Petitioner's criminal trial (between December of 2000 and January of 2001), he only did so to Crawford Mills and Neal Walker, two long-time friends whom he trusted. . . .Bryant's disclosure to both men, though, was conditioned on their keeping his identity completely confidential. . . .When Mills and Walker did contact Attorneys Sherman and Benedict, they honored their friend's request and refused to disclose to either attorney the source of their information. . . .Crawford Mills' contact with Attorneys Sherman and Benedict in 2002 was even further clouded by his earlier communication during the mid to late 1990s, when Mills sent both Sherman and Benedict a copy of his original screenplay which made no mention of Tony Bryant or his claims of third-party culpability. . . .The screenplay, entitled "Little Martha," further employed fictional composite characters, and was of no evidentiary value to either the State or the Defense. . . . .Thus, faced with a second communication by Mills, who continued to refuse to disclose Tony Bryant's name, neither the State nor the Defense had any ability to reasonably

> investigate the incomplete information. . . . . Even after Mills' disclosure of Tony Bryant's name following the Petitioner's conviction, his communication was still in the form of a letter captioned "Little Martha," and in the context of his earlier communication looked like an addendum to his screenplay. . . . Only after the letter was sent to Robert F. Kennedy, Jr., who had no previous contact with Mills, did there exist reasonable cause to investigate the claim further. . . .Attorney Sherman and his investigators had no other leads that would reasonably aid them in their discovery of Tony Bryant's information prior to trial. . . .Therefore, this Court must conclude that prior to the Petitioner's conviction, his trial counsel could not have reasonably discovered the evidence presented under Count One by the exercise of due diligence.

Id. at 97-98 (paragraph numbering omitted).

Thus, in the prior proceeding, petitioner not only took the legal position that the Bryant allegations were newly-discovered, he urged the trial court to accept the above findings of fact which established that defense counsel was unaware of these allegations until after the verdict.[59] Because this aspect of petitioner's burden was firmly established by the evidence, the state did not contest it. *See Skakel v. State*, 295 Conn. at 432.

The substance of Bryant's allegations was summarized by this Court in the appeal from the denial of a new trial:

> In [a videotaped interview with petitioner's investigator], Bryant offered the following account of the events leading up to and following the evening of October 30, 1975. At the time of the murder, Bryant was fourteen years old and living in New York City, where he attended Hughes High School. For the previous three school years, however, he had attended Brunswick School (Brunswick), a private school in Greenwich, and lived with a family friend in Greenwich. The petitioner and Bryant had been classmates at Brunswick, but the two were not friends. After Bryant moved to New York, he continued to socialize with many of the young people around Belle Haven and other Greenwich enclaves, in particular, Neal Walker and Byrne.
>
> Hasbrouck and Tinsley were friends of Bryant's who also attended Hughes High School, although they were about a year older than Bryant. The two accompanied Bryant to Belle Haven four or five times between mid-

[59] In his brief on appeal to this Court, petitioner again asserted that these allegations only came to light after the conviction. *See Skakel v. State*, SC 18158, Appellant's Brief at 17.

> September and October 30, 1975. Bryant was acquainted with the victim from his time living in Greenwich, but Hasbrouck and Tinsley first met her in mid-September at a street fair in Greenwich. Although Hasbrouck never made any direct overtures to the victim, he became "obsessed" with her. He would make comments to Bryant and others that "[s]omeday [he was] going to have her," as well as more vulgar variations of that comment, and, on several occasions, stated that he wanted "to go caveman on her," which meant to Bryant that Hasbrouck would drag her away by the hair and sexually assault her.
>
> On October 30, 1975, the night of the victim's murder, Bryant took the train to Greenwich with Hasbrouck and Tinsley, heading into Belle Haven somewhere between 6 and 6:20 p.m. They stopped by Walker's house at approximately 6:30 or 6:40 p.m., but Walker was not able to leave at that time and he told them to come back later. Bryant, Hasbrouck and Tinsley then walked to the house next door, went inside, helped themselves to several six packs of beer in the refrigerator and proceeded to Byrne's house. Byrne then accompanied the three others as they walked about the neighborhood engaging in various acts of mischief, such as smashing pumpkins. As they walked, they saw other teenagers out in the neighborhood, including Ix and Lisa Rader Edwards.
>
> Bryant and the rest of the group walked behind the Skakel residence, where they found some golf clubs strewn about that each of them handled. Thereafter, Hasbrouck and Tinsley walked around Belle Haven carrying the golf clubs as walking sticks. Bryant and the others proceeded to a large meadow, located behind the Skakel property, where young people in the neighborhood commonly congregated to smoke and drink without being seen by the Belle Haven security guard. Bryant and the others drank several six packs of beer and smoked marijuana. At approximately 8:30 to 8:45 p.m., Bryant saw the victim, as well as the petitioner, at the meadow. Thomas Skakel also came and went, and Bryant waved to Julie Skakel, who, per her usual practice, did not stay at the meadow to socialize. By about 9 p.m., a group of ten to fifteen teenagers, including Bryant, Tinsley and Hasbrouck, had congregated together in a circle at the meadow. Tinsley and Hasbrouck made comments and sexual overtures to some of the girls there, which made things uncomfortable. The victim was there around that time, but became "fed up" with what was going on, left the meadow and went over to a group that was standing by the Skakel residence and included at various points the petitioner and Thomas Skakel.

Skakel v. State, 295 Conn. at 470-72.

Bryant alleged that he left Belle Haven at about 9:30 or 9:40 but his friends remained, spending the night at Geoffrey Byrne's house. Bryant further claimed that when

he saw his two friends Monday morning, they told him "We did it. We achieved the caveman." *Skakel v. State*, 295 Conn. at 472.

In its memorandum of decision denying the petition for a new trial, the trial court (*Karazin*, J.) determined that Bryant's statements met the "*minimum* threshold of trustworthiness to warrant admission as statements against penal interest." (Emphasis added.) See Conn. Code of Evid. §8-6(4)." *Id.* at 473. On the issue of whether the petitioner was entitled to a new trial on the basis of this evidence, however, the court held: "The testimony [sic] of Bryant is absent any *genuine* corroboration. *It lacks credibility, and therefore, would not produce a different result in a new trial.*" *Id.*: 477 (emphasis in original).

The appeal from Judge Karazin's decision was heard by a five-justice panel. On the Bryant issue, two justices in the majority did not reach the issue of the admissibility of his alleged statements. *Skakel v. State,* 295 Conn. at 484 n. 23. This lead opinion, authored by Justice Katz and joined by Justice Vertefeuille, concluded only that the trial court had not abused its discretion in finding Bryant's account is "absent any genuine corroboration. . . lacks credibility, and therefore would not produce a different result in a new trial." Two concurring justices (*Zarella*, J. and *McLachlan*, J.) agreed with this conclusion but would have gone further and found the trial court erred in finding Bryant's evidence admissible as a statement against penal interest. *Id.*: 523. According to the concurrence, Bryant's statements were not against his penal interest and were not trustworthy. *Id.* The concurrence also observed that even if Bryant's statements concerning his activities the night of the murder are considered against his penal interest, the statements Bryant attributes to Hasbrouck and Tinsley certainly are not. *Id.* at 523, 547-48. Only Justice Palmer in dissent would have found Bryant's hearsay statements admissible in a new trial.

Id. at 553-54.

b. Facts from the habeas hearing

Sherman testified, as he had in the 2007 trial, that Crawford Mills contacted him in 1998 or 1999 regarding a play he was writing about the murder called "Little Martha." Sherman further stated that at some point Mills contacted him again and said he knew who the "real killer" was but he would not reveal the person's name. Sherman believed this occurred after the verdict, although he believed that Mills had testified in the new trial proceeding that it was before the verdict. HT 4/16: 136; HT 4/18: 159-60.

On or about July 11, 2002, a little more than a month after the verdict, Sherman received a letter from State's Attorney Jonathan Benedict with an attachment from Mills revealing the name "Gitano Bryant" and providing a phone number for him. *Id.*: 140-41; *see* PE 236.

Sherman also testified that he had received numerous "tips" from persons prior to trial, most of which were easily dismissed as coming from "crackpots." He dismissed Mills and his attempts to promote his play as falling within the category of "crackpot" rather than useful information. Sherman also stated that he did not recall Marjorie Walker Hauer contacting him prior to or during the trial regarding Bryant's allegations. HT 4/16: 143-45; HT 4/26: 107.

Likewise, Jason Throne testified that he could not recall hearing the name "Gitano Bryant" prior to the verdict. Nor did he have any recollection of Marjorie Walker Hauer relaying information regarding Bryant to Sherman. HT 4/23: 10-11.

Further, Sherman testified that neither petitioner nor any family member ever told him they had seen Tony Bryant or his friends in Belle Haven the night of the murder. HT

4/17: 130-31. Importantly, in this proceeding *petitioner testified that he did not see Bryant that night.* HT 4/25: 136.

Marjorie Walker Hauer testified, as she had in the 2007 petition for new trial proceeding, that Tony Bryant was a Brunswick school classmate of her brother, Neal. HT 4/19: 116-17. Unlike when she was called as petitioner's witness in the 2007 trial, however, Hauer testified for the first time that she told State Inspector Frank Garr of Bryant's allegations shortly before the criminal trial started. HT 4/19: 121. She also claimed that sometime after she told Garr, she phoned Sherman and relayed the same information. HT 4/19: 123. Specifically, she claimed she told Sherman that a friend of Neal's, Tony Bryant, claimed to be in Belle Haven the night of the murder with his friends and "his friends admitted to committing the crime." She also stated that Tony did not "say anything about it" for "many, many years" because he was afraid of being implicated in the murder. HT 4/19: 123.

In support of her testimony, Hauer indicated she retained an appointment book from 2002 indicating "Frank Garr" "9 a.m." on April 8, 2002. *Id.* at 135. She also produced a photocopy of a handwritten letter dated May 24, 2002 and addressed to Mrs. Moxley, in which she states that Neal heard a "bizarre story" from Tony Bryant that "no one believes."[60] Although Hauer testified she told Sherman that Bryant and Crawford were very

---

[60] Hauer read the following excerpt into the record:

> My brother Neal has also heard a story of Steven Skakel, vaguely referring to the guilt of one of his brothers, in a bar, and Neal has also heard a bizarre story from Tony Bryant, who is a Black student from Brunswick who lived in New York City. He tells of being in Belle Haven that night with Jeff Burn (sic) and two other Black youths that wanted to cause trouble. So he felt uncomfortable and left. This is hard to believe that three Black kids would go unnoticed in Belle Haven. But why would he make this up? Tony is now a

credible, she admitted that when she said this, she was unaware that Bryant had been convicted of conspiracy to commit robbery. *Id.* at 132. She also admitted being unaware that Bryant had represented himself as a lawyer admitted to the bar when in fact he was not admitted. *Id.* She further stated she was unaware that the two men accused by Bryant were working family men, not homeless drug addicts, as she claimed Bryant had told Neal. *Id.*: 133.

c. The habeas court's resolution of this claim

In its memorandum of decision, the habeas court credited Hauer's testimony as "true and accurate." MOD: 30. The court further found that "[g]iven the identified source of the information and Walker's corroboration that Bryant was known in Belle Haven and had frequented the area, Attorney Sherman should have investigated Bryant's story." MOD: 30. The court nevertheless concluded that it was not satisfied a "reasonable investigation of Bryant's tale would have brought any benefit to the petitioner's defense." MOD: 31. The court recognized that it could not predict whether Sherman would have received any cooperation from Bryant in 2002. *Id.* It also recognized that even if Sherman had obtained a videotaped statement as did petitioner's investigator years later, without corroboration such a statement would be insufficient to establish a third-party defense against Hasbrouck and Tinsley. *Id.*

The court also noted that the state had evidence in its possession that would have eroded confidence in Bryant's story -- particularly the fact that no one reported seeing

---

> lawyer in Florida. The other two boys ended up homeless drug addicts. Tony's mom had said not to say anything for fear of being implicated. When Neal heard about this a few years ago he told Tim Dumas. But no one believes it.

HT 4/19: 127-28.

Bryant and his friends that night. MOD: 32. In addition, the court recognized that Bryant's credibility would be further tarnished by the testimony of Attorney Richard Alexander. Attorney Alexander, who testified as respondent's witness at the habeas trial, stated that in 1991, while he was a partner at a large law firm in Texas, he hired Bryant as an associate on Bryant's representation that he was then a member of the Maryland and District of Colombia Bars. As the court explained: "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." MOD: 32-33. The court concluded that "[a]t a 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. Accordingly, petitioner was "not prejudiced by this particular lapse." MOD: 33.

2. The Habeas Court Erred In Allowing The Petitioner To Relitigate The Factual Issue Of When His Defense Team Became Aware Of Bryant's Identity And His Allegations Implicating Hasbrouck And Tinsley

"[H]abeas corpus has traditionally been regarded as governed by equitable principles . . . Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Negron v. Warden,* 180 Conn. 153, 166 n. 6, 429 A.2d 841 (1980). With respect to this issue, it is difficult to decide which is more troubling: the petitioner's contradictory assertions, in separate proceedings, as to when Attorney Sherman became aware of Bryant's identity and his allegations, depending upon which assertion better supported his claim at the time, or the habeas court's inconsistent

rulings as to whether or not it was bound by matters decided in prior proceedings, depending upon whether the prior decisions supported or undermined the habeas court's opinion that Sherman rendered deficient performance.[61]

As recounted above, all of the evidence produced in the petition for new trial proceeding, and all of the evidence in this proceeding, save for Hauer's testimony as to her alleged disclosure of the Bryant allegations to the defense team (which testimony inexplicably was never presented at that petition for new trial proceeding), established that the defense team did not have sufficient information regarding Bryant's accusations to investigate them prior to trial. This evidence was so persuasive that it was not countered by the state. In turn, Judge Karazin summarily found petitioner had satisfied this aspect of his burden and directed his memorandum largely to whether the Bryant allegations were credible enough to warrant a new trial. See *Karazin* MOD: 30, 26-36. On appeal, this Court similarly accepted the first aspect of petitioner's burden and directed its attention to the credibility of Bryant's allegations as to the alleged culpability of Hasbrouck and Tinsley. See *State v. Skakel*, 295 Conn. at 476-77. Thus, by persuading the state, Judge Karazin, and this Court that counsel could not have uncovered Bryant's allegations prior to trial, even in the exercise of due diligence, petitioner successfully established an essential element of his claim on his petition for a new trial.

---

[61] As discussed *supra*, based upon its erroneous conclusion that this Court found Sherman to be constitutionally deficient relative to his failure to obtain the Morganti sketch, the habeas court unblinkingly accepted this as a conclusive finding, not subject to reconsideration by the habeas court. However, with respect to the issue of whether the defense team was aware of the Bryant allegations in time to use them at the criminal trial, the habeas court had no difficulty in allowing the petitioner to relitigate this issue, ultimately resulting in a finding by the habeas court that is directly contrary to the position taken by the petitioner in the petition for new trial proceeding.

However, once the petitioner ultimately lost that ground for the petition for new trial, for reasons other than the issue of due diligence, it was in the petitioner's interests to take the exact opposition position on the factual issue of the defense team's awareness of Bryant's allegations, i.e., that the defense team not only could have been, but *was* aware of Bryant's allegations at the time and, therefore, was deficient in failing to present such evidence. It was only at this point that the petitioner, for the first time, proffered testimony from Hauer indicating that, contrary to the petitioner's factual assertion in the petition for new trial, she allegedly had informed the defense team of the Bryant allegations. In turn, the habeas court allowed the petitioner to relitigate this factual issue, without any explanation whatsoever as to why he did not present, and could not have presented, her testimony at the petition for new trial when this factual issue was being litigated before Judge Karazin, particularly when *she testified as a witness for the petitioner in that proceeding on the Bryant issue*.

On this record, it cannot be determined whether the failure of petitioner's counsel to present this unhelpful testimony from Hauer was intentional or simply a consequence of a lack of incentive on the petitioner's part to uncover such evidence. Accordingly, it must be emphasized that the Commissioner makes no assumptions in this regard. What should be clear, however, is that the petitioner should not have been allowed to relitigate the issue of the defense team's alleged awareness of Hauer and her alleged knowledge of the Bryant allegations without first justifying his failure to present Hauer's testimony on this factual issue in the petition for new trial, where it was first litigated. As a general matter, courts are, and should be, loathe to permit parties to relitigate factual matters that could have, and should have, been fully litigated, upon consideration of *all* the available, relevant evidence

in a prior proceeding. This is particularly true under the circumstances of the present case, where the initial absence of Hauer's testimony in this regard on the petition for new trial, where it would have undermined the petitioner's claim, contrasted with the subsequent, unexplained appearance of Hauer as a witness in the habeas proceeding, where it was essential to the petitioner's claim, raises at least the spectre of manipulation. The habeas court erred in choosing to overlook this glaring discrepancy in the petitioner's position relative to this factual issue and in allowing him to relitigate this factual issue, without explanation, let alone good cause, as to why Hauer's testimony was not presented previously.[62]

Judge Karazin's determination that the Bryant allegations were newly-discovered should have put this factual dispute to rest. See *Karazin*, MOD: 38. As noted previously, "'[t]he decision whether to apply the doctrine of collateral estoppel in any particular case should be made based upon a consideration of the doctrine's underlying policies .... These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation. . . .' (Internal quotation marks omitted.)." *In re Ross*, 272

[62] Although it is beyond the function of this court to evaluate Hauer's credibility, it is worth noting that the habeas court's decision to find her credible nevertheless is questionable, to say the least, in light of Hauer's failure to disclose, and/or the failure of petitioner's counsel to elicit, testimony as to Hauer's alleged eve-of-trial phone call to Sherman when Hauer first testified at the petition for new trial proceeding. The timing of Hauer's disclosure – after the hearing on the petition for new trial, where such testimony would have been fatal to the petitioner's ability to prove this evidence was newly-discovered, but just in time for the habeas proceeding, when such testimony would be beneficial to the petitioner – certainly provides a reason to question her testimony. That the habeas court was troubled by none of this when wholeheartedly finding her credible is itself troubling.

Conn. at 662, quoting from *Cumberland Farms, Inc. v. Groton,* 262 Conn. at 59. The habeas court erred in not recognizing that all of these interests are at play herein. In particular, it cannot but lead to contempt for the legal system to allow a litigant to present evidence and urge a particular factual finding in one proceeding, and then present evidence to undermine that determination in a subsequent proceeding, when the contrary position better serves his purpose. This is especially so where, as here, *petitioner made no attempt to establish that Hauer's testimony was unknown to him at the time of the earlier proceeding*. Gamesmanship cannot but undermine public confidence in the judicial system and should disentitle a petitioner to the relief he seeks. *See Negron*, 180 Conn. at 166 n. 6. For this reason, the habeas court erred in resting its finding of deficient performance on the petitioner's inconsistent factual allegations and Hauer's suspect testimony.

3. The habeas court erred in finding the defense team was constitutionally deficient in not investigating Hauer's allegations regarding Bryant

Even accepting Hauer's testimony at face value as did the habeas court, the court nevertheless erred in finding that the information provided by Hauer triggered a constitutional obligation on the part of the defense team to investigate further. It must be remembered that Hauer claimed she called Sherman after speaking with Garr on April 8, 2002. Thus, Hauer's contact with Sherman came, at the earliest, in the midst of jury selection. *See* CT 4/2 (voir dire begins); CT 5/8 (evidence begins). When both the scant information Hauer claimed she shared with Sherman, and the timing of her disclosure are considered, it is apparent the habeas court erred in determining that any and all reasonably competent criminal defense attorneys would have investigated her claims.

At the time Hauer claimed she approached Sherman, he had been representing the

petitioner for nearly four years. Sherman and other members of the defense team were intimately familiar with the early investigation and the state's anticipated evidence, having reviewed the Grand Jury transcripts and all the state's discovery, and having previewed the state's evidence at the juvenile hearing and the hearing in probable cause. HT 4/17: 67-70. They were thus well-positioned to evaluate Hauer's statements and assess their utility.

Through the state's extensive disclosure and the Grand Jury transcripts, the defense team knew that no one had ever reported seeing Bryant, Hasbrouck, or Tinsley, or persons fitting their descriptions, in Belle Haven the night of the murder. In addition, neither their client nor any member of their client's family had ever reported seeing these persons or persons matching their description in Belle Haven that night. HT 4/17: 130-31. Further, according to Hauer, what she told Sherman was merely that Tony Bryant, a friend of her brother's, told her brother that he and two friends were in the neighborhood and the friends later admitted to the murder. HT 4/19: 123. This scant information, coming in the midst of jury selection and just before the start of evidence, in a case that had been investigated by law enforcement, a private agency hired by petitioner's father, and numerous journalists and authors for more than 25 years, which found absolutely no corroboration in *any* of these investigations, could be dismissed by a reasonably competent defense attorney as not worth pursuing. See *Harrington*, 131 S.Ct. at 789 (competent counsel can avoid activities that appear "distractive from more important duties"). This is especially so when the unique phenomena surrounding this case are considered. As Sherman testified, this case attracted (and continues to attract) numerous persons claiming to have knowledge of the case. HT 4/16: 143-45; HT 4/27: 107. Unlike most criminal cases which excite only a casual or short-lived interest, this case has a huge "following" of "crack pots," as Sherman

said, as well as journalists and other media; books, movies, documentaries, web sites, and talk shows have been devoted to it. This phenomenon was perhaps at its peak just prior to and during the trial.

The unusual pull and attraction of this case is relevant to the exercise of counsel's professional judgment – in order to accomplish anything of any import, they had to constantly separate the "wheat from the chaff". As Sherman explained in his habeas testimony, he received many so-called "tips" that were obviously of no evidentiary value. Despite this, he did follow up on numerous "leads", many of which ultimately led to nothing.HT 4/17: 63; HT 4/18: 55-58, 67-68. Importantly, he investigated everything his client asked him to investigate. HT 4/26: 93-94. But to require counsel in the unique position of these lawyers preparing to try *this* case to investigate something so insubstantial as Hauer's statements, which they knew found no support in any investigation conducted to date, would be unreasonable.

Under these circumstances, the habeas court erred in failing to employ the presumption required by *Strickland* – that all decisions were made in the exercise of reasonable professional judgment. Once again, in evaluating the objective reasonableness of trial counsel's conduct, counsel must be presumed to possess powers of discernment at least as astute as that of the habeas court; if the habeas court could readily conclude the Bryant allegations were of no benefit to the defense, so too could defense counsel. This is especially so in light of Sherman's testimony that even if he had been aware of Bryant and his allegations prior to trial, he would not have pursued them for at least three reasons 1) they were implausible on their face, 2) he had already formulated a strategy focusing on Littleton as a third-party culprit and did not want to undermine that strategy by "laying out

the buffet table" and 3) Bryant's allegations would introduce a "racial element" into the case that Sherman did not think would benefit his client. HT 4/17: 131-32; HT 4/26: 109. All of these represent sound strategic reasons, based on sound professional judgment. The habeas court erred in failing to recognize them as such.

4. Petitioner Failed To Prove Prejudice

Nevertheless, even if the habeas court correctly determined that the defense team was deficient for not investigating Hauer's statements, petitioner failed to carry his burden of proving prejudice. Importantly, as with most other claims, petitioner failed to present the evidence he contends was admissible and available in 2002 during this habeas hearing. That is, he failed to produce Bryant as a witness, or any evidence that would substantiate Bryant's allegations. He also failed to prove Bryant would have been available as a witness in 2002 and that his allegations would have been admissible. The habeas court correctly concluded, therefore, that petitioner failed to prove prejudice. *See Thomas v. Comm'r of Correction,* 141 Conn. App. 465, 472, 62 A.3d 534, *cert. denied*, 308 Conn. 939, 66 A.3d 881 (2013) (without the testimony of witness at the habeas trial, "the habeas court could not evaluate him as a witness, nor could it assess the likely impact of his testimony."); *see also Townsend v. Comm'r of Correction,* 116 Conn. App. 663, 668, 975 A.2d 1282, *cert. denied*, 293 Conn. 930, 980 A.2d 916 (2009); *Andrews v. Comm'r of Correction,* 45 Conn. App. 242, 247-48, 695 A.2d 20, *cert. denied*, 242 Conn. 910, 697 A.2d 364 (1997); *Nieves v. Comm'r of Correction,* 51 Conn. App. 615, 622–24, 724 A.2d 508, *cert. denied*, 248 Conn. 905, 731 A.2d 309 (1999); *Taft v. Comm'r of Correction,* 47 Conn. App. 499, 504–505, 703 A.2d 1184 (1998).

As the habeas court found, petitioner failed to establish that any amount of effort on

the part of defense counsel would have resulted in Bryant's cooperation.[63] Indeed, as the court correctly noted, all indications are to the contrary. The evidence from the 2007 trial reveals that Bryant never willingly came forward with his story. Rather, after the verdict, Crawford Mills decided he would no longer honor Bryant's demand for anonymity. Mills then gave his name to the state, who gave it to defense counsel. Bryant never agreed to be interviewed by the state. Bryant's disclosures to defense counsel only came about after he was contacted by petitioner's famous cousin, Robert F. Kennedy, Jr. Even at that, Bryant has never agreed to repeat his allegations under oath. *See Skakel v. State*, 295 Conn. at 469, 499-501.

Moreover, other than Barbara Bryant's deposition and Crawford Mills' testimony; see n.41 *supra;* evidence on this issue from the 2007 proceeding was not admitted as substantive evidence in this proceeding. Thus, the bulk of the evidence considered by Judge Karazin in 2007 relating to Bryant's allegations may not be considered in support of petitioner's burden of proving prejudice.

Even if considered, however, it is apparent that this evidence fails to raise the

---

[63] During the course of the petition for new trial proceeding, Bryant invoked his Fifth Amendment privilege and refused to testify. Petitioner presented no evidence he would have done otherwise in 2002. Further, although Judge Karazin found Bryant's out-of-court statement to Colucci admissible as a statement against penal interest, it is important to remember this statement did not exist in 2002. Further, even if this Court were willing to assume Sherman could have obtained a similar statement from Bryant, petitioner failed to establish that such a statement would be admissible. As noted earlier, on appeal, two justices did not rule on the admissibility of Bryant's hearsay allegations because they found his statements incredible and uncorroborated, while two others would have found Bryant's statement to be inadmissible hearsay. *Skakel v. State*, 295 Conn. at 574, 484 n. 23, 523 (2010). Moreover, as Justices Zarella and McLachlan found in their concurrence, even if portions of Bryant's statement were arguably against his interest, the statements he attributes to Hasbrouk and Tinsley certainly are not, and therefore would not be admissible in any court proceeding. *Id.*

possibility that Hasbrouck and Tinsley committed this crime above the realm of rank speculation. Nothing, other than Bryant's out-of-court, uncorroborated statements, links either person with this homicide. Notwithstanding two post-conviction trials, and over 12 years since the verdict during which petitioner's counsel had every opportunity and incentive to uncover further evidence, petitioner has still never produced a single witness who corroborates Bryant's claim he and his friends were in Belle Haven the night of the murder. This fact alone makes his account incredible.[64]

It must remembered that Bryant told Colucci they were gathered in the Skakel backyard with about fifteen other teens, smoking "pot" and being boisterous. Yet, despite years in which to research this allegation, petitioner has failed to produce a single witness who was among these fifteen youths. Bryant even claimed Tommy and Michael Skakel joined his group and he waved at Julie Skakel. PE 192: 37-38. None of these persons has ever testified to seeing Bryant, not even the petitioner in this proceeding. *In fact, petitioner stated categorically that he did not see Bryant that night.* HT 4/25: 136.

Consistent with petitioner's testimony, Sherman testified that neither the petitioner nor any family member ever told him they had seen Tony Bryant or his friends that night. HT 4/17: 130-31. And, of course, none of the scores of people interviewed at the time of the homicide, and none of the witnesses who testified at the hearing on the petition for new trial, placed Bryant or his friends in Belle Haven the night of the crime.

In light of the implausible and uncorroborated nature of Bryant's claims, and the

[64] Judge Karazin found Bryant's accusations lacking in any genuine corroboration. He also determined that it "lacks credibility, and therefore, would not produce a different result in a new trial." App. at A34-A36. This Court found no abuse of discretion in this determination. See *Skakel v. State*, 295 Conn. at 484, n. 23, 523; *see* discussion, RPB pp. 55-59. As argued previously, findings such as these by Judge Karazin are binding in this proceeding.

complete lack of evidence connecting either Hasbrouck or Tinsley to the crime, the Bryant evidence would have been inadmissible as third-party culpability evidence at the petitioner's criminal trial. *See State v. Payne,* 219 Conn. 93, 117, 591 A.2d 1246 (1991); *State v. John,* 210 Conn. 652, 669-71, 557 A.2d 93 (1989).

Moreover, even if Bryant's allegations were admissible, and even if counsel was fully aware of them, competent counsel could reasonably determine that their admission would do more harm than good. As Sherman noted, Bryant's allegations risked introducing a "racial element to the case." Further, Bryant's allegations were so implausible that they would have damaged the overall credibility of the defense and watered down the more viable third-party defense centered on Littleton.

Further, as the habeas court found, respondent presented evidence in this proceeding which shreds Bryant's overall credibility. Attorney Richard Alexander testified that in 1990 or 1991, Bryant represented himself to be an attorney admitted in Maryland and the District of Columbia when he applied for a job with the Texas law firm of Johnson & Gibbs. He was hired on the condition that he pass the Texas bar examination. HT 4/25: 64-65. When the results of the examination were released, Bryant did not tell the firm he had failed. Members of the firm researched Bryant's claims of being a licensed attorney elsewhere and found them to be false. When confronted with the firm's discovery of his omissions and falsehoods, Bryant claimed there was a mix-up, and that his Maryland bar license was in storage at his grandmother's house. HT 4/25: 71-72. Bryant had no response when confronted with the firm's discovery that he was not admitted in the District of Columbia. *Id.* Bryant never produced proof of admission in either jurisdiction, and was fired. This, coupled with Bryant's robbery conviction in California, provides ample reason to

doubt his unsupported accusations. *See* HT 4/19: 153.

Accordingly, while the habeas court erred, for the reasons discussed *supra*, in finding Sherman deficient in failing to pursue and present Bryant's wholly implausible accusations, the court nevertheless correctly concluded that the petitioner fell far short of establishing prejudice.

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

Among petitioner's many incriminating statements considered by the jury in 2002 were two regarding the reason he was placed in Elan. Petitioner told both Dorothy Rogers and Greg Coleman that his family had sent him to Elan to avoid the police investigation. In fact, his statement to Rogers went further, admitting that his family thought he was responsible for the homicide.[65] CT 5/16: 138. This was corroborated by further evidence that petitioner's father had revealed to Mildred "Cissy" Ix that Michael had admitted to him he may have killed Moxley. *See* CT 5/15: 128

The state, in its closing argument at the criminal trial, expressly acknowledged that petitioner had a number of behavioral problems that could have explained why he was sent to Elan, but also argued that, based on the petitioner's statements to Rogers and Coleman, the jury could infer that the real reason the petitioner was at Elan was because his family knew that he was responsible for the victim's murder. In further support of this inference, the state also argued that the fact that Joe Ricci, the director of Elan, was accusing petitioner of responsibility for the murder suggests that he obtained such information from

[65] In this proceeding, Charles Seigan corroborated both Coleman and Rogers on this point. Seigan testified that petitioner also told him he was in Elan to avoid the possibility of being questioned. HT 4/18: 116.

the petitioner or his family when petitioner entered Elan. CT 6/3:129-31. The state had presented evidence that, at the time the petitioner was at Elan, he was not yet considered a suspect by the police. CT 5/29:166-67.

In the habeas petition, the petitioner alleged that defense counsel was ineffective for, *inter alia,* failing to object, on the grounds of prosecutorial misconduct, to the prosecutor's argument that "the `Skakel Family' believed that they `had a killer living under their' roof;" Fourth Amended Petition, dated May 17, 2013, at 54-59, para. 341c; and further ineffective in failing to adequately "present an effective closing argument" that countered this argument by the state. *Id.*, para. 342. (App. Pt. 1: A-889-90, A-891). After the evidence was completed below, the habeas court, on its own initiative, both raised, and ruled on, three different grounds of purported ineffectiveness by Attorney Sherman: (1) in failing "to object *to testimony proffered by the state* suggesting that the petitioner had been sent to Elan as part of a family cover-up and because of their fear of him;" MOD: 79-80 (emphasis added); (2) in failing to utilize certain police reports, either directly or as an investigatory tool for uncovering other evidence, that allegedly would have established that the petitioner was sent to Elan only because of a drunk driving arrest; *Id.* at 80; and (3) in failing to utilize those police reports to establish that, during the time petitioner was at Elan, there were contacts between Elan officials and Greenwich police, thereby rebutting what the habeas court (erroneously) understood to be an argument by the state in closing that there was no contact between the police and Elan officials during that time. MOD: 81. The court ruled that defense counsel was constitutionally deficient in all three respects, but concluded that there was no reasonable likelihood that, had counsel handled this "tangential" issue differently, the outcome of the proceeding would have been different. MOD: 81.

For the reasons that follow, the habeas court erred in raising, for the petitioner's benefit, additional claims of ineffective assistance of counsel. The court should have declined to consider them, as required by well established law, after correctly determining that they had not been initiated by the petitioner himself. Accordingly, this Court also should decline to consider these grounds for relief. In the alternative, the habeas court erred in concluding that trial counsel was constitutionally deficient.

A. The Habeas Court Erred In Adjudicating Grounds For Relief That Were First Raised And Argued By The Habeas Judge Himself

1. Facts pertaining to this claim

In the petitioner's direct appeal, he had claimed that the prosecutor engaged in prosecutorial impropriety during closing argument because, *inter alia*, "the state's attorney improperly asserted that the [petitioner's] family believed that he had killed the victim because, otherwise, he would not have been sent to the Elan School;" *State v. Skakel*, 276 Conn. at 755; and also because "he improperly referred to the [petitioner] as a `killer'" when asserting "that the [petitioner's] family had sent the [petitioner] to Elan `[b]ecause that's what they decided that they had to do with the killer living under their roof.'" *Id.* at 759. This Court found on direct appeal that the prosecutor's arguments were not improper in these respects. *Id.* at 758-59, 760-61.

Notwithstanding the ruling by this Court, the petitioner raised the following allegations as paragraphs 341c and 342 of the controlling petition below:

> 341. Trial counsel failed to object to numerous instances of prosecutorial misconduct that occurred during the summation, nor did he sufficiently counter those arguments in his own summation. The statements which need to be objected to, and if sustained, then they needed to be adequately countered in his closing, are as follows:
>
> * * *

c. The prosecutor argued the "Skakel Family" believed that they "had a killer living under their roof." The State argued:

> One thing that I submit helps tie all this together, particularly on the subject of Elan, and really see the truth, is the defendant's very presence at that place. The defense scoffs at the idea despite I think such clear evidence of a cover up. Why was the defendant at Elan. This is really not a matter of seeing the forest from the trees. It is genuinely transparent.
>
> Clearly, the defendant had a major problem. Already he was an alcoholic, a substance abuser. Already he was beyond the control of his family. He was becoming suicidal. I doubt his family was even aware of the sexual turmoil he was going through. Elan was a last resort but why exactly so drastic a resort.
>
> You heard from Rogers and Coleman he was being hidden from the police is probably part of it. It is likely also, if it was a private juvenile justice system, basically a family's response is what can we do to make sure this doesn't happen again. And where does that ring the truest, at that horrible general meeting with the monster himself, Joe Ricci.
>
> One thing, every client of Elan who was there during that particular era recalls vividly, is Joe Ricci referring to a file and telling the defendant that he wasn't getting ou[t] of that ring until he explained why he killed her and then being forced to w[ear] a sign, confront me on the murder of my neighbor.
>
> Where did Ricci get that information. Clearly he didn't get it from the police. Why did Ricci have that information. Why did Ricci confront the defendant with that information. The answer, the only one that makes sense, lies in why the defendant was there in the first place, lies in why his family felt a need to put him in that awful place. Why, <u>because that's what they decided that they had to do with the killer living under their roof</u>.
>
> Tr. 6/3/02 at 129-31 (emphasis added).[66]

* * *

342. Trial counsel failed to adequately prepare for and present an effective

[66] To be clear, the emphasized portion of the argument was underlined in the Fourth Amended Petition as filed by the petitioner with the habeas court.

> closing argument in that he did not counter the arguments presented in Paragraph 341 and he failed to argue the State's burden of proving each and every element beyond a reasonable doubt.

(Emphasis in original.) Fourth Amended Petition, dated May 17, 2013, at 54-59, para. 341c, 342. (App. Pt 1: A-889-90, A-891).

Although the Fourth Amended Petition continued to contain these paragraphs, the Commissioner already had successfully obtained summary judgment in his favor with respect to these allegations as a result of a motion directed at an earlier version of the habeas petition (dated June 8, 2012), wherein these identical allegations were asserted. On March 1, 2013, Judge Sferrazza granted judgment for the Commissioner on these allegations, stating as follows:

> [T]he Supreme Court addressed the petitioner's claims of prosecutor improprieties on direct appeal, [*State v. Skakel*, 276 Conn. at] 742. The Court determined that virtually identical allegations against the state arising from closing argument were groundless, *Id.*, 750-770. That ruling by the Supreme Court disables the petitioner from proving ineffective assistance by Attorney Sherman on that issue because no impropriety occurred at all.

"Memorandum of Decision on Respondent's Motion for Summary Judgment and/or Motion to Dismiss" (*Sferrazza, J.*), March 1, 2013, at 15 (App. Pt. 1: A-639).

On June 25, 2013, after the close of evidence in the hearing on the remaining counts of the petition, but before either party had submitted posttrial briefs, counsel for the petitioner was contacted by the habeas judge, via e-mail, and simultaneous notice of the contents of the e-mail was sent to counsel for the respondent. Court Exhibit IV:A.[67] In that e-mail, the judge indicated that "[i]n reviewing the criminal trial transcript [the judge had] come across an issue that may or may not be framed by the pleadings;" *id.*; although in its

[67] All of the pertinent e-mails between the habeas court and the parties were made part of the record and are reprinted in the Appendix to this brief. *See* App. Pt. 2: A-1501-1521.

later memorandum of decision, the court indicated that "the court discovered this issue in its review of the Greenwich police reports . . . ." MOD: 80 n.51. In the June 25th e-mail to petitioner's counsel, the judge proceeded to recite certain portions of the prosecutor's closing argument at the criminal trial and articulated a theory by which the judge believed such arguments could have been refuted by certain specific portions of the Greenwich police department file that the judge had reviewed which, according to the judge, suggested that the petitioner had been referred to Elan as a result of a disposition of a drunk driving charge. Court Exhibit IV:A. The e-mail went on to state:

> Given this history, it appears that Skakel has an argument that Sherman should have objected to Atty Benedict's argument as not being based on the evidence but, in fact, contrary to what Atty Benedict knew to be the truth (whether he personally knew is, of course, not the issue as a prosecutor is charged with police knowledge) regarding GPD's contacts with Elon [sic].[68] Additionally, since Sherman knew from Atty Benedict's argument on May 20th that the State was pursuing a theme that the Skakel family put the petitioner in Elon [sic] as part of a cover up, he could have called Lunney as part of his

[68] It appears that the judge construed the prosecutor's argument to be based on the premise that there was no evidence of any contact between Elan and any police officials that would have explained how Ricci could have gotten information from anyone other than the petitioner or his family suggesting that the petitioner was a suspect in the murder. *See* Court Exhibit IV:A ("Atty Benedict argued that the only way El[a]n would have known about the murder would have been through the Skakels which, he stated, supported his cover up claim. . . . Later, in his final closing argument, Atty Benedict raised the cover up claim directly with the jury. See pages 129-131. During this portion of argument, Atty Benedict stated: 'Where did Ricci get that information. Clearly he didn't get it from the Police.' He then went on to argue that the information could only have come from the Skakels and he posited reasons that could be the case.") Based on this reading of the state's argument, the habeas judge viewed the Greenwich police reports, which make references to the Greenwich police department's awareness of the petitioner's residency at Elan and contact with Elan, as contradicting this premise. Court Exhibit IV:A ("My review of the Greenwich Police Department file (which the habeas testimony indicates had been made available to Sherman before the trial) reveals that the Greenwich PD was well aware of Skakel's presence at El[a]n and had, in fact, been in touch with El[a]n while Skakel was a patient there.")

As will discussed further *infra*, the habeas court misconstrued the state's argument in this regard.

> own case to demonstrate the GPD's awareness of Skakel's circumstances at Elon [sic].[69] Of course, I have not drawn any firm convictions regarding this issue. At this point, I simply want to know whether you believe this issue has been framed by the pleadings and, if so, please identify where.

Id. Approximately one hour later, the judge sent another e-mail to petitioner's counsel, again with proper notice and copy to respondent's counsel. Court Exhibit IV:B. In this e-mail, the judge brought to counsel's attention "another report which [petitioner's counsel] may find relevant to this issue." *Id.* The judge then proceeded to articulate the contents of the police report and the manner in which the judge believed those contents further supported the theory of ineffectiveness that the judge had brought to counsel's attention in the earlier e-mail. *Id.*

Two days later, petitioner's counsel responded to the judge's e-mail by requesting additional pages for the petitioner's posttrial brief "[a]s a result of the additional area of inquiry suggested by the Court;" Court Exhibit IV:C. That same day, the judge sent another e-mail, stating, *inter alia*, as follows:

> While I am aware that the petitioner has claimed that defense counsel did not adequately deal with Atty Benedict's argument to the jury that the petitioner was sent to Elon [sic] as a way to keep him away from the police investigation and, in that regard, Atty Benedict implied that Ricci et al could only have gotten their info, suspicions, etc., from the family. To the extent that claim implicates what Sherman should or should not have done about Atty Benedict's closing argument, I think that claim is squarely before me. I'm not sure, however, whether there is any claim that Sherman should have dealt

[69] Although this e-mail, as well as the next, both discuss the contents of police reports written by Det. Lunney, neither e-mail explains exactly what the judge means by "the GPD's [(Greenwich Police Department's)] awareness of Skakel's circumstances at El[a]n." Court Exhibit IV:A; *see also* Court Exhibit IV:B. It appears that the court is inferring, from the fact that the police reports make references to both the petitioner's drunk driving charge and his subsequent presence at Elan, that the petitioner's placement at Elan was solely a consequence of that drunk driving arrest and had nothing to do with his family's concern about his responsibility for Martha's murder. As discussed further *infra*, there is nothing in the police reports, or any other evidence presented in this case, to support that conjecture.

> with this cover up theory in an evidentiary manner once it arose in the trial. And, of course, I am not suggesting that it should be as that's the petitioner's choice. However, since this issue concerns me, I want all of us to be very clear about what is and what is not before me.

Court Exhibit IV:D. Petitioner's counsel then responded as follows:

> We do believe that there is a claim that trial counsel should have addressed the issue during the evidence portion of the case, and we added a section in our brief dealing with precisely that issue. We believe [Paragraphs] 341(c), 342, 358, 359 of our Fourth Amended Petition for Writ of Habeas Corpus cover the claim, and there was testimony at the trial from the Petitioner that he asked trial counsel to address the issue and put before the jury the true reason why he was sent to Elan.

Court Exhibit IV:F.

The court rejected the argument by petitioner's counsel that the petition had fairly asserted a claim that Sherman should have addressed the issue during the evidentiary portion of the case, noting that Paragraphs 341 and 342 "appea[r] to deal with closing argument" and that "Paragraphs 358 and 359 are, of course, extremely broad and could encompass a universe of claims regarding Sherman's trial performance." Court Exhibit IV:G. The judge nevertheless directed counsel for the Commissioner to indicate whether she "believe[s] that the claim has been adequately framed, or that the commissioner didn't have adequate notice to deal with this claim." *Id.* Counsel for the Commissioner, consistent with the view already expressed by the judge, asserted that the claim was not raised, nor even suggested, by the allegations of the habeas petition and further noted that Judge Sferrazza already had ruled in favor of summary judgment on paragraphs 341 and 342. Consequently, the Commissioner argued, the issues proposed by the judge should not be considered. Court Exhibit IV:J. Counsel for the Commissioner also moved that the e-mail correspondence between the court and counsel for the parties be made part of the record; *Id.* The judge responded with another e-mail, directing petitioner's counsel to

respond to the Commissioner's position and granting the Commissioner's motion to have the e-mails made part of the record. Court Exhibit IV:K. The judge also reiterated the arguments that he believed supported the theory of prosecutorial impropriety that the judge had first suggested in its initial e-mail, before stating that "[t]hat, however, is a matter of argument for counsel if the issue of prosecutorial impropriety in this regard is actually before [the court]." *Id.*

On July 1, 2013, the petitioner filed his post-trial brief. Although there had been no further amendment of the pleadings, the petitioner nevertheless briefed the two arguments first articulated by the habeas judge in his e-mails, i.e., that, based on the Greenwich police reports, Sherman should have both "presented to the jury the true reason why Petitioner was sent to Elan," i.e., not "for murder, but rather for treatment relative to his drunk driving charge," and also "object[ed] to the implication [by the prosecutor] that the Petitioner was sent to Elan for murder." Petitioner's Posttrial Brief at 54 (App. Pt. 2: A-1523). In urging that the police reports allegedly demonstrate that the petitioner was sent to Elan as a direct consequence of the drunk driving charge and further demonstrate that the police had contact with Elan officials while petitioner was there, the petitioner's arguments were almost identical to the arguments first advocated by the habeas judge himself in his first two e-mails. *Compare* Petitioner's Posttrial Brief at 54 n.80 *with* Court Exhibits IV:A and IV:B.

The day after the petitioner's brief was filed, the habeas judge again e-mailed the parties. Court Exhibit IV:M. The judge first noted the Commissioner's argument that any challenge to the propriety of Attorney Benedict's closing argument was foreclosed by Judge Sferrazza's ruling granting summary judgment, but held off ruling on that until after the Commissioner had an opportunity to file his posttrial brief. *Id.* The judge then noted his

agreement with the Commissioner's view that the pleadings did not fairly allege anything relating to Sherman's alleged failure to present evidence relating to the reasons why petitioner was sent to Elan, but further noted that "the transcript from the habeas hearing reflects that Skakel did, in fact, testify to this issue 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." *Id.* The judge rejected the Commissioner's argument that the petitioner's failure to raise the claim in his habeas petition foreclosed relief on this basis and, instead, invited the Commissioner, if he so wished, to move "to reopen the evidence for the limited purpose of responding to this claim." *Id.* The Commissioner objected to the judge's proposed solution to the manner in which this claim arose and declined the invitation to move to reopen the evidence regarding the new claim. Court Exhibit IV:P.

As noted *supra*, the habeas court eventually ruled that defense counsel's performance was deficient, based upon these newly-asserted theories of ineffectiveness first articulated by the habeas judge himself in his e-mails to counsel. MOD:79-81.

2. The habeas court erred in refusing to follow well-established law requiring a court to disregard claims not raised by the petitioner in the petition and choosing, instead, to adjudicate a claim that the habeas judge himself had first raised and for which the judge had actively advocated

It is clear, from the procedural history set forth above, that the claim regarding Attorney Sherman's failure to utilize information contained in the Greenwich police file to argue that the petitioner was sent to Elan solely as a result of a drunk driving conviction was a claim that first arose solely in the mind of the habeas judge himself. Indeed, in both his initial e-mail to petitioner's counsel and in the court's subsequent memorandum of decision, the judge expressly admitted that it was he, not the petitioner or his counsel, who

first raised this basis for habeas relief. *See* 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 at 80 n.51 ("*the court discovered this issue* in its review of the Greenwich police report . . . .") (Emphasis added).

Furthermore, upon "discovery" of this issue, the judge did far more than seek clarification as to whether the claim was properly before him. Throughout the correspondence documented in the various e-mails contained in Court Exhibit IV, the judge took a position of advocacy on this claim: articulating it; explaining the potential theory of ineffectiveness that could be pursued by the petitioner; and citing to specific pieces of information from the police reports that the judge believed support that theory. It was only after the judge stressed his belief as to the potential merit of this suggested claim that the petitioner, not surprisingly, took the position that his petition meant to encompass such a claim all along.

To its credit, the habeas court rejected the petitioner's position and correctly found that the claim regarding Attorney Sherman's alleged failure to present evidence on the issue of why the petitioner was sent to Elan was not a claim that was fairly suggested anywhere in the petitioner's pleadings. At that juncture, the habeas court's responsibility under the law was clear. It is well-established that a petitioner is not entitled to relief on claims that he did not present in the petition. *Johnson v. Comm'r of Correction*, 285 Conn. 556, 580, 941 A.2d 248 (2008). Notwithstanding this clear directive, however, the habeas judge proposed, instead, that the Commissioner move to reopen the evidence, thereby affording the parties an opportunity to further explore this new basis for relief for the petitioner that the judge himself had raised. Two important points about this remarkable

proposal need to be reiterated: (1) the habeas *judge*, not petitioner's counsel, first suggested that the hearing be reopened to present further evidence on this claim for habeas relief; *see* Court's Exhibit IV:K; and (2) although the petitioner bears the heavy burden of proof on any and all claims for habeas relief; *Myers v. Manson*, 192 Conn. 383, 387, 472 A.2d 759 (1984); the judge in this instance placed the onus on the Commissioner, *not* the petitioner, to reopen the evidence relative to the new claim, essentially acknowledging that, as far as the judge was concerned, the "evidence" that the judge himself had discovered in the Greenwich file already established that the claim – which the judge had first asserted on the petitioner's behalf – had merit and the Commissioner merely needed to be given an opportunity to rebut that presumptively valid claim with further evidence.[70]

Perplexed by the unusually active role taken by the judge in pursuing this issue, as well as the Catch-22 solution the court offered to the Commissioner – i.e., forgo his right to present evidence on this newly-asserted claim in order to preserve his claim as to the impropriety of the manner in which this claim arose in this case or, instead, agree to a reopening of the hearing, thereby affording the petitioner an opportunity to backfill the appellate record with evidence on a claim that, by the habeas court's own acknowledgement, the petitioner had never intended to present evidence on in the first

[70] Any uncertainty whether the habeas court already was firmly convinced of the merit of its own claim, based solely on hearsay statements it culled from the Greenwich police reports, is dispelled by the court's later acknowledgment of doubt, in its Memorandum of Decision, as to whether "there could be any point in trying to rebut what the Greenwich police reports clearly reflect." MOD:81, n.51. As will be discussed further *infra*, the fact that a court would so readily view hearsay statements – which generally are not even *admissible* in a court of law, unless they fit certain well-established exceptions – as, instead, being so presumptively clear, credible and accurate that they are almost irrefutable proof of a fact, is mystifying.

place – the Commissioner declined the court's invitation to reopen the evidence.

In this appeal, the Commissioner recognizes that, by refusing to accede to the manner in which the court attempted to obviate the problem presented by the judge's post-trial suggestion of an additional claim for relief, i.e., by reopening the evidence, the Commissioner cannot now complain of prejudice merely from the lack of notice. However, the lack of notice is not the most troubling aspect of the highly unusual circumstances under which this claim arose. This is not a case in which a party seeks to belatedly amend a pleading and the court exercises its discretion to allow the late amendment and afford the opposing party an opportunity to reopen evidence to eliminate any prejudice. Rather, as discussed *supra*, this is a case in which the *judge* "discovers" a new claim for one of the parties; fully argues both the legal theory and evidence that he believes establishes the merit of such a claim for relief for that party; refuses to disregard the claim, as required under the law, after expressly recognizing that it was not asserted by that party; and advocates, instead, for further proceedings in which the judge erroneously shifts the burden to the opposing party to *dis*prove the merit of the claim that the judge urges should be pursued. Under these unique circumstances, a mere reopening of the evidence was a woefully inadequate solution because it simply could not undo the impropriety of the judge's actions in initiating, substantiating and arguing this claim on the petitioner's behalf. Nor could it reasonably be expected to offset the inherent prejudice to the Commissioner in erroneously placing upon him the burden of changing the judge's mind with respect to a claim upon which he already had taken such a clear position.[71]

[71] Query, for example, what view a criminal defendant would have – indeed, what view even a neutral observer would have – if the judge, in a criminal trial to the court, e-mailed

"[C]oncern for public confidence in the administration of justice suggests the maxim that justice must satisfy the appearance of justice." (Internal citations and quotation marks omitted.) *State v. Colton*, 234 Conn. 683, 701, 663 A.2d 339 (1995). Particularly because of the clear potential for conflict in the habeas judge's actions in initiating, advocating and ultimately deciding this claim, the court erred in failing to dispose of this claim by adhering to the well-established principle that claims not raised by the petitioner should not be decided by the court. *Johnson*, 285 Conn. at 580.

Finally, it must be stressed that the Commissioner is not claiming that the judge's improper assertion, substantiation and advocacy of a new claim for the petitioner's benefit mandated recusal from the case. *See e.g.*, *Joyner v. Comm'r of Correction*, 55 Conn. App. 602, 740 A.2d 424 (1999). Nevertheless, with respect to this particular claim, the unusual circumstances surrounding its genesis, wherein the judge ruled on a claim that the judge himself initiated and advocated for so strenuously, demanded all the more that the judge follow the law, urged by the Commissioner below, that required the court to disregard claims not raised by the petitioner. "[G]iven the negative impact [the judge's actions] are likely to have on the public's perception of the criminal justice system;" *State v. Elson*, 311 Conn. 726, 764, 91 A.3d 862 (2014); the habeas court erred in considering the post-trial claim that Attorney Sherman was ineffective in failing to present evidence on the issue of why the petitioner was sent to Elan and, accordingly, this Court should not consider this claim further.

---

the prosecutor post-trial with suggestions as to additional criminal charges that might be supported by the evidence, attempted to preclude any claim of prejudice by offering to reopen the trial to allow the defendant to present evidence that might undermine the judge's proposed theory of criminal liability and the same judge then ultimately found the defendant guilty of those additional criminal charges.

B. In The Alternative, The Habeas Court Erred In Concluding That Defense Counsel Was Deficient In The Manner In Which It Addressed The Issues Of Why Petitioner Was Sent To Elan And Whether There Were Any Contacts Between Police And Elan Officials

1. Facts pertaining to this claim

As noted *supra*, the record from the criminal trial reflects that the state proffered evidence, from Rogers and Coleman, that petitioner admitted to both of them his belief that his family had sent him to Elan to avoid the police investigation of the victim's murder. CT 5/16:138; 5/17:137-38. To Rogers, petitioner went further, sharing his belief that his family, in fact, thought he was responsible for the homicide. CT 5/16:138.

In addition, the state introduced evidence through other Elan witnesses that they were confronted by the Elan administration with whatever issues or problems had precipitated their placement in Elan. CT 5/23:135-40; 159; 191-92; CT 5/24:43. Testimony at the criminal trial also revealed that Elan received information from the families of the residents, as well as schools and therapists, regarding the issues facing the residents. CT 5/23:142-43; CT 5/17:106. As mentioned previously, the administration of Elan, particularly Joe Ricci, its founder and chief administrator, confronted petitioner on why he murdered his neighbor. CT 5/23:119, 121: CT 5/24:4. Alice Dunn, who had been both a resident and staff member at Elan, recalled Ricci reading from a rather large file while thus confronting petitioner. CT 5/17:58, 83, 97. In addition, Angela McFillan recalled Ricci asking petitioner to explain what he did after returning from his cousin's house. CT 5/24:36.

The state contrasted this testimony indicating Elan administrators were accusing petitioner of the murder, with the fact that the police did not suspect petitioner at that time. When the state asked Detective James Lunney if petitioner was a suspect during the time he was a resident of Elan, Lunney stated that he was not. CT 5/29: 166. The state further

asked Lunney whether the Greenwich police department made "any efforts" to enroll the petitioner in Elan, to which Lunney responded, "None whatsoever." *Id.* The state also asked Lunney if the police shared any of the details of the investigation with Elan. To this, Lunney again responded, "None whatsoever." CT 5/29:166-67.

At the criminal trial, the state attempted to ask petitioner's father why petitioner had been sent to Elan, but Rushton, Sr. claimed not to remember. CT 5/15: 80. Under questioning by Attorney Sherman, however, Julie Skakel, the petitioner's sister, testified that her brother Michael is dyslexic, and that this contributed to the "problems he had with his father education wise and everything else." CT 5/29: 91-92. She explained that "Michael has great difficulty in school listening and it was perceived as more of a behavioral problem than a learning difficulty." *Id.* at 92. Sherman also elicited from Julie Skakel that the day the chauffeur Larry Zicarelli drove Michael into the city, "that occurred" because Michael had slept with one of his mother's dresses.[72] *Id.* at 93. Julie also testified that Michael did not adjust well to their mother's death two years before the murder. *Id.* Sherman also asked Julie whether her brother was sent to Elan due to problems he was having in various schools, and to a problem he had in Windham, and Julie responded yes. CT 5/29: 93-94.

When the state later asked Julie if her father sent Michael to Elan, she stated she did not know who sent him. CT 5/29: 95-96. The state then asked her a series of questions about the turbulent relationship between Michael and their father. Julie admitted

[72] Zicarelli testified that Michael jumped out of his car on the Triboro Bridge and had to be forced back into the car. Michael told Zicarelli, "he had done something very bad and he either had to kill himself or get out of the country." CT 5/16: 15-23. He also told Zicarelli if he knew what he had done, Zicarelli would never talk to him again. *Id.*

that Michael's daily drinking, and his use of drugs, probably contributed to the turbulent relationship. CT 5/29: 96-97.

When Sherman attempted to follow these questions by asking Julie if Michael was sent to Elan to hide from the Martha Moxley investigation, the court sustained the state's objection (based on the fact Julie had already testified she did not know who sent him to Elan), and struck Julie's negative response. CT 5/29: 97-98.

In its rebuttal argument at the criminal trial, the state expressly acknowledged that petitioner was struggling with many behavioral issues around the time he was placed at Elan. CT 6/3:130. The state argued, nevertheless, that the jury should infer that an additional reason for petitioner's placement in Elan was, as he had told Coleman and Rogers, an effort by his family to shield him from the police investigation. *Id.* at 130-31. Also, drawing on its evidence that petitioner's father confided in Mildred "Cissy" Ix that petitioner had admitted possible responsibility for Martha's murder, that Elan residents were confronted with whatever issues precipitated their placement in Elan, and Lunney's testimony that petitioner was not a police suspect at the time, the state asked the jury to infer that Ricci, in accusing petitioner of murder at a time before even the police considered him a suspect, most likely based that accusation on information he received from the petitioner's own family. *Id.*

At the habeas trial, petitioner's counsel asked Attorney Sherman why he had not put Thomas Sheridan, a family member and lawyer, on the stand to counter the state's evidence regarding petitioner's placement in Elan. Sherman responded that he would not have put Sheridan on the stand for any reason, characterizing him as a "loose cannon." HT 4/16:110. When asked to explain what he meant by this, Sherman stated he was afraid

Sheridan would blurt out information prejudicial to his client. When pressed further by the respondent, Sherman stated he was concerned Sheridan might reveal the types of prejudicial information regarding his client that was contained in the Sutton reports, such as petitioner's cruelty to animals. HT 4/18:55. When asked by petitioner's counsel why he did not put another witness on to counter the state's evidence, Sherman stated he was concerned that if he opened the door to this issue the state might have been able to cross-examine that witness and elicit a host of prejudicial information regarding his client. HT 4/16:110.

During his habeas testimony, petitioner testified on direct examination that he was essentially "kidnapped" by "[f]our large men, tattooed; people that were pretty scary," who flew him off to Elan. HT 4/25:93. The petitioner testified that Joe Ricci talked to him about the Moxley murder and required that he make admissions regarding the murder at the general meetings. *Id.* at 95. According to the petitioner, Ricci first "require[d]" him to make an "admission" that his brother Tommy killed Martha,[73] but that Ricci later made accusations implicating petitioner in the murder after petitioner had unsuccessfully attempted to run away from Elan. *Id.* The petitioner testified at the habeas trial that he later told Attorney Sherman that he believed he was sent to Elan was "[b]ecause [he] had failed out of an – five or six schools at that time and because [he] had gotten a DWI in Windham, New York, and [he] didn't have a license and– that was why." HT 4/25:94. On cross examination, petitioner minimized the role that the drunk driving offense may have

[73] The petitioner did not explain how any alleged statement he was forced to make implicating Tommy constituted an "admission" by him, nor what disciplinary purpose would have been served by Ricci allegedly forcing the petitioner to make such a statement against his brother.

had in his placement at Elan when the Commissioner asked whether that was the reason why he was sent to Elan. Petitioner stated, "Well, I've had a DWI at 16; that was one incident, but when my father flew up three days after I was convicted, he – I meant convicted after I was kidnapped, his reasoning for me being in Elan was, if you only did better in school, I wouldn't have to send you to this damn place." HT 4/25: 147. In response to a follow-up question, as to whether his father sent him to Elan due to very poor grades, petitioner answered, "He always – yeah, absolutely, I failed and – yeah, yeah." *Id.*

As discussed *supra*, after the habeas trial, the habeas judge indicated that he had found significance in certain police reports which, according to the judge, indicated that "the Greenwich police had been made well aware of the circumstances of the petitioner's admission to Elan. . . ." MOD at 80. The judge did not clarify what he meant by "the circumstances of the petitioner's admission to Elan," nor did he cite to or quote from any specific portion of any specific police report. In its decision, the court also noted that the police reports make reference to a number of "contacts" between Greenwich police officers and Elan officials. *Id.* at 79-80 and n.50. On the basis of this information, the court found that defense counsel was deficient in failing to utilize this information to rebut what the habeas court construed to be erroneous suggestions by the state that (1) petitioner was sent to Elan by his family solely because his family wanted to protect him from the police investigation of the murder and (2) there were no contacts between police and Elan officials while petitioner resided there. MOD:75-80.

2. The Habeas Court Erred In Finding Defense Counsel Deficient In Failing To Utilize Certain Police Reports To Rebut Portions Of The State's Case

The habeas court erred in finding Attorney Sherman deficient on the basis of the

information in the police reports.[74] The habeas court interpreted the state's closing argument as precluding any additional reasons for petitioner's presence at Elan, other than an attempt by his family to shield him from the police investigation of the murder. The court also interpreted the state's argument as suggesting that the reason why the jury should infer that Ricci did not get his information about petitioner's responsibility for the murder from the police is because the police had no contact with Elan officials while petitioner was there. The court completely misconstrued the state's argument in both respects and, consequently, crafted three erroneous theories of ineffectiveness by defense counsel relative to this issue: (1) defense counsel's failure "to object to testimony proffered by the state suggesting that the petitioner had been sent to Elan as part of a family cover-up and because of their fear of him;" MOD at 79-80; (2) defense counsel's failure to utilize the Greenwich police reports, either directly or as an investigatory tool for uncovering other evidence, that allegedly would have established that the petitioner was sent to Elan only because of a drunk driving arrest; *Id.* at 80; and (3) defense counsel's failure to utilize those police reports to establish that, during the time petitioner was at Elan, there were contacts between Elan officials and Greenwich police, thereby rebutting what the habeas court believed to be an argument by the state in closing that there was no contact between the police and Elan officials during that time. MOD at 81. For the following reasons, the habeas court's reasoning and conclusions are erroneous.

a. The state's argument expressly acknowledged that there may have been multiple reasons why the petitioner was sent to Elan

The habeas court first reasoned that the police reports could have been used to

[74] *See* footnote 53, *supra*.

rebut part of the state's closing argument, which it misapprehended as deceptively suggesting that there was no evidence of any reason for the petitioner's placement at Elan, other than his family's knowledge that he was involved in Martha's murder. In truth, however, the state's argument expressly acknowledged to the contrary.

As noted *supra,* at the criminal trial, defense counsel presented evidence of a number of behavioral issues that could have contributed to the decision to place the petitioner at Elan. In turn, and precisely because of the presentation of this evidence by effective counsel, the state never argued that the only reason for the petitioner's presence at Elan was his involvement in the murder. On the contrary, the prosecutor expressly conceded before the jury that the petitioner was experiencing a number of behavioral problems around that time: "Why was the defendant at Elan[?] This is really not a matter of seeing the forest from (sic) the trees it is genuinely transparent. *Clearly, the defendant has a major problem. Already he was an alcoholic, a substance abuser. Already he was beyond the control of his family. He was becoming suicidal. I doubt his family was even aware of the sexual turmoil he was going through. Elan was a last resort . . . .*" (Emphasis added.) CT 6/3:130. The prosecutor went on to argue that, nevertheless, the jury could infer that the reason that petitioner's family subjected him to such a "drastic" last resort as Elan was precisely the reason acknowledged by petitioner himself when talking to Rogers and Coleman, i.e., his responsibility for Martha's murder. *Id.* The prosecutor argued that his family most likely viewed a place like Elan as "private juvenile justice system" for such extreme behavior. *Id.*

Because the evidence clearly showed, and the prosecutor expressly conceded, there were a number of other possible (although less compelling) explanations for the

decision by petitioner's father to put his son in a place like Elan, the habeas court erred in finding defense counsel deficient for not rebutting an argument that the state simply never made.

b. There was nothing objectionable about the state's proffer of evidence, or its closing argument, relative to the issue of whether petitioner's involvement in the murder was the most compelling reason for his placement at Elan

Although the habeas court found defense counsel deficient for failing "to object to testimony proffered by the state that the petitioner had been sent to Elan as part of a family cover-up and because of their fear of him," MOD at 79-80; the court does not identify the specific "testimony" to which defense counsel allegedly should have objected nor on exactly what legal grounds counsel should have objected.

It is clear that the habeas court, based on its own theories from the police reports, believes that the petitioner was sent to Elan solely because of his drunk driving arrest and, therefore, did not find persuasive the state's closing argument inviting the jury to rely instead on the petitioner's statements to Rogers and Coleman indicating that he was sent there because of his involvement in the murder. However, the court cites no authority for the proposition that a defense attorney can – let alone is constitutionally required to – object to "testimony proffered by the state" simply on the grounds that a postconviction court might not consider it persuasive.

To the extent that the habeas court takes issue with both the state and defense counsel relative to the prosecutor's closing argument inviting the jury to infer from all the evidence, including the testimony of Rogers and Coleman, that the petitioner was sent to Elan because of his involvement in the murder, it is well-established that a prosecutor is entitled to argue "based upon the facts in evidence and the reasonable inferences to be

drawn therefrom." *State v. Ceballos*, 266 Conn. 364, 394, 832 A.2d 14 (2003). As this Court recognized in the petitioner's direct appeal, "[t]he assertion of the state's attorney that the defendant had been sent to Elan because of his apparent involvement in the victim's murder was . . . [founded] on the testimony of Rogers and Coleman, both of whom testified that the defendant himself had explained that his family had enrolled him at Elan to shield him from the police." *State v. Skakel*, 276 Conn. at 758. If this explanation of the reason for his placement at Elan was a "lie", as the habeas court chose to infer from the police reports; MOD at 76; then it was a lie of the petitioner's own making and any information contained in those police reports still would not have explained away why the petitioner nevertheless was repeatedly stating to numerous witnesses – either truthfully *or* falsely -- that the true reason he was sent to Elan was because of his involvement in the victim's murder.

Accordingly, because the state's suggestion that the petitioner's placement at Elan was related to his involvement in Martha's murder was grounded in evidence of the petitioner's own admissions to that effect, the argument simply was not objectionable and, accordingly, defense counsel was not deficient in failing to raise a meritless objection to it. *See Williams v. Manson*, 195 Conn. 561, 564, 489 A.2d 377 (1985) (counsel not deficient in failing to raise meritless objection to evidence); *see also Toccaline*, 80 Conn. App. at 805-06 (counsel not deficient in failing to object to arguments by prosecutor that were based on evidence admitted at trial).

c. Petitioner failed to demonstrate that the vague, hearsay statements in the police reports relied upon by the habeas court would have been admissible and/or added anything significant to the evidence already presented by the defense regarding other possible reasons for the petitioner's presence at Elan

Notwithstanding the testimony of Rogers and Coleman as to the petitioner's own explanation for his placement at Elan, the habeas court found defense counsel deficient in failing to utilize "a trove of information available that would have put a lie to [this] claim." MOD at 76. Unfortunately, in making this ruling, the court fails to identify the "trove of information" that would have established that petitioner was sent to Elan solely because of his drunk driving arrest. The court also ignored a "trove of information" that defense counsel *did* present to the jury that provided a number of possible explanations for petitioner's presence at Elan, other than that given by petitioner in his statements to Rogers and Coleman. As discussed *supra*, Attorney Sherman elicited a substantial amount of testimony from Julie Skakel about her brother's turbulent relationship with their father, his drug and alcohol abuse, his sexual turmoil, his difficulty in coping with their mother's death, and his problems in school. CT 5/29:91-94. He specifically questioned Julie Skakel as to why her brother was sent to Elan and she indicated that it was due to problems he was having in various schools, and to a problem he had in Windham, New York. *Id.* at 94. The state later elicited further testimony from Julie about the turbulent relationship between the petitioner and their father, petitioner's daily drinking, and his use of drugs. CT. 5/29: 96-97.

In contrast to the significant, admissible evidence presented by defense counsel at the criminal trial on this issue, the "trove of information" upon which the habeas court itself relies to second-guess counsel consists simply of some vague references in a police report. In its ruling, the habeas court cites to no specific report stating that the petitioner

was sent to Elan for only one particular reason. The only portion of a report that the court makes specific reference to on this issue; *see* MOD: 79 n.50; simply states that petitioner "was presented in court on Sunday, pleaded guilty to all the charges with the exception of DWI. This case was held in abeyance, and later that afternoon a plane arrived at the local airport and Michael was handcuffed and taken by two attendants and a doctor to a hospital in Maine." *See* App. Pt 2: A-1494. Tellingly, in the very next line, that same police report states that, "recently . . . Michael Skakel has been causing numerous problems for the family." *Id.* These vague and inconclusive statements are hardly the "smoking gun" that the habeas court makes them out to be, i.e., definitive proof that the petitioner was sent to Elan *only* because of his drunk driving arrest and for no other reason. On the contrary, these statements tend only to reaffirm the accuracy of the state's argument that petitioner was dealing with a host of behavioral issues and that his placement in Elan was "a last resort."[75] CT 6/3:130.

Moreover, the habeas court also ignored Attorney Sherman's sound strategic reasons for declining to plumb too deeply into the factors that may have contributed to petitioner's placement in Elan. As Attorney Sherman explained in his habeas testimony, there was a plethora of prejudicial information regarding petitioner that the defense understandably did not want before the jury, including reports of cruelty to animals, and his extensive psychiatric history. HT 4/18:55. As to the drunk driving incident in particular, no competent defense attorney would open the door to evidence that petitioner had tried to run

[75] Significantly, in addition to Julie's testimony from the criminal trial, the petitioner himself testified at the habeas trial that his father's primary motivation had been the problems he was having in school. HT 4/25:93-94, 147.

down a police officer with his car,[76] particularly in light of the fact that the defense already had presented a wealth of testimony, through Julie Skakel, as to other possible explanations for petitioner's presence at Elan.[77]

Furthermore, even if any and all reasonably competent attorneys would have been required to present all conceivable evidence relative to this "tangential" issue; MOD:81; Attorney Sherman certainly could not have proffered, at the criminal trial, the clearly inadmissible hearsay statements that the habeas court inexplicably chose to rely on below as both substantive and irrefutable proof of the one true reason petitioner was sent to Elan. Citing an inapposite decision in a civil banking case, the habeas court blithely suggests that the statements made in the police reports would be admissible under the business records exception to the hearsay rule. MOD at 81 n. 51 citing *Milford Bank v. Phoenix Contracting Grp., Inc.*, 143 Conn. App. 519, 534-36, 72 A.3d 55 (2013). However, the Commissioner is unaware of any pertinent authority supporting the proposition that statements made by a police officer in a police report may be admitted in a court of law as substantive evidence of

---

[76] One of the police reports relied on by the habeas court, dated May 12, 1978; *see* MOD: 79 n.50; indicates that Greenwich police received information from a James Scarey, then-Chief of Police in Windham, New York, that at 3:45 a.m. on March 5, 1978, "Michael was drving on a local road, at which time he was signaled by a standing police officer investigating an accident to stop, at which time Michael attempted to run down the police officer, fled the scene, was chased and eventually hit a telephone pole." *See* App. Pt. 2: A-1494.

[77] Although habeas counsel suggested below that the Skakel family lawyer, Attorney Sheridan, could have been called to testify on the subject, Attorney Sherman explained that he would not put Sheridan on the stand for any reason, because Sheridan was a "loose cannon" and Sherman feared he would have "blurt out" prejudicial information regarding the petitioner. This reasonable, strategic concern was entitled to great deference. *Strickland,* 466 U.S. at 689. Moreover, having failed to present any evidence at the habeas trial as to what Sheridan actually would have said, if Sherman had chosen to call him to the stand, petitioner based his claim that Sheridan's testimony would have been helpful, rather than harmful, on nothing more than rank speculation.

a fact under the business records exception (although the state's ability to obtain convictions certainly would prove much easier if this were true).

Finally, the habeas court's conjecture that the reports might, at the least, have led to helpful testimony from Lunney and Keegan on this issue is undermined by the fact that the petitioner never presented any such testimony at the habeas hearing and, therefore, there simply is no record of whether it would have been helpful at all. Once again, the petitioner's burden of proof in a habeas proceeding "is not met by speculation . . . but by demonstrable realities. . . ." *Johnson*, 285 Conn. at 584. The habeas court erred in relieving the petitioner of this burden here.

d. The state never argued that there were no contacts between police officials and Elan while petitioner was at Elan

The habeas court also misconstrued the state's closing argument relating to the source of Ricci's information as to the petitioner's suspected involvement in the murder. The court erroneously inferred that the state was suggesting that Ricci could not have gotten this idea from the police because there was no evidence anywhere of any contact between Connecticut police and the officials at Elan in Maine. The court concluded that this argument was a "lie" because the police reports show that there was contact between Greenwich police and Elan during this time period.

Nowhere in the prosecutor's argument did he represent to the jury, either explicitly or implicitly, that the police had no contact with Elan officials. Rather, as noted *supra*, the state had presented testimony from Detective Lunney that (1) the police did not yet consider petitioner a suspect in Martha's murder at the time he was at Elan and (2) that police did not share any information about the murder investigation with Elan officials. CT

5/29:166-67. It was on the basis of this evidence that the prosecutor argued to the jury, "Where did Ricci get that information? Certainly he didn't get it from the police." CT 6/3:130. Contrary to the habeas court's assertion, this argument, and the evidence upon which it is founded, is not belied by anything in the police reports. Even taking, at face value, the statements in the police report indicating some incidental telephone contact between Greenwich police and Elan officials, such references do not "put the lie" to the state's evidence that the police neither considered petitioner a suspect in the murder during the time period in which he was at Elan nor shared any information about the murder investigation with Elan, nor does it "put the lie" to the state's argument asking the jury to infer, therefore, that Ricci's belief that petitioner was involved in the murder most likely came from information Ricci received from the petitioner and/or his family, not the police.

Accordingly, it was error for the habeas court to base its finding of deficient performance on its misinterpretation of the state's argument in this regard.[78]

---

[78] In fact, the only reference to the police having "no contact with Elan officials while the defendant was a student there" -- the premise upon which the habeas court based its finding that the prosecutor allegedly misled the jury in this regard -- is found, *not* in the prosecutor's closing argument to the jury, but rather in this Court's opinion in the petitioner's direct appeal. *See State v. Skakel*, 276 Conn. at 759. Of course, read in context, this statement was not necessarily erroneous. This assertion was made immediately after this Court's reference to petitioner not being "a suspect in the victim's death when he attended Elan" and, coupled with Lunney's testimony about there being no discussions with Elan about the murder investigation, could be viewed as simply shorthand for there being no contact between police and Elan about the murder investigation. Police contact that did not include the police divulging information about the investigation would not explain why Ricci was confronting petitioner with specifics about the murder and his responsibility for it.

In any event, however, it is clear that, whatever the genesis or intent of this statement by this Court on direct appeal, nothing in the prosecutor's argument before the jury explicitly or implicitly represented that there was no contact whatsoever between police officials and Elan, as the habeas court erroneously surmised.

VII. THE HABEAS COURT ERRED IN FINDING THE DEFENSE TEAM DEFICIENT FOR FAILING TO PRESENT EXPERT TESTIMONY ON COERCED CONFESSIONS

The petitioner also claimed below that Attorney Sherman should have consulted, and presented testimony from, an expert regarding the coercive nature of the environment at Elan in order to attack the testimony of several witnesses who attended Elan School at the same time as petitioner, and testified that he made admissions - with varying degrees of specificity – about Martha Moxley's murder. He contended that Sherman's representation was deficient in failing to offer expert testimony regarding false confessions to blunt the impact of that testimony. The habeas court agreed that Sherman's representation was deficient in this respect, but concluded that the petitioner failed to demonstrate prejudice. MOD: 86-88.

The habeas court erred in concluding that Sherman's performance was deficient in this regard.[79]

A. Facts Pertaining To This Claim

With respect to the petitioner's inculpatory statements during his stay at Elan, Sherman challenged the admission of those statements as privileged, bringing in Attorney Linda Kenny from New York to assist with this aspect of the litigation. HT 4/16: 100. These efforts succeeded in precluding any evidence being offered from the professional staff at Elan regarding the petitioner's statements, but any statements made by the petitioner to other students at Elan were deemed by the trial court to be non-privileged. *Id.*

When asked by petitioner's counsel whether he attempted to seek to suppress the statements made to other students on the theory that they were the result of coercion,

[79] *See* footnote 53, *supra*.

Sherman testified that he did not. HT 4/16: 101. Sherman later acknowledged that there was no "state action" which would have supported suppression of the statements made at Elan on the ground that they were unduly coerced. HT 4/17: 158-59. Nevertheless, Sherman did meet with several people who educated him about the coercive tactics used at Elan and places like it; HT 4/16: 104, 105-06; and also met with Elizabeth Loftus, an expert on the issue of false confessions; HT 4/16: 103-04; HT 4/17: 159, 160; HT 4/18: 63-66. Sherman also both consulted with, and had the petitioner examined by, a number of mental health experts and therapists to determine whether they could provide the defense with any helpful information to explain the inculpatory statements the petitioner made while at Elan. HT 4/17: 161-62. However, these experts not only failed to provide any helpful information to the defense but they, in fact, provided information regarding the petitioner's potential personality disorders that Sherman believed would be exploited by the state (i.e., to suggest "motive, means and causation") if he attempted to present testimony from them regarding the petitioner's state of mind when he responded to Elan's coercive tactics. *Id.* at 162-64.

There being no basis upon which to exclude the statements on legal grounds as unduly coerced, Sherman instead chose to educate the jury about the coercive environment at Elan through the testimony of the witnesses who had firsthand knowledge of Elan's methods at that time. HT 4/16: 102, 103; HT 4/17: 154, 161. A review of the criminal trial transcript, as well as this Court's decision on direct appeal, corroborates that a significant amount of testimony was presented on the issue of Elan's coercive methods through witnesses who had firsthand knowledge of that institution's methods at the time. *See* CT 5/23:111-24 (Sarah Petersen); CT 5/23: 173-75 (Michael Wiggins); CT 5/23: 209

(Donna Kavanaugh); CT. 5/24: 10-14 (Angela McFillin). *See also State v. Skakel*, 276 Conn. at 646 ("Several former Elan residents testified about the deplorable conditions at the institution, which employed a behavioral modification approach predicated on controversial techniques of intimidation, confrontation and humiliation of its residents."). By presenting such evidence, Sherman succeeded in getting the prosecutor, in closing argument at the criminal trial, to concede that Elan used coercive tactics at times. The state agreed that the general meetings were "horrendous" and were equivalent to a "non-stop Terrace (sic) Island[80] concentration camp type of atmosphere" and "the lower circles of hell." CT 6/3/02:17.

Sherman testified that part of his strategy was also to demonstrate to the jury that, despite the coercive tactics utilized during general meetings at Elan, the petitioner never made any statements during those oppressive meetings that constituted any admission that he had killed the victim; HT 4/16: 102; HT 4/17: 154, 161; HT 4/26: 89-93; and this evidence, in fact, succeeded in obtaining a concession from the prosecutor, during closing argument, that the "petitioner admitted nothing in that awful general meeting," and that he never confessed in front of a hundred witnesses. CT 6/3: 122-23. Thus, Sherman strategically chose not to present the testimony of an expert, such as Loftus, regarding the effect of coercive methods in eliciting a false confession because it was the defense theory that there never was any "confession" made by the petitioner at these coercive meetings to begin with, despite extreme measures by Ricci to obtain one at the general meetings. HT 4/16: 105; HT 4/17: 159, 160-61; *see* HT 4/16: 102. Furthermore, Sherman testified that he

[80] Although transcribed as "Terrace Island," the prosecutor presumably said and/or meant "Parris Island," a Marine Corps boot camp known for its strict discipline and rigorous training methods.

was concerned about turning his defense "into a war of experts" and suggesting to the jury that the petitioner was trying to obtain "a rich man's justice" by "buy[ing] experts" to help him get acquitted. HT 4/16: 105.

Sherman nevertheless recognized that the incriminating and inculpatory statements that the petitioner made to other students at Elan were made during more private conversations, not during the coercive general meetings. HT 4/17: 154-57. Consequently, Sherman's strategy with respect to those witnesses was to present evidence that attempted to undermine their credibility and attempt to persuade the jury that the petitioner did not actually make such statements to those witnesses. HT 4/17: 154; HT 4/26: 89-93.

At the habeas trial, the petitioner presented testimony from Richard Ofshe, a purported expert on false police confessions. Ofshe admitted that, in preparing for his habeas testimony, he had reviewed only a limited portion of the record, as contrasted with "far more thorough and organized research" that would have been necessary if he "were going to prepare to testify in substance at a trial." HT 4/22:30, 32. Nevertheless, on the basis of his limited review, Ofshe opined that the petitioner did not "admit to other Elan students that he murdered Martha Moxley, but rather adopted a 'compromise strategy,'" which involved "a shift from repeated flat-out denials of his having any involvement in the death [of] Martha Moxley to his subsequent response that he might have killed Martha but didn't have any memory of doing so." HT 4/22:50. According to Ofshe's understanding of the evidence, the petitioner's "initial position was affirmative, that he had nothing to do with [the murder] ... and that the shift was to acknowledge [Elan's] ... accusations against him by saying, you may be right, and that the end statement was, I have no memory of having done anything like that." HT 4/22: 56. Ofshe proffered that, had he been retained by trial

counsel, he would have testified that the petitioner's vague statements that he had no memory of killing Martha Moxley were in the nature of opinions, made simply to satisfy those in authority at Elan, and thus should not be considered admissions of any sort. *Id.*: 53. However, when confronted at the habeas trial with other portions of the criminal trial testimony that he had not reviewed, and in which Elan witnesses testified that petitioner, outside the context of the coercive general meetings, had specifically made statements to them implicating himself in the murder, Ofshe admitted that these statements could not be explained as part of a "compromise strategy". HT 4/22: 60-66.

The habeas court concluded that Attorney Sherman's decision to forgo presenting the testimony of an expert on false confessions fell below the standard of reasonable competence, reasoning that such testimony "would have put the petitioner's ambiguous and arguably inculpatory statements allegedly made at group sessions into a different context." MOD: 87. In the habeas court's view, without expert testimony from someone like Ofshe, the jury would not have been capable of understanding "that the purpose of pummeling a resident with accusations would not be to achieve a truthful answer, but rather submission to the allegation simply as a means of stopping the coercion." MOD: 87 and n.55. The court nevertheless concluded that the petitioner had failed to establish prejudice because Ofshe's testimony regarding the effect of coercion would not have explained the petitioner's inculpatory "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.

B. The Habeas Court Erred In Finding Deficient Performance

In refusing to defer to Attorney Sherman's strategic decision to forgo expert

testimony on the allegedly coercive environment at Elan, the habeas court notes only that "Attorney Sherman testified that he considered retaining an expert on false confessions but decided against it because the petitioner had denied that he ever confessed to the murder." MOD: 86. To the extent that the habeas court suggests that this is the entirety of Attorney Sherman's testimony with respect to this issue, it is clearly erroneous. Inexplicably, the habeas court makes no mention of Attorney Sherman's testimony that he actually consulted with such an expert before making the tactical decision not to pursue such a strategy, not only because (1) it would have suggested to the jury that the defense was pursuing the somewhat inconsistent theories that, on the one hand, he never made any admissions at Elan but, on the other hand, he was pressured into making admissions at Elan due to the coercive environment there, but also because (2) Sherman did not want to turn his defense into a "war of experts" and suggest to the jury that the defendant's wealthy family was merely "buy[ing]" an expert's favorable testimony and (3) there already was ample evidence, from other witnesses, regarding the coercive environment at Elan.

The habeas court's failure to acknowledge the full extent of Attorney Sherman's testimony regarding his actions is both troubling and erroneous. As discussed more fully *supra*, the High Court has directed that, in evaluating the reasonableness of counsel's conduct, lower 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.) (Internal quotation marks omitted.) *Cullen*, 131 S. Ct. at 1407. *See also Harrington*, 131 S.Ct. at 791 ("*Strickland* ... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). The habeas court's refusal to consider the full range of

legitimate strategic considerations underlying Sherman's decision is even more egregious here because Sherman expressly testified that he *was* motivated by such considerations when deciding not to call an expert on coerced confessions. By inexplicably ignoring Attorney Sherman's complete explanation of his rationale, the habeas court abandoned its paramount duty to evaluate whether Sherman's choice to forgo presenting an expert on this issue was a choice that was *objectively* reasonable, i.e., one any reasonably competent attorney could have made. *See Waters v. Thomas,* 46 F.3d 1506, 1512 (11th Cir. 1995) (question under *Strickland* is "whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.... [Courts] are not interested in grading lawyers' performances; [courts] are interested in whether the adversarial process at trial, in fact, worked adequately.")

"[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney." *Boyle v. McKune*, 544 F.3d 1132, 1139 (10th Cir. 2008). As the United States Supreme Court has noted, this is no less true with respect to expert witnesses:

> Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. ***There are, however, "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."*** [*Strickland,* 466 U.S.] at 689, 104 S.Ct. 2052. ***Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach***.

(Emphasis added.) *Harrington*, 131 S. Ct. at 788-89. *See Wright v. Comm'r of Correction*, 143 Conn. App. 274, 68 A.3d 1184 (2013) (affirming habeas court's determination that counsel not ineffective for failing to call expert on false confessions).

In this case, it is readily apparent that Attorney Sherman proffered a number of legitimate, strategic considerations that justified his decision not to call an expert on false

confessions. First, as a general matter, the need for, and even the admissibility of, expert testimony on the effect of undue coercion on the reliability of a confession is an issue upon which reasonably competent attorneys could differ. Jurors do not need expert testimony to explain what their common sense tells them, i.e., that any statements made under unduly coercive circumstances are likely to be unreliable. Expert testimony is generally admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. *State v. Iban C.*, 275 Conn. 624, 634, 881 A.2d 1005 (2005); *accord* Conn. Code of Evid. §7-2. Where, however, the expert does not have skill or knowledge on the particular subject at issue which is beyond the ken of the average juror, it is error to admit his or her testimony. *State v. George*, 194 Conn. 361, 372-3, 481 A.2d 1068 (1984), *cert. denied*, 469 U.S. 1191 (1985). As the Second Circuit noted in *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008), "testimony is properly characterized as 'expert' only if it concerns matters that the average juror is not capable of understanding on his or her own. *See United States v. Amuso*, 21 F.3d 1251, 1263 (2d Cir.) [*cert. denied*, 513 U.S. 932 (1994)] ('A district court may commit manifest error by admitting expert testimony where the evidence impermissibly mirrors the testimony offered by fact witnesses, or the subject matter of the expert's testimony is not beyond the ken of the average juror.')" *Mejia*, 545 F.3d at 194.

Contrary to the habeas court's assumption, the proposition "that the purpose of pummeling a resident with accusations would not be to achieve a truthful answer, but rather submission to the allegation simply as a means of stopping the coercion;" MOD: 87 and n.55; is not so complex a principle that it is beyond the common knowledge of the average

juror -- any kid who has ever been forced to cry "uncle" is well aware that it rarely elicits a reliable statement as to one's family tree. "[J]urors, in deciding cases, are not expected to lay aside matters of common knowledge or their own observations and experiences. . . ." (Internal quotation marks omitted.) *State v. Warholic*, 278 Conn. 354, 365, 897 A.2d 569 (2006). Thus, had the defense offered testimony on this issue at trial, there is a strong likelihood that the trial court, faithfully applying the proper standard for expert testimony, would have rejected it, because "the proffered testimony [would be] merely a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence." *State v. George*, 194 Conn. at 372. Indeed, the very point that the habeas court believed only an expert like Ofshe could relay to the jury, i.e., that a person might make false incriminating statements at the group meetings only in order to placate his tormentors, was, in fact, expressly made during the course of the testimony of some of the lay witnesses that Sherman chose to present on this point instead. *See* CT 5/23:122 (Petersen's testimony that petitioner would only give vague statements about not remembering if he killed victim, and even then only "after long hours of torture and after that sometimes just to get them to leave him alone, I believe, he would say I don't remember, I don't remember. And that would at least get them to lay off him for a little while"); *id.*:154-55 (testimony from witness that she falsely acknowledged being promiscuous, in response to Elan tactics of screaming such accusations at her during general meeting, because she "wanted them to leave me alone"); *id.*: 209 (Kavanaugh's testimony that, in response to constant spanking to obtain admission at general meeting, she "gave them what they wanted to hear").

In addition to failing to establish that Ofshe's testimony related to an issue that was

beyond the ken of an average juror, the petitioner also failed to establish that the type of expertise Ofshe claimed to possess was recognized and admissible in Connecticut courts in 2002. *See Ledbetter v. Comm'r of Correction*, 275 Conn. 451, 461-62, 880 A.2d 160 (2005) (Counsel cannot be faulted for failing to advance novel legal theory which has never been accepted by the pertinent courts.) In his testimony, Dr. Ofshe could recall no judicial proceeding in which he was allowed to testify about the reliability of admissions made in non-police interrogations, which is the testimony proffered in this case. HT 4/22:40. Nor does petitioner cite any such authority. On the contrary, in *State v. Lamonica*, 44 So. 3d 895 (La. Ct. App. 2010), the First Circuit Court of Appeal in Louisiana upheld a trial court's refusal to allow Dr. Ofshe's testimony. There, like here, the admissions in question were made not in response to law enforcement interrogation, but in response to questions asked by members of the defendant's church. *Lamonica*, 44 So. 3d at 902. The Court of Appeal noted that, in contrast to extensive studies that had been done regarding police interrogations, the testimony that Dr. Ofshe proffered in *Lamonica* was subject to "no methodology about false confessions that could be tested, or that would permit an error rate to be determined." *Id.* at 906. The court concluded: "[w]e find the area of research on false confessions caused by high-control groups to be vague and speculative, at best, and such research does not satisfy the standard of *Daubert*, particularly in light of the fact that Dr. Ofshe had not studied or worked on any cases in this particular area for more than ten years." *Id.*, citing *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

This case precisely mirrors the circumstances of *Lamonica*. Dr. Ofshe posited that the petitioner engaged in a "compromise strategy" in order to deflect accusations about the Moxley homicide posed by members of a high-stress organization, one that Dr. Ofshe had

never studied. Ofshe offered no evidence of scientific research that would support expert opinion testimony regarding the veracity of statements made under those circumstances. Therefore, because petitioner did not establish that the type of expertise Ofshe claims would have been recognized by Connecticut courts in 2002, he failed to prove Sherman was ineffective in not proffering it. *See See Sekou v. Warden*, 216 Conn. 678, 690, 583 A.2d 1277 (1990) ("the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation"). *See also Alvarez v. Comm'r of Correction*, 79 Conn. App. 847, 850, 832 A.2d 804 (2003) (petitioner, who failed to establish that contested evidence was admissible at trial, failed to show he was prejudiced by counsel's failure to offer that evidence), *cert. denied* 266 Conn. 933 (2003). Moreover, even if this Court were to now declare that the type of "expert" testimony proffered by Ofshe properly could have been admitted by the criminal trial court, the mere novelty of this type of testimony at the time of the petitioner's trial, by itself, undermines any claim that Sherman was constitutionally deficient in failing to proffer it. *Ledbetter*, 275 Conn. at 461-62.

Furthermore, even if this evidence might have been ruled legally admissible by the criminal trial court, the fact still remains that the need to educate the jury on such a common sense principle by way of expert testimony was so minimal, and the potential downsides to presenting such evidence so great, for the reasons explained by Attorney Sherman, discussed more fully *infra*, that any reasonably competent counsel could have decided, as did Sherman, to forgo securing and presenting such testimony. As the High Court has stated, "[a]n attorney can avoid activities that appear distractive from more important duties. *Bobby v. Van Hook*, 558 U.S. [558 U.S. 4, 11,] 130 S.Ct. 13, 19 [(2009)]

(per curiam). Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." (Internal quotation marks omitted.) *Harrington*, 131 S. Ct. at 788-89.[81]

A second reason why Sherman reasonably decided not to waste time and resources on expert testimony in this regard is because he recognized, as did all of the parties at the criminal trial, that the only damaging statements upon which the state was relying were those made, not in the coercive group meetings, but rather in more private conversations with Elan residents, where no coercion was present.[82] Indeed, applying an internally inconsistent rationale that is repeated throughout its decision, the habeas court, after berating Sherman for choosing not to call an expert, then expressly *agreed* that such testimony "would not have been of particular use in helping the jury assess the accuracy or

[81] The habeas court erroneously accused Attorney Sherman of "miss[ing] the point," reasoning that an expert on coerced confessions "would have been helpful in setting the temper and tone of Elan for the jury." MOD: 86-87. Respectfully, however, it is the habeas court itself that missed the point. No one, including Attorney Sherman, disputed the possibility that evidence regarding Elan's coercive environment might be "helpful," at least to the extent that this possibility was one worth considering. Undoubtedly, that is why Attorney Sherman did explore the possibility of presenting such testimony and met with Dr. Loftus and others, as well as why Sherman elicited evidence from other witnesses regarding Elan's coercive environment. Nevertheless, for the reasons discussed above, Sherman ultimately made a judgment call that the downsides of expert testimony outweighed any minimal benefits. For the habeas court to have so lightly substituted its own judgment call for that of experienced counsel on this was a clear violation of the *Strickland* Court's directives to the contrary. As the High Court itself has recognized, "[f]rom the perspective of [petitioner's] defense, there were any number of hypothetical experts . . . whose insight might possibly have been useful. [Nevertheless, a]n attorney can avoid activities that appear distractive from more important duties . . . ." (Internal citation and quotation marks omitted.) *Harrington*, 131 S. Ct. at 789.

[82] As noted *supra*, even the prosecution itself conceded that any statements made by the petitioner during group sessions carried little weight in terms of reliability and persuasiveness. CT 6/3/02: 17, 19, 122-23. This concession by the state only further reflects the degree to which Sherman's efforts in educating the jury as to Elan's coercive environment were successful, without the need for expert testimony.

reliability of the reports of the petitioner's alleged narrations of the events of October 30, 1975," as given to the jury by Coleman and Higgins; MOD at 87-88; whose testimony regarding the petitioner's admissions at Elan was by far more significant to the state's case than anything said at the coercive general meetings. The court correctly recognized that expert testimony regarding the pressures exerted on a student to admit to wrongdoing in a coercive group setting did not explain the petitioner's decision to volunteer incriminating, narrative statements to fellow students in private conversations, as occurred with Coleman and Higgins, free from the oppression of the group setting.[83] *Id.* Inexplicably, however, the court decided that the insignificant benefit from expert testimony on this subject only demonstrated the absence of prejudice, but not the reasonableness of Sherman's strategic decision not to secure such testimony. When evaluating the reasonableness of Sherman's actions, it was hardly consistent with the great degree of deference owed to counsel for the habeas court to have presumed that counsel could not have been as perceptive as the habeas court itself in appreciating that the presentation of this type of expert testimony "would not have been of particular use," in the final analysis.

Third, the habeas court improperly rejected out-of-hand Sherman's rationale that any expert testimony that sought to attack any purported "confession" by the petitioner during the general meetings would have been inconsistent with his strategy of using these statements to the petitioner's advantage, by arguing that, despite these coercive tactics, *the petitioner never actually "confessed" to anything at the general meetings.* It is a perfectly legitimate, and well-established, strategy not to pursue inconsistent defenses. *See State v.*

[83] As noted *supra*, Ofshe himself expressly acknowledged that his opinion regarding the unreliability of coerced statements would have no application to statements made during private conversations with students. HT 4/22: 60-66.

Shabazz, 246 Conn. 746, 764, 719 A.2d 440 (1998) ("Although it is true that a defendant is legally permitted to raise inconsistent defenses, when he does so a jury, applying its common sense, is entitled to view with skepticism the persuasiveness of all of the defenses."), *cert. denied*, 525 U.S. 1179 (1999); *Santiago v. Comm'r of Correction*, 125 Conn.App. 641, 647–48, 9 A.3d 402 (2010), *cert. denied*, 300 Conn. 910 (2011).

Fourth, as this Court has recognized, "[a]lthough an expert may [be] helpful to the defense, there is always the possibility that an expert called by one party, upon cross-examination, may actually be more helpful to the other party." *Michael T. v. Comm'r of Correction*, 307 Conn. 84, 101, 52 A.3d 655 (2012). In this case, the habeas court failed even to acknowledge Sherman's understandable concern that presenting expert testimony would open the door to damaging information about the petitioner's potential "personality disorders." Sherman correctly recognized that, given the enormous prejudicial effect that evidence regarding personality disorders could have, he could not risk a ruling that the defense had "opened the door" to the petitioner's mental history by eliciting expert testimony on the psychological forces that allegedly produced petitioner's statements during the general meetings. Indeed, had Sherman taken that gamble and lost, he undoubtedly would have been criticized for that decision, and arguably more rightly so, given the questionable need to educate the jury with expert testimony on this issue in the first place. "Knowing when to quit is often a hallmark of commendable courtroom advocacy." *United States v. McGill*, 11 F.3d 223, 228 (1st Cir. 1993). Well aware that he would be presenting lay testimony regarding Elan's coercive atmosphere, and properly trusting the jury's application of common sense and experience to question the worth of any coerced statements, Sherman can scarcely be faulted for deciding that any minimal benefit

to expert testimony on coercion was not worth the substantial risk of opening the door to damaging evidence of the petitioner's personality disorders.

Fifth, it also was reasonable for Sherman to have been reluctant to present a defense based on what might appear to the jury to be a battle of experts. *See Harrington*, 131 S. Ct. at 790 (implicitly recognizing as reasonable counsel's concern for "transform[ing] the case into a battle of the experts").

Finally, it is worth reiterating that Sherman did not abandon evidence relating to Elan's coercive tactics entirely. On the contrary, Sherman fully explored this issue through the testimony of witnesses who were able to give a firsthand account of Elan's environment at the time. Moreover, as noted *supra*, this safer, alternative strategy by Sherman resulted in significant concessions from the prosecutor that any statements made during the coercive general meetings were of questionable value. In light of all of the substantial downsides of presenting expert testimony that would have been, at best, minimally "helpful" in further countering the less significant statements made at the group meetings, it is readily apparent that Sherman's decision to approach the issue of coercion through the lay witnesses instead was a sound one and the habeas court erred in refusing to give proper deference to that strategic choice by counsel. *See United States v. McGill*, 11 F.3d at 227-28 (counsel's decision not to call witness, after "skillful cross-examination" had elicited much the same opinion evidence that counsel had hoped to establish through defense witness, not deficient).

VIII. THE HABEAS COURT ERRED IN FINDING THAT COUNSEL'S ACCEPTANCE OF B.W. AS A JUROR FELL BELOW THE STANDARD OF REASONABLE COMPETENCE

The petitioner also claimed below that Attorney Sherman was ineffective for

accepting two jurors, L.C. and B.W. The habeas court found that Sherman's decision to accept L.C. was not constitutionally deficient. The court found that Sherman's decision to accept B.W., a police officer, fell below the standard of reasonable competence, but concluded that the petitioner failed to demonstrate prejudice. MOD: 92-94.[84]

A. Facts Pertaining To This Claim

During jury selection, B.W. was first questioned by Attorney Sherman. CT 4/4: 142. B.W. indicated that he and Sherman had known each other "for at least 10 – 11 years." *Id.*: 142-43. During this *voir dire*, Sherman and B.W. discussed a case, early in their relationship, wherein Sherman represented a client who had assaulted B.W. and for whom Sherman successfully obtained accelerated rehabilitation, over B.W.'s objection. *Id.*: 143. B.W. nevertheless agreed that there were no bad feelings between himself and Sherman as a result of that case. *Id.* In fact, B.W. volunteered that his wife, who also was called as a witness in that case and knew Sherman's reputation as "a very good lawyer," feared at first that she would be "grilled" and "intimidated" by Sherman. *Id.*: 147. However, once B.W.'s wife did take the stand, neither she nor B.W. felt that Sherman intimidated her and she was not upset with the way Sherman handled the examination. *Id.*: 148.

B.W. recognized that, as a police officer, he might be stereotyped by a defense attorney selecting a jury as "leaning toward the prosecution, maybe." CT 4/4: 146. Nevertheless, B.W. repeatedly assured Sherman that he could be fair to both sides. *Id.*: 144, 146, 156. When asked whether he could reserve opinion until he heard all of the evidence in the case, B.W. explained that he knows from his "training and experience [as a police officer], you listen to both sides of the case" and that "[t]here are always two sides to

[84] *See* footnote 53, *supra*.

a story." *Id.*: 156. He indicated that, even though he wears a badge, he also understands that "both sides commit mistakes." *Id.*

B.W. volunteered that he knew one of the witnesses, Detective Lunney, socially, as a result of them being in the same motorcycle club, but that he and Lunney never discussed any details of this case. *Id.*: 144, 145, 157. He assured Sherman that he would judge Lunney's testimony just as he would anyone else's and would not be inclined to find the defendant guilty just because he knows Lunney. *Id.*: 144-45.

Sherman questioned B.W. extensively about his occupation and whether he was familiar with some of the state's witnesses. CT 4/4: 148-51, 154. With respect to one of the state's witnesses, Dr. Henry Lee, B.W. indicated that he "may have sat in on a lecture from him but other than that" had never dealt with Dr. Lee before; *id.*: 146-47; that he did not think that Lee was an instructor when B.W. was going through the police academy in Bethel; *id.*: 154; and, when asked by Sherman whether he would take everything Dr. Lee said "as a sermon on the mount," B.W. indicated that he "can't really say that;" *id.*: 149. B.W. candidly admitted that, because of Dr. Lee's reputation, his testimony "carries some weight," a proposition with which Sherman himself readily agreed. *Id.*: 150. Nevertheless, B.W. assured Sherman that he would evaluate the credibility of Lee's testimony on the basis of what he had to say at the trial, not his reputation, and the fact that Lee was testifying for the state does not necessarily mean that its case is a strong one. *Id.*: 150. B.W. assured Sherman that he also would have no problem voting not guilty if the evidence was insufficient to prove guilt beyond a reasonable doubt and explaining to any fellow officers who had a problem with this that they "weren't in the courtroom" to hear the evidence that needed to be weighed. *Id.*: 151-2. As for Sherman's questions relating to

whether he could resist pressure from co-workers, family and friends to discuss this high profile case, B.W. responded that he was a professional and that this would not be a problem. *Id.*: 153.

At the habeas trial, Attorney Sherman testified that he found B.W.'s responses to his questions to be "incredibly honest" and that Sherman also "knew his reputation in the community." HT 4/16: 176. Sherman explained that both B.W. and L.C. "seemed fair minded." *Id.*: 178. He also pointed out that he had "put policemen . . . on juries before . . . and you can't use a broad brush on all these people." HT 4/16: 178; HT 4/17: 169; HT 4/26: 96-97. Sherman testified that, in weighing whether or not to strike a juror, he had to consider whether the next juror was going to be even less favorable, especially in this case, where Sherman was concerned about people who "wanted to sit on this jury so that they could be part of the big show." HT 4/17:168. Sherman also testified that he consulted with the petitioner prior to accepting B.W. and that the petitioner did not object. HT 4/16:177; 4/18:2-3.

B. The Habeas Court Erred In Finding That Attorney Sherman's Tactical Decision To Accept B.W. Was Constitutionally Deficient

The habeas court erred in second-guessing Attorney Sherman's decision to accept B.W. as a juror. *Strickland* holds that

> [n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89. In order that this dictate would not readily be overlooked, the *Strickland* Court reiterated this principle over and over again, cautioning that "[t]here are

countless ways to provide effective assistance in any given case;" *id.* at 689; that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way;" *id.*; and that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another;" *id.* at 693.

Consistent with this principle, courts uniformly recognize that

> counsel's actions during jury selection are considered a matter of trial strategy, and counsel's strategic choices are virtually unchallengeable. . . . Attorneys consider many factors in making their decisions about which jurors to challenge and which jurors to accept, and reviewing courts should hesitate to second-guess counsel's strategic decisions, even where those decisions seem questionable.

People v. Jones, 982 N.E.2d 202, 215-16 (Ill. Ct. App. 2012), *appeal denied*, 985 N.E.2d 309 (Ill. 2013). *Accord Tolliver v. United States,* 2009 WL 1393300 (S.D. Ill. May 15, 2009) ("the decision of when to use a peremptory strike lies firmly within the realm of 'strategic choices' that the Court will not second guess on collateral review"); *Com. v. Torres*, 71 Mass. App. Ct. 723, 726, 886 N.E.2d 732, 736 (2008) *aff'd*, 453 Mass. 722, 905 N.E.2d 101 (2009) ("Whether to exercise a peremptory challenge of a particular juror is a question of strategy addressed to the judgment of the defendant and his counsel"); *Barmore v. State*, 323 Ga. App. 377, 381, 746 S.E.2d 289, 293 (2013) ("Which, and how many, prospective jurors to strike is a quintessential strategic decision.") (Internal quotation marks omitted); *State v. McNeill*, 83 Ohio St. 3d 438, 439, 700 N.E.2d 576 (1998) ("The use of peremptory challenges is a matter of strategy. Debatable trial tactics do not constitute ineffective assistance of counsel."). "[T]he use of peremptory challenges is inherently subjective and intuitive;" *People v. Coffman*, 34 Cal. 4th 1, 48, 96 P.3d 30 (2004); and, consequently, counsel's choices should not be labelled incompetent merely because he makes "unconventional choices or play[s] hunches." *People v. Thompson*, 21 N.Y.3d 555, 560,

997 N.E.2d 1232, 1234 (2013).

Indeed, the habeas court itself expressly 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 at 91. Unfortunately, however, the court paid little more than lip service to this principle when evaluating Sherman's selection of B.W., ultimately deciding that Sherman was incompetent simply because the court's own "intuition" about B.W., gleaned solely from the cold, printed record, differed from Sherman's intuition, which stemmed from his personal knowledge of B.W. and his firsthand observation of B.W.'s demeanor as he responded to his inquiries.[85]

There is no question that many attorneys, in the exercise of their professional judgment, might apply "a wooden proposition that competent counsel must always object"[86] to a juror who fits a particular stereotype due to his or her occupation, education or lifestyle, regardless of how fair and honest that juror appears during counsel's personal exchange with the juror during *voir dire*. It is apparent that the habeas court believed that, if it were counsel, it undoubtedly would have done so with respect to B.W. Some might consider

---

[85] As the Seventh Circuit fittingly cautioned reviewing courts under similar circumstances,

> [t]his case highlights many of the reasons why [a court's] review of counsel's performance must be highly deferential. As the court seeks to "reconstruct the circumstances of counsel's challenged conduct," it is particularly difficult "to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. The temptation to read the one-dimensional record . . . and unwittingly take up the role of the "Monday morning quarterback" is ever present. In the context of ineffective assistance claims . . . judges—who are often drawn from the trial bar and who are generally expected to be omniscient in all other respects—must quell the tendency to call the plays they think should have been called. A reviewing court must seek to "evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. at 2065

Harris v. Reed, 894 F.2d 871, 877 (7th Cir. 1990).

[86] *See Toccaline*, 80 Conn. App. at 802.

police officers, viewed collectively – and perhaps cynically – to be so inherently biased and contemptuous of both criminal defendants and criminal defense attorneys that they simply are incapable of weighing the evidence objectively. Whether such a prejudice, like other prejudices, is either accurate or fair to the individual juror is of no moment here, because the Sixth Amendment question before this Court, as was before the habeas court, is whether defense counsel was adequately protecting the interests of his client, not whether counsel was treating potential jurors fairly. By the same token, however, that very same constitutional question is resolved, not simply on the basis of what some attorneys might choose to do, or even what a majority of attorneys might choose to do. Rather, the petitioner bears the heavy burden of demonstrating that *all* reasonably competent attorneys, standing in Attorney Sherman's shoes, would have been compelled to reject B.W. as a juror because of such stereotypical views of police officers. *See Harrington*, 131 S. Ct. at 788 ("The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' *not whether it deviated from best practices or most common custom*.") (Emphasis added.) *See also Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011) (finding of deficient performance must be grounded in "more than [the judge's] own sense of 'prudence.'"); *Waters,* 46 F.3d at 1512 (*Strickland* "has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. [Courts] ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.").

The petitioner fell far short of meeting his burden of demonstrating that it is a universal rule among competent defense attorneys to keep all law enforcement officials off a jury, regardless of credible assurances during *voir dire* that they could remain objective.

See, e.g., Long v. State, 867 N.E.2d 606, 616-17 (Ind. Ct. App. 2007) (counsel chose not to "strike the former county sheriff," who assured counsel that "he could 'set aside thirty years of law enforcement experience, [his] knowledge of police officers, [his] command of police officers, and ... judge this case based on facts and the law.'"); *People v. Turner*, 37 A.D.3d 874, 876-77, 829 N.Y.S.2d 261 (2007) (counsel decides "not to use more peremptory challenges and to permit five jurors with either a background in or a familial connection to law enforcement to remain on the panel," in light of their assurances that they would remain impartial). *See also People v. Hawkins*, Docket No. 282483, 2009 WL 1027212 (Mich. Ct. App. Apr. 16, 2009) (notwithstanding juror's response that relative had recently been murdered and person later charged in death had "got[ten] away with it," experienced trial counsel not deficient for accepting juror's assurances that she could keep open mind, be fair and impartial to both sides, separate prior incident from present case, and decide case solely on evidence presented at trial). Indeed, left to stand, the habeas court's decision now sets a standard that any defense attorney who does not exercise a peremptory challenge to strike a law enforcement official is presumptively deficient under the first *Strickland* prong. As *Strickland* itself aptly cautioned, any such rule "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 688-89

Furthermore, the habeas court was not present at the *voir dire* and, unlike Attorney Sherman, simply was in no position to gauge B.W.'s demeanor and the sincerity and credibility of those responses. *See Harrington*, 131 S. Ct. at 788 ("Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge.") Thus, a

court should be "reluctant to find ineffective assistance based on an attorney's failure to challenge a potential juror . . . because [a court] is incapable of seeing the potential jurors and hearing their answers to questions posed at voir dire; and, the decision to accept or reject a potential juror is purely a matter of trial strategy, which is often based on these non-verbal cues." *Hawkins*, 2009 WL 1027212. *Accord State v. Trimble*, 122 Ohio St. 3d 297, 311, 911 N.E.2d 242 (2009) ("Trial counsel, who observe the jurors firsthand, are in a much better position to determine whether a prospective juror should be peremptorily challenged.").

In addition, unlike the habeas court, Sherman had had prior interactions with B.W. over the previous decade, knew his reputation in the community and, therefore, was in a far better position than the habeas court to evaluate the "incredibl[e] honest[y]" of B.W.'s responses. *See* HT 4/16: 176.[87]

Even putting those significant disadvantages aside, however, the habeas court

[87] After criticizing Attorney Sherman for failing to draw what the habeas court believed to be the inexorable conclusion that B.W. was presumptively biased, the habeas court, in evaluating prejudice, refused to apply any presumption that B.W. was biased because, "[t]o do so, in th[e] court's view, would be disrespectful to B.W. who, in fact, expressed his belief and commitment to impartiality in spite of his significant connections to key players in the trial." MOD: 94 n.58. However, the inconsistent logic that the habeas court routinely applied when analyzing the two *Strickland* prongs once again resulted in an irreconcilable inconsistency in the court's decision: on the one hand, the habeas court labelled Sherman incompetent for failing to presume that B.W. would be biased, regardless of Sherman's personal observations of B.W.'s responses during *voir dire* that suggested otherwise; on the other hand, the habeas court itself, in evaluating prejudice, saw no reason to presume bias on the part of B.W., in light of those very same responses on *voir dire*, but only *after* the court had chided Attorney Sherman for having reached that very same conclusion.

Furthermore, while expressing concern for "disrespect[ing]" B.W. as a reason not to apply a presumption of bias, the habeas court failed to recognize that its erroneous determination that every competent attorney would have been required to disbelieve B.W.'s repeated assurances that he could evaluate the case objectively was equally as disrespectful of B.W.'s integrity and abilities as the presumption the habeas court was purporting to reject.

appeared to consider only the face value of B.W.'s responses without appreciation for the honesty that those responses reflected. It is far from clear that a juror who has the integrity to be mindful of, and openly acknowledge, his potential bias as a juror, but who nevertheless expresses a sincere belief that he can overcome that concern and work to remain objective, should automatically be viewed as undesirable for *either* side. Rather, that is trial counsel's judgment call, for which no hard and fast rule does, or should, exist.[88] *See Strickland*, 466 U.S. at 688-89 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."); *id.* at 690 (rejecting "rigid requirements for acceptable assistance"). Moreover, even if rigid stereotyping were the rule by which all competent counsel must abide during jury selection, it also is far from clear that it would be objectively unreasonable for an attorney to view a police officer, who has chosen to dedicate his life to following and enforcing the law, and whose daily experience requires him to evaluate people of questionable background (such as Coleman and Higgins) and listen to conflicting versions of events, as well as make difficult and sometimes unpopular decisions under pressure, as

[88] Oddly enough, the habeas court rejected the petitioner's claim of ineffectiveness as to Sherman's acceptance of L.C., whose friend's mother knew the victim's mother, because the court reasoned that Sherman reasonably could have concluded "that he could rely on her integrity and spoken commitment to follow the court's instructions." MOD: 92. Although B.W. gave similar assurances during his *voir dire* as to his ability to be fair and open-minded, as well as follow the court's instructions; *see* CT 4/4: 144, 146, 149, 150, 151, 155, 156, 159; and Sherman testified that he knew B.W. and believed him to be fair and honest; HT 4/16: 176, 178; the habeas court inexplicably failed to give this decision by Sherman the same deference afforded Sherman's decision regarding L.C.

an unattractive candidate.

Of course, these considerations are only in addition to other practical considerations that Attorney Sherman had to take into account in his overall strategy regarding jury selection and the use of peremptories, considerations that were completely ignored by the habeas court when evaluating Sherman's decision to accept B.W. It is indisputable that the publicity regarding this case far exceeded the typical criminal case. Simply weeding out jurors who already had significant knowledge of the case -- let alone those who might have biases against the petitioner's wealth and celebrity or who might have ulterior motives for wanting to serve, such as to pursue their own postconviction celebrity as one of the jurors in this high profile case -- rendered jury challenges a particularly precious commodity in this case. This, in turn, rendered it inappropriate for the habeas court to second-guess Sherman's jury selection methods in this "singular" case[89] by applying the same assumptions and strategies regarding jury selection that another attorney might rely upon in a case of lesser notoriety.

The court also refers to "B.W.'s evident admiration of Dr. Lee" as another reason why the court believes Sherman was required to challenge B.W. in order to be constitutionally effective. MOD: 93. B.W. admitted that, because of Dr. Lee's reputation, his testimony "carries some weight," a proposition with which Sherman himself readily agreed. CT 4/4: 150. Nevertheless, when asked by Sherman whether he would take everything Dr. Lee said "as a sermon on the mount," B.W. indicated that he "can't really say that;" *id.*: 149; and, instead, he assured Sherman that he would evaluate the credibility of Lee's testimony on the basis of what he had to say at the trial, not his reputation, and the

[89] *See* MOD:1.

fact that Lee was testifying for the state does not necessarily mean that its case is a strong one. *Id.*: 150. It is difficult to see how such responses constituted a glaring "red light" that deprived Sherman of any discretion in evaluating B.W.'s overall objectivity. MOD: 93. Indeed, other jurors, when asked, also indicated that they were aware of Dr. Lee and his reputation and, like B.W., nevertheless also assured the defense that they could weigh Dr. Lee's testimony objectively. *See* CT 4/5: 28, 163; 4/10: 56. If, in fact, a juror's knowledge of Dr. Lee and his recognition as a respected expert in his field constituted a "red light" mandating either a challenge for cause or the exercise of a peremptory challenge, either jury selection would still be continuing today or Sherman quickly would have used up all of his peremptory challenges, rendering them unavailable for use on more problematic venirepersons down the road.[90]

Moreover, the defense was relying upon Dr. Lee's reputation every bit as much as the state was. In closing argument, Sherman stressed to the jury that not only did Dr. Lee find no physical evidence directly linking the petitioner to the crime, but also that Dr. Lee found microscopic hairs similar to Ken Littleton, the defense's third party suspect, on the sheet in which the victim's body was wrapped. CT 6/3: 26-27. Sherman also reminded the

---

[90] As the United States Supreme Court has cautioned,

> [i]t is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23, 81 S. Ct. 1639 (1961).

jury that, in Dr. Lee's opinion, the victim's pants were rolled down before the infliction of the fatal blow, a fact from which Sherman argued that it was unlikely that the victim would have rolled her pants down consensually for the petitioner, whom she purportedly disliked. *Id.*: 28. Because Dr. Lee's testimony was helpful to the defense in these respects, Sherman himself emphasized in closing that Lee was "unimpeachable" and that "nobody in Connecticut," including Sherman was "going to try and attack Henry Lee," whose testimony he characterized as "very clear, very honest." *Id.*: 27. In light of the defense's own reliance on Dr. Lee's testimony as well, the mere fact that a juror, like B.W., acknowledged that Lee's testimony "carries some weight" simply would not have been the "red light" for the defense that the habeas court erroneously considered it to be.

Equally perplexing is the habeas court's conclusion that B.W.'s "less than pleasant interactions with Attorney Sherman over a period of time" also should have led Sherman to the inexorable conclusion that B.W. had to be eliminated from the jury. MOD: 93. To begin with, the colloquy with B.W. reveals only *one* adversarial interaction between Sherman and B.W., in the case discussed *supra*. Furthermore, B.W. assured Sherman that this prior interaction did not leave any hard feelings between the two. Unquestionably, police officers and defense attorneys routinely find themselves in an adversarial setting; attorneys routinely find themselves opposing other attorneys and judges; and even judges frequently find themselves in conflict with other judges. This does not mean, however, that they are incapable of conducting themselves professionally, understanding that each has a job to do, and perhaps even maintaining a close friendship in other settings. In fact, even from the cold, printed record, it is apparent that the interaction during *voir dire* between B.W. and Sherman, who had known each other for over a decade, was both cordial and mutually

respectful. *See* CT 4/4: 142-60. More importantly, however, it is precisely because Sherman, who was present and personally interacting with B.W., was in a position far superior to the habeas court, which had no ability to gauge B.W.'s demeanor when answering the questions, that the habeas court's refusal to afford Sherman the proper deference in making this judgment call was particularly egregious.[91]

IX. THE HABEAS COURT ERRED IN FINDING THAT COUNSEL'S CLOSING ARGUMENT FELL BELOW THE STANDARD OF REASONABLE COMPETENCE

The habeas court also found that Attorney Sherman was deficient in the manner in which he presented his closing argument but, once again, found that the petitioner had not met his burden of demonstrating prejudice in this regard. MOD: 105-07.[92]

A. Facts Pertaining To This Claim

The closing arguments of both the prosecution and the defense are reprinted in the Appendix. In the 90 minutes allotted for argument; CT 6/3: 86; Sherman stressed the following points: He began by summarizing the defense, stating that the petitioner "didn't do it. He doesn't know who did. He wasn't there when the crime was committed and he never

[91] The habeas court also considered it noteworthy that Attorney Sherman's questioning of B.W. was far more "probing [and] exhaustive" than the prosecutor's. MOD: 92 n.56. However, it is hardly remarkable that the state, having already seen and heard B.W.'s satisfactory responses to Sherman's thorough examination, did not feel compelled to go over the same territory again. Moreover, no one disputes the obvious fact that the defense initially would be more concerned with B.W.'s occupation as a police officer than would the state. What the respondent disputes is the habeas court's erroneous belief that B.W.'s occupation rendered him absolutely incapable of being a fair juror, regardless of his answers and demeanor. Thus, the fact that even the habeas court recognized that Sherman engaged in a "probing" and "exhaustive" examination of B.W., before making his tactical determination that B.W. would treat his client fairly, only further illustrates that this decision was made after thorough investigation and thoughtful consideration of the potential pros and cons. It is that diligence, not whether the choice counsel made mirrored the habeas judge's personal, preconceived notion of which call should have been made, that is the hallmark of effective representation under the sixth amendment.

[92] *See* footnote 53, *supra*.

confessed. That's the whole case. There is no great mystery." *Id.*:21-22. He accused the state of playing "investigative musical chairs for 27 years" and confirming preconceived theories rather than searching for information objectively. *Id.*: 22. He pointed out to the jurors that he did not try to "give [them] a twinkie defense" by putting on "big fancy" experts and "boutique defenses." *Id.:* 23.

Sherman noted that the state had presented no evidence that the petitioner was even "disturbed", let alone the type of "demonic" individual that someone would have to be to have committed this kind of killing. CT 6/3:23-24. He also noted that, although there were lighter moments during the course of the trial, they were never meant to trivialize the victim's murder or insult her family. *Id.*: 24.

Sherman argued that the state's evidence was confusing and questioned the purpose of it, stating that some of the testimony from the state's witnesses raised more questions than it answered. CT 6/3:25. He stressed that there was no physical evidence implicating the petitioner and pointed out that, at age 15, the petitioner was unlikely to have been able to get rid of the blood with which the killer must have been covered. *Id.*: 25-26.

Sherman chided the state for continuing to test physical evidence right up through jury selection. CT 6/3:27. He emphasized that Dr. Lee, who was highly respected, testifed that the hairs found in the sheet in which the victim's body was wrapped were microscopically similar to Littleton. *Id.*: 26-27. He further emphasized Lee's testimony that the victim's pants were likely rolled down before the infliction of the more bloody and significant injuries. *Id.*: 28. He criticized the state for not being able to narrow the potential time frame in which the murder occurred. *Id.*: 29.

Sherman then took issue with Chief Keegan's testimony for the state, accusing him

of trying to "shave the pieces" to make them fit. CT 6/3:30. Nevertheless, he noted Keegan's testimony about how cooperative the Skakel family was during the initial stages of the investigation. *Id.*: 31. Sherman noted Keegan's testimony that it was "reported" that the Skakels left golf clubs about the property. *Id.* He also reminded the jury of Keegan's testimony that the physical evidence of the petitioner's guilt was "zilch". *Id.*: 33. He further noted Keegan's testimony that Keegan originally had applied for an arrest warrant for petitioner's brother Tommy. *Id.*: 34.

Sherman asked the jury to consider whether anything that happened that evening is likely to have suddenly turned Michael into a "homicidal maniac." CT 6/3:34-35. He characterized the state's version of what happened as the type of story that would be included in "the Inquirer, the Globe, the Star." *Id.*: 36.

Sherman then turned his attention to Littleton, arguing that, while he had "no clue" whether Littleton was guilty, his alleged confession to Baker[93] was no "less compelling, any less persuasive than the garbage you heard" from other witnesses who testified about the petitioner's own inculpatory statements. CT 6/3:37. He went through the testimony about the Littleton "confession" and argued that this showed the "monumental efforts" undertaken by the state "and what they would do to get somebody to say I did it." *Id.* at 36-38.

Attorney Sherman argued that, nevertheless, it was apparent that Baker believed

[93] As discussed *supra*, there was evidence presented at the criminal trial that, earlier in the investigation, the police and Littleton's ex-wife, Mary Baker, had led Littleton to believe, mistakenly, that, at some point while he and Baker were still married, he "blacked out" in the back seat of a car driven by Baker and "confessed" to killing Martha. *See* CT 5/13: 114-18; *see also id.*: 123-24, 163-69. Littleton later informed Dr. Morall of this alleged admission and Sherman was able to get this alleged admission into evidence at the criminal trial. However, Baker testified at the criminal trial that Littleton, in fact, had never made any such admission to her. CT 5/13: 163-69.

Littleton was guilty and that much of the information that Baker used to dupe Littleton into believing he had confessed to her came from her, not from law enforcement, thereby suggesting that she was privy to this information because Littleton had shared it with her. CT 6/3:39-41.

Sherman then discussed the evidence regarding the most likely time of death, which he urged had to be around the same time petitioner was at his cousin's house (at least according to the defense). CT 6/3:43-49. He discussed the testimony of the defense witnesses who corroborated petitioner's "alibi" and attacked the state's evidence to the contrary. *Id.*: 51-61. Sherman also responded to the state's argument that the family conspired to cover up petitioner's involvement. *Id.*: 61-62

Sherman went on to argue at length as to why the state's witnesses who testified about the petitioner's inculpatory statements, as well as the accounts they provided, were unreliable for various reasons. CT 6/3:62-88. Sherman also addressed the various accounts of the "tree masturbation" story. *Id.*: 88-89.

Sherman began his conclusion by summarizing the state's case as lacking any physical evidence and dependent upon a "sketchy motive" and witnesses with their own questionable motives. CT 6/3:89. He expressed his sympathy for the Moxley family and suggested that the state was trying to bring the family closure, first by trying to get an arrest warrant for Tommy and then changing it to the petitioner. *Id.*: 90. He reminded the jurors that "there are few times in your life that you make a decision as important as this." *Id.* He also reminded them that the charges did not stick against Tommy or Littleton and that they should question whether "[t]wo weeks, two years, 27 years from now" they might might "have that same feeling of nausea that maybe you made the wrong decision in finding

Michael Skakel guilty of this murder based on the evidence that was presented to you." *Id.*: 90-91.

The habeas court ruled that Attorney Sherman's closing argument was constitutionally deficient but, once again, found no prejudice. MOD:105-08. Specifically, the court criticized the argument with respect to the following: (1) the allegedly "disjointed [and] unfocussed" nature of the argument overall; *id.*:105; (2) Sherman's failure to "provide the jury a road map" explaining the state's burden of proof beyond a reasonable doubt and the presumption of innocence; *id.*:105-06; (3) his "failure to explain the relevance of the third-party culpability evidence to the issue of reasonable doubt;" *id.*:106; (4) his failure to rebut the state's argument that the petitioner had fabricated the masturbation story to explain any DNA evidence from the petitioner that might be found near the scene, as well as Sherman's failure to address other unspecified "areas of evidence;" *id.*:105, 106; (5) his failure to "deal with the state's claim that the petitioner had been placed in Elan to remove him from the investigative focus of the Greenwich police and because of his family's fear of him;" *id.*:106; and (6) improper comments made by Sherman during his argument; *id.*:106-08. The court concluded, however, that there was no prejudice because "the court instructed the jury that closing arguments do not constitute evidence and that the jury is obligated to fasten its attention to the evidence." MOD:108.

B. The Habeas Court Erred In Finding Attorney Sherman Constitutionally Deficient In His Closing Argument

1. General principles of law

Although the Supreme Court already has cautioned reviewing courts that "[r]epresentation is an art" rather than a science; *Strickland*, 466 U.S. at 693; closing argument, like jury selection, is an aspect of representation that particularly defies any

effort to characterize an approach as right or wrong. "[R]eviewing courts must not unnecessarily 'grade counsel's performance;' [*Strickland*, 466 U.S. at 697]; and this admonition seems particularly compelling in the case of closing argument, an inherently subjective task." *Thompson v. Wainwright*, 787 F.2d 1447, 1455 (11th Cir. 1986). There are so many factors involved in deciding how to present closing argument – the facts of the case; the perceived effectiveness or insignificance of the various witnesses, not only in the substance of their testimony but also in their demeanor before the jury; the personalities of the jurors that counsel is attempting to persuade; the oratory strengths and styles of both the prosecuting attorney and defense counsel himself – that any attempt to second-guess counsel's actions in this regard invariably will more reflect the reviewer's subjective preferences than counsel's effectiveness, viewed objectively and with the great degree of deference mandated by *Strickland*. This is particularly true with respect to any court, like the habeas court here, that is attempting to evaluate the argument from the cold, printed record, without the benefit of having been in the courtroom to hear how it was delivered.

For these reasons, the United State Supreme Court itself has recognized that

> counsel has wide latitude in deciding how best to represent a client, and ***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***. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact" . . . but ***which issues to sharpen and how best to clarify them are questions with many reasonable answers***. Indeed, it might sometimes make sense to forgo closing argument altogether.

(Emphasis added.) (Internal citation omitted.) *Yarborough v. Gentry*, 540 U.S. at 5-6.

2. The court's stylistic criticisms.

The habeas court characterized defense counsel's closing argument as, *inter alia*, "disjointed and unfocussed." MOD:105. As a general matter, attempts to gauge the

constitutional standard of effectiveness in closing argument on the basis of style already tread on thin ice. Just like a prosecutor's rebuttal argument, a defense attorney's closing argument also is, in substantial part, a responsive argument, a responsibility that rarely carries with it the opportunity for fluid composition, able to withstand Monday-morning critics searching for stylistic flaws. *See State v. Lemon*, 248 Conn. 652, 662, 731 A.2d 271 (1999) ("closing arguments of counsel ... are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear"). Given that defense counsel has only one opportunity to both (1) attempt to present his prepared argument and (2) attempt to evaluate and rebut the particularly important points that the state has chosen to emphasize in its opening argument, which defense counsel himself was just hearing for the first time, the habeas court's criticism that defense counsel's argument allegedly lacked "focus" only further reflects the court's inability, or refusal, to properly evaluate counsel's conduct "from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Undoubtedly, had Attorney Sherman chosen to stick solely with a scripted speech, regardless of the particular points emphasized by the prosecutor in his opening argument, he would have been criticized for failing to properly respond to those arguments, abandoning substance for style. It is precisely because claims of ineffective assistance of counsel are ripe for such unfair criticism, regardless of which course counsel had chosen, that *Strickland* demands that counsel be afforded wide latitude in making such difficult strategic decisions, a demand that the habeas court repeatedly chose to ignore in this case. In short, stylistic disagreements should not be the proper measure by which to distinguish between counsel's effectiveness and incompetence.

In any event, the respondent disagrees with the habeas court's characterization of Sherman's argument, as compared with closing arguments given in other cases. Insofar as this Court is equally as capable of forming an opinion as to the quality of that argument, there is no reason to give deference to the habeas court's inaccurate description of it.[94] Each aspect of Attorney Sherman's argument served a particular purpose in rebutting the state's evidence and arguments. The mere fact that this evidence was itself extensive, and often required counsel to shift his focus from one point to another, in order to cover all the important points in the limited time given for closing argument, reflects his thoroughness and the professional judgment he exercised in attempting to counter as many aspects of the case as he could in the allotted time. Significantly, the prosecutor acknowledged that he would not be presenting "the typical prosecutor's opening statement." CT 6/3/03: 6. It would hardly be surprising then, let alone evidence of incompetence, if defense counsel's argument in response also did not fit any "cookie-cutter" expectation by the habeas court and the petitioner's expert as to how that argument was going to proceed. Similarly, the prosecutor also cautioned the jury the he was "going to speak on various subjects that occurred" in the course of the trial;" *id.*; a warning that simply reflected the fact that the trial itself was lengthy and, at times, complicated and, therefore, the arguments of *both* parties unavoidably might seem disjointed and unfocussed at times.

3. The court's focus on specific arguments not made by Sherman

The habeas court, in evaluating counsel's overall effectiveness, magnified the significance of what counsel did not do while giving little or no consideration to what

[94] This Court, which routinely reviews hundreds of criminal cases each year, including transcripts of closing arguments, undoubtedly is in a superior position to evaluate counsel's closing argument in this case as compared to those of other criminal defense attorneys.

counsel *did* do so effectively. "[I]t is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington*, 131 S. Ct. at 791. As discussed *supra*, Attorney Sherman presented a multitude of arguments, in the time permitted, that offered the jury a wide variety of sound reasons why they might choose to find the state's evidence unpersuasive. Nevertheless, the habeas court concluded that, because counsel, either consciously, inadvertently or due to lack of time, did not cover the entire gamut of topics that the habeas court believes also should have been addressed, this rendered counsel constitutionally deficient and rendered meaningless all of counsel's other efforts during argument to persuade the jury to find in his client's favor.

As a general matter, the habeas court's reliance on particular topics not covered reflects a gross misapplication of the proper standard for determining constitutionally deficient performance. As the High Court has observed,

> [e]ven if some . . . arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them. Focusing on a small number of key points may be more persuasive than a shotgun approach. As one expert advises: "The number of issues introduced should definitely be restricted. Research suggests that there is an upper limit to the number of issues or arguments an attorney can present and still have persuasive effect.". . . Another authority says: "The advocate is not required to summarize or comment upon all the facts, opinions, inferences, and law involved in a case. A decision not to address an issue, an opponent's theory, or a particular fact should be based on an analysis of the importance of that subject and the ability of the advocate and the opponent to explain persuasively the position to the fact finder." . . . . In short, judicious selection of arguments for summation is a core exercise of defense counsel's discretion. When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. *See Strickland*, 466 U.S., at 690, 104 S.Ct. 2052 (counsel is "strongly presumed" to make decisions in the exercise of professional judgment). . . .
>
> Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth

> Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. . . . To recall the words of Justice (and former Solicitor General) Jackson: "I made three arguments of every case. First came the one that I planned-as I thought, logical, coherent, complete. Second was the one actually presented-interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night." Advocacy Before the Supreme Court, 37 A.B.A.J. 801, 803 (1951).

(Internal citations omitted.) *Yarborough*, 540 U.S. at 7-8.

Consequently, it was error for the habeas court to dissect Sherman's argument and find constitutional deficiency simply because the court disagreed with Sherman as to which issues should have been mentioned and/or stressed. No matter what counsel does, it can always be claimed that he should have done more. For this reason alone, this Court should reject the habeas court's finding of constitutional deficiency in Sherman's closing argument.

In any event, even if it had been appropriate for the habeas court to evaluate Sherman's closing argument in light of the court's own priorities, its specific criticisms of the argument are unfounded.

a. Reasonable doubt and presumption of innocence

With respect to reasonable doubt and the presumption of innocence, the habeas court erred in ruling that every reasonably competent attorney is required to devote precious, limited time in his closing argument – particularly one following a lengthy and complicated trial – to reinforce basic principles of law upon which the court itself will be instructing the jury shortly thereafter. On the contrary, in *Yarborough*, the Court expressly rejected such a proposition, recognizing that the question is whether the attorney effectively gave reasons to find reasonable doubt, not whether he talismanically invoked the buzz words "reasonable doubt", that is important:

> The Ninth Circuit faulted counsel for not arguing explicitly that the government had failed to prove guilt beyond a reasonable doubt. Counsel's entire presentation, however, made just that point. He repeatedly stressed that no one-not the prosecutor, the jury, nor even himself-could be sure who was telling the truth. This is the very essence of a reasonable-doubt argument. To be sure, he did not insist that the existence of a reasonable doubt would *require* the jury to acquit-but he could count on the judge's charge to remind them of that requirement, and by doing so he would preserve his strategy of appearing as the friend of jury autonomy.

(Emphasis in original) *Yarborough*, 540 U.S. at 10.

Furthermore, the state already had thoroughly and accurately acknowledged its burden of proof beyond a reasonable doubt, as well as touched upon the elements of the offense, in its own argument. CT 6/3: 5-6. Once again, had Attorney Sherman chosen to waste his own valuable argument time simply to reiterate these principles, knowing that the trial court would soon be instructing the jury on them as well, he undoubtedly would have been criticized for doing what he now is being criticized for not doing.

b. Third-party culpability evidence

The habeas court's complaint that Sherman was deficient in failing "to explain the relevance of the third party culpability evidence to the issue of reasonable doubt" is enigmatic, insofar as the court fails to explain what it is exactly that Sherman should have said differently. Moreover, in agreeing with the criticism of Sherman's comment, during closing argument, that he had "no clue" whether Littleton was the murderer; MOD:24, 105; the court failed to grasp the overall strategic context in which this comment was made. Indeed, far from being deficient, Sherman's strategy with respect to the third party culpability evidence only calls to mind *Strickland's* caution that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693.

To be sure, Attorney Sherman could have chosen to follow a course consistent with the one that the habeas court wrongly concluded was the *only* course counsel was allowed to follow, which was to take upon the defense itself the burden of persuading the jury that Littleton was the murderer and argue that, if the jury found the defense met that burden, then the petitioner must be acquitted. However, the evidence against Littleton had both its strengths and its weaknesses.[95] Consequently, rather than using the simplistic formula of third party culpability preferred by the habeas court, which merely would have pitted the state's suspect (the petitioner) against the defense's weaker third party suspect (Littleton), Sherman decided instead to use the evidence and accusations that the state initially made against Littleton *against the state itself*, in an effort to illustrate the dangers of attempting to infer guilt from circumstantial evidence, innuendo and unreliable confessions. Far from reflecting incompetence, Attorney Sherman's arguments reflect both a realistic and creative approach to the weaknesses in the third party culpability evidence, suggesting to the jury that, on the one hand, there was no direct evidence against the petitioner and circumstantial evidence incriminating any number of suspects other than petitioner in this case, including Littleton; CT 6/3: 27-28 (noting circumstantial evidence of hair, microscopically similar to Littleton, found on sheet wrapping victim's body); while, on the other hand, also emphasizing that the overreaching demonstrated by the state's initial efforts to obtain questionable inculpatory admissions from Littleton should give the jury equal pause when evaluating the state's reliance on the inculpatory admissions made by

[95] Of course, the mere fact that the evidence against Littleton had its weaknesses does not mean that it was unreasonable for Attorney Sherman to attempt to base his claim of third party culpability on Littleton rather than Tommy Skakel, the evidence against whom also had its weaknesses, for the reasons discussed *supra*.

the petitioner in this same case. *See* CT 6/3/02: 36-39.[96] *See also id.*: 75 (arguing that an

---

[96] "Ken Littleton, I have no clue, no clue whether or not Ken Littleton did this or didn't do this. At the very least, what we learned from Ken Littleton is, you know, a confession ain't always a confession, is it. And boy was that instructive and educational to us, not about Ken Littleton, but about Michael Skakel. At the very least, it was a window into the character of the State's evidence and their efforts, and their monumental efforts and what they would do to get somebody to say I did it.

The bottom line is was Ken Littleton's confessions any less compelling, any less persuasive than the garbage you heard from Higgins, from Coleman, from Geranne Ridge, from Zicarelli, from Mr. Tuccarone -- I don't think so. Littleton's is on tape. Littleton says, quote, and what did you tell Dr. Morall that you said to Mary -- I did it. And when you say I did it, you are talking about that you committed the murder of Martha Moxley? Correct. He confessed he did it.

Next question, did you ever tell Mary that you stabbed Martha Moxley through the neck? And do you remember I was going over here because he kept waiting for the objection and I am waving my hands wildly and I am saying over here, it's a yes or no, Mr. Littleton. His answer, yes. Yes, he told Mary that he stabbed Martha in the neck.

Two confessions, are they bogus, were they contrived -- I don't know. I am not here, I am not here to persuade you that Ken Littleton committed this crime. The state sure spent a lot of time trying to convince you he didn't. I mean, we went three days without hearing anything about Michael Skakel in this case which is generally a good sign for the defense. But I am not here to say, you know, here is the guy who did it.

I said at the beginning of this case, I don't think anyone is going to come in and confess. I guess I was wrong about that. But, I am not here to persuade you that that's the guy. I don't know who it is. All I know is that the lengths that they would go to make someone else confess. And, the explanation that Ken Littleton gave us, I thought he was a very pathetic creature, I felt very badly for him. I don't think I beat him up too much on the stand."

One thing about Ken Littleton, though, is Mr. Benedict in his conspiracy theory says, and they spirited all the kids away to Windham. We found out from Ken Littleton and not first here on the stand but through the tape recording that refreshed his memory that it was Ken Littleton's idea to take the kids to Windham the next day, which was the norm. They always went up there, they always went up there to hunt or to go skiing. It was Littleton's idea.

It wasn't the vortex of lawyers and that was kind of a funny break in this. He described that there were 15 to 20 lawyers out there from Great Lakes Carbon, he was lost in a vortex of lawyers. But it was his idea to take them to Windham, not part of the conspiracy. And, he testified to that. Ken Littleton didn't know what happened. He approached Dorothy Moxley's husband, Mr.

"Elan confession" elicited through intimidation certainly "no greater than a Littleton confession").

Viewed in this light, Sherman's strategy was not only reasonable, but arguably the *most* effective use that any attorney could have made of the evidence surrounding Littleton. If Sherman pressed too hard with a certainty that Littleton was really the guilty party, he risked losing credibility with the jury. Consequently, he chose instead to follow a strategy that has been recognized by even the United States Supreme Court as a reasonable one. In *Yarborough*, the Ninth Circuit had criticized counsel for presenting a relatively passive argument for acquittal, suggesting that counsel himself was not certain where the truth lay and even casting aspersions upon the defendant himself. The High Court, however, recognized the benefits of counsel's strategy and rebuked the Ninth Circuit's criticisms entirely:

> The Ninth Circuit found other flaws in counsel's presentation. It criticized him for mentioning "a host of details that hurt his client's position, none of which mattered as a matter of law." Id., at 900. Of course the reason counsel mentioned those details was precisely to remind the jury that they *were* legally irrelevant. That was not an unreasonable tactic. *See* F. Bailey & H. Rothblatt, Successful Techniques for Criminal Trials § 19:23, p. 461 (2d ed. 1985) ("Face up to [the defendant's] defects ... [and] call upon the jury to disregard everything not connected to the crime with which he is charged"). The Ninth Circuit singled out for censure counsel's argument that the jury must acquit if Gentry was telling the truth, even though he was a "bad person, lousy drug addict, stinking thief, jail bird." See 320 F.3d, at 900. It apparently viewed the remark as a gratuitous swipe at [the defendant's] character. While confessing a client's shortcomings might remind the jury of facts they otherwise would have forgotten, it might also convince them to put aside facts they would have remembered in any event. This is precisely the sort of calculated risk that lies at the heart of an advocate's discretion. By candidly

---

> Moxley, and asked him would he foot the bill for a sodium pentathal test to find out if he could remember what happened. Again, this goes under the heading of damned if I know because it's a question.

CT 6/3: 36-39.

> acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case. See J. Stein, Closing Argument § 204, p. 10 (1992-1996) ("[I]f you make certain concessions showing that you are earnestly in search of the truth, then your comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate").
>
> * * *
>
> The Ninth Circuit [also] rebuked counsel for making only a passive request that the jury reach some verdict, rather than an express demand for acquittal. But given a patronizing and overconfident summation by a prosecutor, a low-key strategy that stresses the jury's autonomy is not unreasonable. One treatise recommends just such a technique: "Avoid challenging the jury to find for your client, or phrasing your argument in terms suggesting what their finding must be ... . [S]cientific research indicates that jurors will react against a lawyer who they think is blatantly trying to limit their freedom of thought." Stein, supra, § 206, at 15.
>
> * * *
>
> [T]he Ninth Circuit [also] criticized counsel's approach on the ground that, by confessing that he too could not be sure of the truth, counsel "implied that even he did not believe [the defendant's] testimony." 320 F.3d, at 900. But there is nothing wrong with a rhetorical device that personalizes the doubts anyone but an eyewitness must necessarily have. Winning over an audience by empathy is a technique that dates back to Aristotle. See P. Lagarias, Effective Closing Argument §§ 2.05-2.06, pp. 99-101 (1989) (citing Aristotle's Rhetoric for the point that "[a] speech should indicate to the audience that the speaker shares the attitudes of the listener, so that, in turn, the listener will respond positively to the views of the speaker"); id., § 3.03, at 112 (deriving from this principle the advice that "counsel may couch his arguments in terms of 'we,' rather than 'you, the jury' ").

(Emphasis in original.) *Yarborough*, 540 U.S. at 9-11.

In the present case, as in *Yarborough*, counsel understood that, rather than lose credibility with the jury by insisting that the third party culpability evidence against Littleton was stronger than it was, it was wiser to acknowledge its weaknesses but, at the same time, use those weaknesses to point out similar flaws in the state's evidence against the petitioner. "To support a defense argument that the prosecution has not proved its case it

sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates . . . . When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict." *Harrington*, 131 S. Ct. at 790, 791. By candidly acknowledging weaknesses in the defense evidence and empathizing with the jury's possible doubts as to which of the potential suspects was guilty – including the defense's own suspect, Littleton – Sherman both "built credibility with the jury;" *Yarborough*, 540 U.S. at 9; and made a cogent argument as to why the jury should have a reasonable doubt about the guilt of *any* of the suspects, including the petitioner. *See Yarborough*, 540 U.S. at 6 ("Woven through these issues was a unifying theme-that the jury, like the prosecutor and defense counsel himself, were not at the scene of the crime and so could only speculate about what had happened and who was lying.").

As for the hyperbole that it was "outrageous" for Attorney Sherman to comment that he felt badly for Littleton; MOD:105; the record reflects that Sherman made this comment in the context of describing Littleton as a "pathetic creature" whom Sherman hoped he did not "beat . . . up too much on the stand." CT 6/3: 38. By doing so, Sherman not only hoped to make amends to any jurors who may have thought he was too harsh in his cross examination but, more importantly, also sought to portray Littleton as an unstable person and a "pathetic" and unreliable state's witness, whose testimony was easily defeated on cross examination. This was a reasonable strategic decision by Sherman and entitled to more deference than the habeas court afforded it. Moreover, there was nothing about this depiction of Littleton as a "pathetic" character that was inconsistent with the defense theory that Littleton also was a viable suspect in the murder.

c. Rebuttal of the state's argument regarding the masturbation story

The habeas court also found Attorney Sherman deficient because he allegedly

> failed, completely, to rebut the state's claim that the petitioner's masturbation story was a late fabrication provoked by fear of Dr. Lee's involvement in the early 1990's. In his opening argument, Attorney Benedict argued that by 1991 and 1992, DNA had become the "real deal" in criminal investigations and he tied this argument to his claim that the petitioner's masturbation story did not arise until that time. In making this argument, Attorney Benedict ignored, and Attorney Sherman apparently missed, the testimony of the state's witness, Michael Meredith, who stated, early in the trial, that the petitioner had told him in the summer of 1987 that he had climbed a tree outside the victim's window from which he saw T[ommy] Skakel and the victim, and that while in the tree, he masturbated. This evidence, adduced by the state, contradicts the state's theme that the masturbation story was a fabrication in anticipation of a fear that Dr. Lee would discover incriminating DNA evidence in his review of the forensic materials.

MOD at 106.

The two essential facts upon which the habeas court bases its criticism of Attorney Sherman's performance in this regard are clearly erroneous. A finding of fact is clearly erroneous "when there is no evidence in the record to support it ... or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Naples v. Keystone Bldg. & Dev. Corp.*, 295 Conn. 214, 225, 990 A.2d 326 (2010).

First, it simply is not true that "Attorney Benedict ignored, and Attorney Sherman apparently missed, the testimony of state's witness, Michael Meredith" regarding the masturbation story the petitioner told Meredith in 1987. On the contrary, it is the habeas court that ignored, or apparently missed, the fact that Attorney Benedict explicitly and repeatedly referred to Meredith's testimony about the petitioner relating the masturbation story to him; CT 6/3:10, 17, 20, 114, 117, 120, 128, 132, 133, 137; ignored or missed this

Court's reaffirmation of that fact in the petitioner's direct appeal; *State v. Skakel*, 276 Conn. at 750 ("the state's attorney referred to Meredith's testimony throughout his closing argument, explicitly stating that the defendant had related the masturbation story to Meredith in 1987, five years before Lee's involvement in the case"); and also ignored or missed Attorney Sherman's rebuttal argument, which also made specific reference to the fact that the petitioner had given the same story to Meredith; CT 6/3: 88 ("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. . . . Michael Meredith embellishes the story but he still says Michael told him the same story.") Any conclusion based on this finding cannot stand.

Second, and just as importantly, this Court, in the petitioner's direct appeal, also expressly rejected the very same spin on the state's argument that the habeas court put on it when criticizing Attorney Sherman for failing to rebut it. Obviously, the state was well aware that the petitioner had told Meredith in 1987 about masturbating in a tree because it was the state itself that presented this testimony in its case. Thus, it would have been foolish for the state to have attempted to argue that the petitioner's first account of a masturbation story occurred in 1992, when he told Pugh, because such an argument easily would have been refuted by both defense counsel and the state's own evidence from Meredith. This is precisely why the state made no such argument. Rather, as this Court recognized on direct appeal, the point of this argument by the state was to show that, in 1992, after Dr. Lee entered the case and DNA became an issue, the petitioner, by strange coincidence, then decided to tell Pugh about masturbating in a *different* tree than he told

Meredith about: the tree he described to Meredith[97] was too close to the house to explain how his DNA (if found) could have gotten on the victim's body, found much farther away from the house, whereas the tree he told Pugh about was directly over where the victim's body was found. CT 6/3:12 (state argues that, according to version petitioner gave Pugh, and later to Richard Hoffman, petitioner "had masturbated, not in that cedar tree by John Moxley's room and not in that monkey tree that's on the side of the house, but rather in the vicinity of Martha Moxley's body"). Then, also by strange coincidence, almost immediately after the petitioner planted this story in Pugh's head in 1992, the Skakel family's investigators began trying to encourage Pugh to meet with them to memorialize this second, "better" version of the tree masturbation story, to explain why his DNA might be found on the victim's body. *See State v. Skakel*, 276 Conn. at 750-51.[98]

---

[97] According to Meredith, petitioner told him that, on the night of the murder, he "had climbed a tree outside of his house and Martha's house where he could see through her window" and "that he had masturbated on the evening of the murder in the tree or was in the process . . . ." CT 5/20:112.

[98] As this Court recognized,

> The state's attorney underscored Pugh's testimony because it lent support to the state's theory regarding the defendant's motive for disseminating the masturbation story in the first place: as we have explained, Pugh testified that, in 1992, the defendant stated that he had masturbated in the same tree under which the victim's body was found. Pugh further testified that, immediately after the defendant told him this story, he began receiving repeated telephone calls from the defendant's private investigators requesting that Pugh meet with them to discuss the victim's murder. Pugh also explained that, when he did not return their calls, the defendant himself called to urge him to talk to the investigators. In light of the conduct of the defendant and his investigators, it was not improper for the state's attorney to argue that the defendant, or Sutton Associates, or both, in 1992, considered it urgent that Pugh repeat the story that the defendant had told him. It also was not improper for the state's attorney to argue that the defendant's urgent interest in the matter likely was related to the fact that the state recently had reopened its investigation into the victim's murder, and that Lee had part of that investigation. Because the state's attorney merely urged the jury to draw

It is unclear why, in deciding to criticize Sherman's closing argument in this regard, the habeas court ignored this Court's explication of the point that the state was making in this portion of its argument. What is clear is that it was error for the habeas court to find Sherman deficient in failing to rebut an argument by Attorney Benedict that Benedict never made.

Furthermore, Attorney Sherman did directly and effectively address the argument that Benedict *did* make, doing his best to argue that there was no inconsistency in the versions that the petitioner gave Meredith and Pugh, noting that Pugh merely "assumed" that the petitioner was referring to the tree that the victim's body was found under and that it would not have made sense for the petitioner to have told anyone, including Pugh, that he had gone up to watch the victim and masturbate in a tree that was too far away from the victim's house to have been able to see her.[99]

For these reasons, the habeas court erred in finding Attorney Sherman

---

reasonable inferences from the facts, the argument was not improper.
State v. Skakel, 276 Conn. at 750-51.

[99] 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. He went out, he was looking for Martha, he liked her, he went in the tree next to the house. I mean, if you believe Michael Meredith, Michael Meredith says that he was next to the house looking at her 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 Michael 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.

* * *

[I]t doesn't make sense that he would tell everyone he went to look in her house by climbing the tree under which she was found. It is too far away.
CT 6/3:88-89.

constitutionally deficient in the manner in which he rebutted the state's argument relating to the tree masturbation stories.

d. The reason the petitioner was placed in Elan

Finally, the habeas court also made passing reference to its earlier discussion of defense counsel's alleged failure to respond to the state's argument as to the reason petitioner was placed at Elan. MOD:106. For the reasons discussed *supra*, the habeas court misconstrued the state's argument in this regard. Moreover, no amount of argument could eradicate the state's evidence from Rogers and Coleman regarding the petitioner's statement to them that he was sent to Elan because his family believed he was responsible for Martha's murder and, by addressing it in a feeble attempt to explain it away, defense counsel only would have risked highlighting that damaging part of the state's evidence. As the habeas court itself concluded, this issue was, at best, "tangential;" MOD at 81; and, accordingly, the habeas court should have deferred to counsel's decision to spend precious argument time on more meaningful parts of the case, upon which he had stronger arguments. *Yarborough*, 540 U.S. at 7.

4. Sherman's "improper comments"

Equally misguided is the habeas court's reliance on certain additional comments by Attorney Sherman, which subsequently drew an objection by the state and resulted in a curative instruction by the trial court, as evidence of Sherman's alleged failure to provide effective assistance to the petitioner. MOD at 106-08.

During the course of Sherman's argument, he, *inter alia*, (1) asserted that his client, the petitioner, "didn't do it" and he "doesn't know who did;" CT 6/3: 21; a statement the state found objectionable as an attempt by Sherman to have the petitioner testify through

his attorney and regarding which a curative instruction later was given; *id.*: 106-07, 141-42; (2) accused the state of preferring "the lousy contaminated diminished memories" of witnesses in statements made in 2002 and 1998 to more reliable statements made in 1975, which Sherman accused the state of fighting to keep out; *id.*: 46; which the criminal trial court *sua sponte* found inappropriate and told the jury to disregard; *id.*; (3) made an innocuous reference to the Alex Kelly case when speculating as to why one of the state's witnesses erroneously may have believed that the petitioner left the country at some point; *id.*: 69: which the criminal trial court *sua sponte* also found inappropriate and told the jury to disregard; *id.*: 70; (4) asked the jury to consider the state's failure to produce certain witnesses as reflecting further weaknesses in the state's case, an argument the state found objectionable and regarding which a curative instruction was later given; *see* CT 6/3: 107-09, 142; and (5) made comments implying that the state's objections at certain points during the trial suggested that the state was trying to hide something, an argument the state also found objectionable and regarding which a curative instruction also later was given. *See id.*: 109, 142.

The habeas court seized upon these improper comments and placed them in the mix of instances allegedly reflecting Sherman's deficient performance, finding that "the fact that Attorney Sherman's improper comments necessitated these curative instructions is remarkable." MOD:108. On the contrary, what is remarkable is the habeas court's reliance on Attorney Sherman's occasionally overzealous advocacy on the petitioner's behalf as evidence of Sherman's constitutionally *inadequate* advocacy on the petitioner's behalf.

As this Court has recognized, "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, 836 A.2d 224 (2003). In this case, the criminal trial court, as was its right and obligation, determined that certain portions of Sherman's arguments went too far and properly instructed the jury to disregard them. However, while Sherman's comments were, at times, legally objectionable – which is not uncommon during the course of any trial -- there was nothing outrageous or "remarkable" about them; they certainly were not likely to have inflamed the jury in any way.

In evaluating counsel's performance for sixth amendment purposes, it was not the court's function to "grade counsel's performance;" *Strickland*, 466 U.S. at 697; and, therefore, the relevant question before it was not whether counsel's actions were suspect or objectionable to the prosecution or the court. Rather, the focus should have been on whether, even assuming counsel's actions or arguments were improper under the law, they were improper and harmful in a way that adversely affected the defendant's interests. *See Safford v. Warden*, 223 Conn. 180, 192, 612 A.2d 1161 (1992) (characterizing as "almost frivolous" petitioner's claim that counsel ineffective for failing to jeopardize plea bargain that benefitted petitioner, by pursuing motion to disqualify sentencing judge, who participated in plea negotiations that resulted in that favorable bargain. Court observes that "[c]riminal defendants, the criminal defense bar, the prosecution bar and the bench would be surprised, to say the least, to learn that the sixth amendment guarantee of effective assistance of counsel" gauges counsel's performance on behalf of his client, "not by whether it fell below the standard of reasonableness *to the prejudice of the client*, but by whether it sufficiently protected the purity of the criminal process.") (Emphasis added). *See also Strickland*, 466 U.S. at 689 ("the purpose of the effective assistance guarantee of the

Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.") The habeas court utterly failed to explain how Sherman's comments, although legally objectionable, constituted evidence of deficiency rather than, to the contrary, evidence of Sherman's fervent efforts to obtain an acquittal for petitioner.

Accordingly, it was error for the habeas court to rely upon instances of Attorney Sherman's overzealousness in arguing for the petitioner's acquittal as a basis for finding Sherman constitutionally deficient.

X. THE HABEAS COURT ERRED IN FINDING THE DEFENSE TEAM DEFICIENT FOR FAILING TO SEEK SUPPRESSION OF THE HOFFMAN TAPES

The habeas court also found that Attorney Sherman was deficient in failing to attempt to suppress the petitioner's inculpatory statements that were memorialized on the audio recordings made during his collaboration with Richard Hoffman on the petitioner's autobiography in 1997. MOD:102-03. Once again, however, the habeas court found that the petitioner had failed to establish prejudice, concluding that he did not demonstrate that there was, in fact, a legal basis upon which to have the tapes suppressed. *Id.*: 104. For the reasons set forth below, the court erred in finding counsel deficient for failing to pursue a challenge that the court expressly recognized was without merit. *See Sekou v. Warden,* 216 Conn. 678, 690, 583 A.2d 1277 (1990).[100]

A. Facts Pertaining To This Claim

The grand jury, as part of its investigation, issued a subpoena to Hoffman, directing

[100] *See* footnote 53, *supra*.

him to appear before the grand jury and to bring with him records, tapes, and other materials being used in the preparation of the autobiography. PE 108. The subpoena was served on Hoffman, who was living in Massachusetts at the time, by a Massachusetts police officer, who was accompanied by Inspector Frank Garr from the Fairfield State's Attorney's Office. Hoffman testified at the habeas hearing that, among the statements made by Garr when the officers were at his residence were "we can do this the easy way, or we can do this the hard way" and "I am not returning to Connecticut without what I came for." HT 4/18: 87. Notwithstanding these statements, which Garr denied making; HT 4/19:14-15; Hoffman testified that the environment was amicable; HT 4/18:102; that he "didn't see this [sic] as adversaries at that moment at all;" *id.*: 88; and that Hoffman invited the officers to have coffee while he retrieved the subpoenaed items; *id.*: 103-04. Hoffman further testified that he understood that it was the grand jury that was requiring him by law to produce the items; that it was not his place to play "judge and jury" in the criminal investigation and it was up to other people to "sort it out;" and that, as a good citizen, it was a "no-brainer" for Hoffman simply to turn over to Garr the items that the grand jury was seeking. HT 4/18: 102. Accordingly, Hoffman turned the items over to Garr. *Id.*: 96. Hoffman appeared before the grand jury as well, as required by the subpoena. The state later used the tapes during the criminal prosecution, primarily as evidence of the petitioner's claims as to what he did upon his alleged return from his cousin's house, including his claim of having masturbated in the tree near the victim's house.

Sherman testified that, at some point prior to the criminal trial, he went with a private investigator, Charles Moore, to speak with Hoffman. HT 4/16: 188. According to Sherman's testimony, Hoffman informed him that his decision to turn the material over to

the officers was "totally" voluntary; HT 4/16: 193, 202; HT 4/17: 164; HT 4/26: 119; and Hoffman never testified that he told Sherman anything different. After analyzing the issue, as well as consulting with Attorney David Grudberg on the issue, Sherman concluded that he would have difficulty establishing that the petitioner had standing to challenge the "seizure" of the tapes from Hoffman. HT 4/16:198; HT 4/17:164; 4/18:135. Moreover, Sherman had little doubt that, regardless of any attempt on his part to exclude the tapes, either his efforts would not succeed or, if nothing else, the petitioner's oral statements to Hoffman that were captured on the tapes could be elicited by the state from Hoffman when he testified. HT 4/16:196; 4/17:166-67.

Sherman testified that ultimately, however, the primary reason why he decided to forgo a challenge to the tapes was strategic. HT 4/16:195; 4/18:176. Sherman explained that he was well aware that, regardless of whether he attempted to object to the tapes, the tree masturbation story was coming into evidence through other state's witnesses, i.e., Meredith, Pugh, Ridge and/or Hoffman. Sherman saw a benefit to the defense to allowing the tapes into evidence so that the jury at least could hear the petitioner's own version, in his own voice, thereby essentially allowing the petitioner to "testify" about it without having to be subjected to cross examination by the state. HT 4/16: 195-96; 4/17:166-67. In addition, Sherman felt that much of what was on the tapes came across as "endearing" and "humanized Michael" for the jury, without having him take the stand. HT 4/26: 119-21. Thus, as far as Sherman was concerned, it did not matter whether he could have established standing and/or even succeeded in suppressing the tapes, because he saw an upside to their admission. HT 4/18:135, 139, 176; 4/16: 121.

At the habeas trial, the petitioner presented two written agreements between the

petitioner and Hoffman, the terms of which provided for confidentiality in any information or materials that the petitioner provided to Hoffman and that the petitioner retained sole ownership rights in the information and materials that the petitioner provided. *See* PE 291 and PE 292 (App. Pt. 2: A-1580).

The habeas court found that the "seizure" of the tapes by Garr was unlawful because "Garr intimidated and coerced Hoffman into giving him these materials when Hoffman was not legally required to do so." MOD:103. The court further concluded that Attorney Sherman was deficient in failing to move to suppress the tapes. The court found that "it did not even occur to [Sherman] to attempt to suppress the utilization of the seized materials at trial." *Id.* It further found that "Sherman made no effort to learn whether he had a basis for seeking to suppress the materials seized from Hoffman by Garr;" that Sherman "was not aware that Hoffman and the petitioner had entered into" the agreements described above; and that, in the court's view, those agreements "would have given Attorney Sherman standing to contest [the] seizure by Garr." MOD:102-03. Nevertheless, the court found that any challenge made by Sherman ultimately would not have succeeded because "[t]he materials were not subject to an attorney-client privilege; rather they were subject to a commercial confidentiality agreement the terms of which would not bar the grand jury from access in the course of a murder inquiry." MOD:104. Accordingly, the court concluded that the petitioner failed to demonstrate prejudice. *Id.*

B. The Habeas Court Erred In Finding The Defense Team Constitutionally Deficient In Failing To Attempt To Suppress The Hoffman Tapes

1. The habeas court's factual findings that "it did not even occur to" Sherman to attempt to suppress the tapes and that "Sherman made no effort to learn whether he had a basis for seeking to suppress" the tapes are clearly erroneous

Once again, a finding of fact is clearly erroneous "when there is no evidence in the record to support it ... or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Naples*, 295 Conn. at 225. Under either or both articulations of this standard, the habeas court's findings that "it did not even occur to" Sherman to attempt to suppress the tapes; MOD:103; and that "Sherman made no effort to learn whether he had a basis for seeking to suppress" the tapes; *id.*:102; are clearly erroneous.

The *sole* evidence presented in this case regarding Sherman's thoughts and actions relative to the Hoffman tapes came from Sherman himself. Sherman expressly testified that he *did* speak with Hoffman about his surrender of the tapes and was informed by Hoffman that he turned them over voluntarily; HT 4/16: 193, 202; HT 4/17: 164; and that he *did* make an effort to learn whether he had a legal basis for seeking to exclude the tapes, including consulting with another well-respected attorney, David Grudberg, before coming to the conclusion that the petitioner lacked standing and that, in any event, it would be strategically beneficial to the defense to have the tapes admitted; HT 4/16:198; HT 4/17:164; 4/18:135.

It is true that the habeas court, as factfinder, was not required to credit Sherman's testimony in this regard. However, as this Court consistently has stated, in civil and criminal cases alike, a factfinder "may not infer the opposite of a witness' testimony solely from its disbelief of that testimony." *State v. Hart*, 221 Conn. at 605. Thus, even if the habeas court chose to discount Sherman's testimony, the record still is devoid of any affirmative evidence establishing that "it did not even occur" to Sherman to suppress the

tapes and/or that he "made no effort" to learn whether he had any basis for suppression. It was the petitioner's burden to present such evidence, which was essential to establishing a factual basis for his claim of neglect by Sherman in this respect. No such evidence was presented below and the court was not entitled to rely, instead, solely on its disbelief of Sherman's testimony to erroneously find that Sherman did not consider suppression of the Hoffman tapes. On the contrary, counsel is presumed to act competently unless and until petitioner presents credible evidence establishing to the contrary.

For example, the United States Supreme Court recently overturned an erroneous finding by the Sixth Circuit that counsel performed deficiently, finding, in part, that the lower court erroneously had reasoned that the absence of evidence in the record verifying that counsel advised his client properly supported its conclusion that counsel was deficient in this regard. The Supreme Court noted that such reasoning perverted the burden of proof with respect to claims of ineffectiveness:

> [C]ounsel should be "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052, and that the burden to "show that counsel's performance was deficient" rests squarely on the [petitioner], *id.*, at 687, 104 S.Ct. 2052. The Sixth Circuit turned that presumption of effectiveness on its head. 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." [*Strickland,* 466 U.S.] at 689, 104 S.Ct. 2052.

Burt v. Titlow, 134 S. Ct. at 17.

Because the record is completely devoid of any evidence overcoming the "strong presumption" of Sherman's competence in this regard, and because the only evidence presented actually contradicted the habeas court's findings, the court's findings that Sherman did not think of suppressing the tapes, and made no effort to learn whether he

had any basis to do so, are clearly erroneous because there is no evidence in the record to support them. *Naples*, 295 Conn. at 225.[101]

2. The habeas court erred in concluding that Sherman was deficient in not pursuing a challenge to the tapes on the grounds that they were improperly seized from Hoffman because there was no evidence indicating that Sherman was ever informed of any factual basis for such a challenge and the sole evidence presented was to the contrary

An essential premise of the habeas court's conclusion that Sherman was deficient in failing to challenge the tapes on the basis of Garr's allegedly intimidating statements to Hoffman is that Sherman either knew that Garr made such statements to Hoffman or that he failed to conduct a reasonable investigation into the circumstances under which the

[101] The respondent recognizes that the habeas court, as the factfinder, was entitled to credit and discredit any testimony it chose to, as well as draw any reasonable inferences it wished. For this reason, the respondent does not also claim that the habeas court's factual finding that "Garr intimidated and coerced Hoffman into giving him" the tapes is "clearly erroneous," at least within the legal meaning of that phrase. Nevertheless, the scenario painted by the court – in which Garr, accompanied by his "beefy" cohort, implicitly threatened Hoffman with physical harm and intentionally lied to him regarding Garr's authority to seize the subpoenaed items without Hoffman's consent, until Hoffman reluctantly turned over the items he clutched tightly in his bosom -- certainly conflicts with the description provided by *both* Hoffman and Garr in their habeas testimony and, at a minimum, strains the outer limits of the court's right as a factfinder generally to construe the evidence as it wishes. Regardless of whatever Garr may have meant about doing it the easy way or the hard way and not going back to Connecticut without the items, Hoffman himself testified that the environment was amicable; HT 4/14: 102; that he "didn't see this [sic] as adversaries at that moment at all;" *id.* at 88; and that Hoffman invited the officers to have coffee while he retrieved the subpoenaed items; *id.* at 103-14. More importantly, Hoffman's own testimony likewise makes it clear that the reason he turned the items over is because of the pressure from the *grand jury subpoena*, not Garr. Hoffman testified that he understood that it was the grand jury that was requiring him by law to produce the items; that it was not his place to play "judge and jury" in the criminal investigation and it was up to other people to "sort it out;" and that, as a good citizen, it was a "no-brainer" for Hoffman simply to turn over to Garr the items that the grand jury was seeking. Considered in its fuller context, it is far from clear that anything Garr did, or Hoffman believed, vitiated the voluntariness of Hoffman's decision to cooperate with the grand jury's investigation by turning the items over to Garr, or otherwise constituted an "illegal seizure" of the items, as the habeas court opined. MOD: 103.

tapes were turned over by Hoffman, which investigation would have uncovered this fact. There is no evidence to support either finding in this case and, in fact, the only evidence is to the contrary.

As noted *supra*, Sherman testified that he investigated the circumstances under which Hoffman surrendered the tapes; that Hoffman informed him that his decision to turn the material over to the officers was totally voluntary; and that he had no recollection of Hoffman telling him that Garr said "we can do this the easy way or the hard way" or that he was "not leaving without the material." HT 4/16: 193, 202; HT 4/17: 164; HT 4/26: 119. Although Hoffman later testified, at the habeas trial, that Garr made such statements to him, the petitioner did not present a shred of evidence, from Hoffman or anyone else, that Hoffman *told* Sherman this version at any point in time.[102] Thus, the only evidence on this factual issue came from Sherman, who testified that he *did* investigate the factual circumstances of the surrender of the tapes and was informed by Hoffman that the surrender was voluntary. Once again, although the habeas court, as factfinder, was free to reject Sherman's testimony, it was not free to infer the opposite solely on that basis. *State v. Hart*, 221 Conn. 595, 605, 605 A.2d 1366 (1992).

Because the petitioner presented no evidence establishing that Sherman knew of Garr's alleged statements to Hoffman or that Sherman, upon investigating this issue, had any reason to disbelieve Hoffman's initial assurances that there was no coercion involved

[102] In his habeas testimony, Hoffman confirmed that Sherman did contact him at some point prior to the criminal trial. HT 4/18: 104. However, Hoffman never testified to the substance of their conversation, other than that Sherman never asked him whether there were any agreements between Skakel and Hoffman. *Id.* At the habeas trial, petitioner never pursued any line of inquiry with Hoffman regarding what he told Sherman about his encounter with Garr.

in the surrender of the tapes, the habeas court erred in concluding that Sherman was constitutionally deficient in failing to pursue a challenge to the tapes on a factual basis that Sherman had no way of knowing existed at the time he investigated the possibility of such a challenge.

3. The habeas court erred in concluding that Sherman was not functioning as counsel solely because of the court's disagreement with Sherman's opinion as to whether he could establish standing to challenge the seizure of the tapes from Hoffman

Although the habeas court expressly recognized that any motion to suppress the Hoffman tapes would have been unsuccessful, the court nevertheless disagreed with Attorney Sherman's conclusion that the petitioner lacked standing to challenge the allegedly illegal seizure of the tapes from Hoffman. Consequently, the habeas court concluded that Attorney Sherman was incompetent, under the first *Strickland* prong, for failing to pursue this fruitless motion, but further concluded that the petitioner nevertheless did not establish prejudice because the motion would not have succeeded. MOD:99-105.

The habeas court's reasoning in support of its finding of deficient performance is flawed for a number of reasons. First, as with the prior claim of ineffectiveness surrounding Sherman's decision not to call an expert, the habeas court inexplicably fails to acknowledge the full extent of Sherman's stated reasons for deciding not to move to suppress the tapes. It is true that one reason given was Sherman's belief that the petitioner lacked standing, which will be discussed *infra*. However, another reason and, in fact, the more *important* strategic reason, according to Sherman, was his belief that, because there was no question that the state was going to be able to present evidence to the jury, through other witnesses, about the petitioner's claim to have masturbated in the tree, Sherman believed it would be

beneficial at least to allow the jury to hear the petitioner's explanation through the tapes, in the petitioner's own voice, a tactic which also insulated the petitioner from cross examination by the state.

As discussed *supra*, the habeas court erred in failing to address these patently legitimate strategic concerns when evaluating whether Sherman's decision to forgo a challenge to the tapes was a choice that was *objectively* reasonable, i.e., one any reasonably competent attorney could have made. *Harrington*, 131 S. Ct. at 791. Clearly it was. Recognizing the inevitability of the jury hearing the same substantive evidence, perhaps inaccurately, from other state's witnesses, it was reasonable of Sherman to have chosen to make the best of the situation by insuring that the petitioner at least had the opportunity to convey his version to the jury by way of the tapes, in his own voice, while nevertheless shielding the petitioner from the rigors of cross examination. This strategic reason alone justified Sherman's decision not to challenge the tapes.

Moreover, the fact that the habeas court expressly found that any challenge to the "seizure" of the tapes ultimately would have been meritless not only undermines the petitioner's claim of prejudice, under the second *Strickland* prong, but also further undermines the court's conclusion, under the first prong of *Strickland*, that counsel was deficient in failing to pursue such a challenge. *See Sekou*, 216 Conn. at 690 ("the failure to pursue unmeritorious claims cannot be considered conduct falling below the level of reasonably competent representation"); *accord Williams v. Manson*, 195 Conn. 561, 564, 489 A.2d 377 (1985) ("the failure to object to admissible evidence cannot be considered conduct falling below the level of reasonably competent representation").

Furthermore, the habeas court's finding of deficiency based on its mere

disagreement with Sherman's legal opinion as to whether the petitioner had standing to challenge the tapes again reflects a misapprehension of the proper standard. As our Appellate Court aptly has stated, "[t]he question is not whether . . . counsel's interpretation [of the law] was correct, but only whether it was one a reasonably competent attorney could have made." *Rouillard v. Comm'r of Correction*, 35 Conn. App. 754, 761, 646 A.2d 948 (1994), citing *Aillon v. Connecticut*, 597 F.Supp. 158 (D.Conn.1984), *aff'd*, 770 F.2d 157 (2d Cir.1985), *cert. denied*, 478 U.S. 1021 (1986) and *Valeriano v. Bronson*, 209 Conn. 75, 90, 546 A.2d 1380 (1988). *See Harrington*, 131 S. Ct. at 791 (constitutional deficiency hinges, not simply on whether counsel erred, but rather "whether counsel's error was so fundamental as to call the fairness of the trial into doubt"); *Myers v. Manson*, 192 Conn. 383, 396, 472 A.2d 759 (1984) ("Though [counsel's] statement was inaccurate and regrettable we can not say that it rendered [counsel's] otherwise effective assistance ineffective."); *United States v. McGill*, 11 F.3d 223, 227 (1st Cir. 1993) ("To avoid the shoals of ineffective assistance, an attorney's judgment need not necessarily be right, so long as it is reasonable. *See Strickland*, 466 U.S. at 687-91.") Regardless of which view – the habeas court's or Sherman's – this Court believes was correct, there certainly was room for reasonable minds to differ on whether the petitioner could have established standing to challenge the manner in which the tapes were obtained from Hoffman. The fact that Sherman consulted with Attorney Grudberg on this issue before reaching his decision only further illustrates the reasonableness of his actions in this regard. *See Williams v. Warden*, 217 Conn. 419, 434-35, 586 A.2d 582 (1991).

Tellingly, neither the petitioner nor the habeas court cited any cases supporting their assumption that the petitioner's proprietary interest in the tapes, as reflected in his written

agreements with Hoffman, was sufficient to confer standing to challenge the "seizure" of the tapes. The absence of any such citations is noteworthy, given the court's conclusion that such an allegedly obvious principle of law should have been readily apparent to any reasonably competent attorney.

Moreover, regardless of whether, by virtue of any commercial agreements between Hoffman and the petitioner, the petitioner retained a property interest in the physical tapes themselves, it remains far from clear that the petitioner, having voluntarily chosen to give Hoffman the right to possess the tapes at the time they became subject to the grand jury subpoena, would have had legal standing to challenge what was, at that point, only an interference with Hoffman's possessory rights regarding those tapes, particularly on grounds that related only to Hoffman himself, i.e., the alleged intimidation by the officers in persuading Hoffman to turn them over in response to the subpoena.

Furthermore, well-established precedent from both this Court and the United States Supreme Court indicates that "[t]he capacity to claim the protection of the fourth amendment does not depend upon a property interest . . . but upon whether the person who claims fourth amendment protection has a reasonable expectation of privacy in the invaded area. *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978); *Terry v. Ohio*, 392 U.S. 1, 8-13, 88 S.Ct. 1868, 1872-76, 20 L.Ed.2d 889 (1968); *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed.2d 576 (1967)." *State v. Reddick*, 207 Conn. 323, 330, 541 A.2d 1209 (1988). Thus, although Hoffman and the petitioner had a "commercial confidentiality agreement;" MOD:104; it also is far from clear that this would have afforded the petitioner standing to object to Hoffman's compliance with the grand jury subpoena. "[A] 'legitimate' expectation of privacy by definition means more

than a subjective expectation of not being discovered." (Internal quotation marks omitted.) *United States v. Jacobsen*, 466 U.S. 109, 123 n.22 (1984). Consequently, even a reasonable expectation that one's associate will not disclose information or evidence to the authorities does not, by itself, translate into a reasonable expectation of privacy for purposes of establishing fourth amendment standing. *Id.* at 122-23. On the contrary, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S. Ct. 2577 (1979).

> It is well-settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information: "This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, ***even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed***." *United States v. Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 1624, 48 L.Ed.2d 71 (1976). The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated.

(Emphasis added.) (Footnote omitted.) *Jacobsen*, 466 U.S. at 117-18. Having freely chosen to make the taped statements to Hoffman, the petitioner would have had difficulty claiming a fourth amendment expectation of privacy in those taped statements, a necessary prerequisite to his standing to bring a fourth amendment challenge to the state's use of the statements.

In any event, as discussed *supra*, the pertinent sixth amendment question is not whether a reviewing court decides, in retrospect, that Sherman was incorrect in his assessment of the standing issue, but rather, whether reasonable minds may have differed such that Sherman's decision to forgo a challenge was one that competent counsel may

have made. Particularly in light of Sherman's overarching belief that it was strategically beneficial to allow the tapes into evidence, as well as the habeas court's own recognition that any challenge ultimately would have been futile in precluding the state from presenting the tapes in its prosecution, it was reasonable for Sherman to decide that additional time spent pursuing further investigation of any potential challenge to the seizure of the tapes was unwise. *See Strickland*, 466 U.S. at 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary").

At bottom, the habeas court's entire rationale in finding Sherman constitutionally deficient in this regard rests upon a number of speculative hypotheses that, even with the benefit of hindsight, are highly questionable: that any and all reasonably competent attorneys, in addition to tending to all other responsibilities in this complex case, invariably would have found it a useful expenditure of their time and resources to pursue the possibility of attempting to establish standing *in furtherance of a motion to suppress that even the habeas court itself found ultimately would not have resulted in the exclusion of the tapes from either the grand jury proceedings or the criminal trial* and, in any event, even if granted, would not have precluded the state from eliciting essentially the same evidence through Hoffman's testimony, even without the tapes. Once again, "[a]n attorney can avoid activities that appear distractive from more important duties . . . [and] was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." (Internal citation and quotation marks omitted.) *Harrington*, 131 S. Ct. at 789. Thus, the habeas court erred in finding Sherman incompetent in failing to pursue this unhelpful, and ultimately futile, strategy merely

because the court believed that Sherman at least may have been able to establish standing (albeit in pursuit of a futile motion) if he had chosen to challenge the seizure of the tapes.

XI. THE PETITIONER DEMONSTRATED PREJUDICE SUFFICIENT TO SATISFY THE SECOND *STRICKLAND* PRONG UNDER A "CUMULATIVE ERROR" THEORY

A. Facts Pertaining To This Claim

In his brief below, the petitioner claimed that, even if he failed to demonstrate prejudice with respect to any of trial counsel's errors individually, the "cumulative effect" of trial counsel's deficiencies was sufficient to satisfy the prejudice prong of *Strickland.* Petitioner's Posttrial Brief at 56-58. In so claiming, the petitioner stressed that he was *not* "advocating that an accumulation of `almost deficiencies' ought to be aggregated to find prejudice . . . [but rather that, should the court] find that trial counsel committed more than one error under the performance prong of *Strickland*, it can evaluate the overall fairness of the trial to determine if there is a reasonable probability that, but for counsel's unprofessional ***errors***, the result of the proceeding would have been different." (Emphasis in original) (Internal quotation marks omitted). *Id.* at 58. Nevertheless, in his brief below, the petitioner made no attempt to demonstrate how the individual errors by counsel resulted in cumulative prejudice. *See id.* at 56-58.

In its Memorandum of Decision, the habeas court found that, because it determined that sufficient prejudice was demonstrated as to individual instances of deficiency by virtue of Attorney Sherman's failure to adequately present the alibi, failure to assert a third party culpability claim against the petitioner's brother Tommy and failure to adequately impeach Coleman, it was unnecessary for the court to reach the petitioner's claim regarding the "cumulative effect" of any of the other deficiencies by Sherman that the court had found.

MOD:131, 134. The habeas court nevertheless opined that (1) none of the state court authorities cited by the parties would preclude the application of a "cumulative effect" theory to find prejudice in the sixth amendment context and (2) "persuasive federal decisional law on point" supports the application of such a theory. *Id.*: 131-34. However, the habeas court never specifically ruled that the petitioner would have met his burden under this alternative theory. Moreover, other than reiterating the deficiencies that it found to be insufficiently prejudicial individually; MOD:127-31; and expressing its view that the state's case against the petitioner was not strong; *id.*: 134-35; the habeas court (like the petitioner) made no attempt to articulate how the "cumulative effect" of any claimed deficiencies even arguably demonstrated prejudice sufficient to satisfy the second prong of *Strickland.*[103]

B. In General, The Term "Cumulative Error"[104] Has Been Used To Refer To Two Different Methods Of Analysis, One That Is Inconsistent With *Strickland* And Another That Is Consistent With *Strickland.*

1. "Cumulative error" theory in general

In order to determine whether "cumulative error" is properly considered in the context of evaluating prejudice under the second prong of *Strickland*, it is critical, first and

---

[103] The habeas court's apparent purpose in engaging in a lengthy discussion in support of adopting a "cumulative error" theory of prejudice under *Strickland* was to suggest the availability of this alternative basis for affirming its grant of relief, even though the court itself was not expressly willing to grant relief on this basis. By setting forth an advisory opinion in this fashion, the habeas court, in contravention of the "basic judicial duty to eschew unnecessary determinations of constitutional questions;" *State v. Rinaldi*, 220 Conn. 345, 353, 599 A.2d 1, 5 (1991), quoting *State v. Gold*, 180 Conn. 619, 639, 431 A.2d 501, *cert. denied*, 449 U.S. 920 (1980); has left the Commissioner with little choice but to address this issue in this brief or risk the possibility that this Court might accept the habeas court's invitation to consider this alternative theory for affirmance.

[104] Although both the petitioner and the habeas court frequently use the phrase "cumulative effect," cases addressing the issue also use the term "cumulative error." For purposes of this brief, the Commissioner also uses the term "cumulative error" to refer to what is essentially the same doctrine.

foremost, to stress that the term "cumulative error" is itself ambiguous and potentially misleading, in that it is used by various courts at times to refer to two entirely distinct modes of analysis. In one, which the Commissioner will refer to as the **"aggregated error" method**, the party and/or court posits that errors that individually do not result in legally sufficient harm or prejudice nevertheless can be deemed to have demonstrated harm or prejudice collectively merely because the sheer number or accumulation of errors suggests that the trial was unfair and the verdict unreliable, regardless of whether those errors are legally and analytically unrelated. *See e.g. Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995). In the second, which the Commissioner will refer to as the **"interrelated error" method**, harm or prejudice is demonstrated, not on the basis of an arbitrary, subjective and mathematical computation as to how many non-prejudicial errors is too many nevertheless, but rather on the basis of a logical and articulable relationship between two or more errors that renders it likely that their combined occurrence affected the outcome, to the degree necessary to meet the legal standard of harm or prejudice, in a way that neither error would have individually. *See e.g. Commonwealth v. Johnson*, 600 Pa. 329, 344-45, 966 A.2d 523, 532 (2009)[105]; *see also Powell v. Bowersox*, 895 F. Supp. 1298, 1306 (E.D. Mo.

---

[105] This Court has repeatedly held that "no number of failed [ineffectiveness] claims may collectively warrant relief if they fail to do so individually." . . . Notwithstanding the possible error in the PCRA court's understanding as a general matter, we recognize that, in this case, the twin guilt phase "errors" briefed to us—trial counsel's failure to investigate potential eyewitnesses and trial counsel's presentation of an inconsistent alibi defense—*are in fact intertwined. As two components of appellee's identity defense, which in this case includes both an alibi component and a mistaken identity component, the claims may fairly be considered together*, given appellee's overarching argument that trial counsel's multiple failings demonstrate his unacceptable lack of preparedness for trial.

(Emphasis added.) *Commonwealth v. Johnson*, 600 Pa. 329, 344-45, 966 A.2d 523 (2009).

1995), *aff'd*, 112 F.3d 966 (8th Cir. 1997).[106]

The Commissioner submits that the former, "aggregated error" method is inconsistent with controlling precedent from the United States Supreme Court relative to claims of ineffective assistance of counsel under *Strickland.* Conversely, the Commissioner does not dispute that the latter, "interrelated error" method of evaluating cumulative error is a proper method of evaluating multiple errors by counsel under the second *Strickland* prong. Because there has been no showing of any "interrelated error" with respect to the issues upon which the habeas court found non-prejudicial deficiencies by defense counsel in this case, relief would not be warranted, even if this Court were to adopt a "cumulative error" theory in this context.

2. Only the "interrelated error" method of evaluating prejudice is consistent with the dictates of *Strickland*

In the absence of any United States Supreme Court decisions on point, as yet, with respect to the issue of cumulative error, the few lower courts that have both adopted this theory in the Sixth Amendment context and explained their rationale for doing do appear to rely upon the following passage from *Strickland* as implicit support:

> In making this determination [of prejudice], a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the

---

106 In support of his ineffective assistance of counsel claim, petitioner also offers a "cumulative error" argument. Petitioner argues that the decision to advise petitioner not to testify, when viewed in conjunction with "the decision to have sex with a client during or shortly after a capital murder trial," was one of a series of decisions, which militate in favor of granting the writ. This assertion is also not persuasive. *The two "decisions" are completely unrelated. Further, it is not clear how, if at all, one decision impacted the other.*
(Emphasis added.) *Powell*, 895 F. Supp. at 1306.

> evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 695-96. *See*, e.g., *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001); *Mackey v. Russell*, 148 F. App'x 355, 368–69 (6th Cir.2005).

Far from lending support, this passage from *Strickland* clearly undermines the propriety of any method of analyzing prejudice, such as the "aggregated error" theory, which would permit courts to abandon their duty to legally analyze the likely impact of particular errors on the verdict and, instead, simply make a subjective determination that some unspecified and arbitrary number of otherwise non-prejudicial errors by counsel nevertheless totals a Sixth Amendment violation. By its plain language, the above-quoted passage from *Strickland* requires courts to (1) evaluate, in view of the totality of the evidence at the criminal trial, both the manner in which, and the degree to which, each individual error by counsel is likely to have affected any of the facts relied upon by the judge or jury in reaching the guilty verdict and, then, (2) determine whether any likely effect that these errors may have had on such facts renders it reasonably likely that the verdict would have been different absent those errors. *Strickland*, 466 U.S. at 695-96. It should be readily apparent that this was meant to be a *qualitative*, rather than quantitative, evaluation of counsel's errors and that the mere multiplicity of errors that were unlikely to have affected the jury individually should not be presumed to undermine it collectively, in the absence of a cogent explanation as to how and why.

"[I]t is not enough for the defendant to show that the errors had some conceivable

effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. In contravention of this principle, an "aggregated error" method of evaluating prejudice relies solely upon speculation that it is "conceivable" that the outcome of the proceeding was affected, nothwithstanding that the decisionmaker cannot begin to explain how. In a similar vein, the High Court also has squarely rejected the application of any "presumed prejudice" in all but a narrow class of sixth amendment cases that are not at issue here. *See Mickens v. Taylor*, 535 U.S. 162, 166-74, 122 S. Ct. 1237 (2002). In contravention of this dictate as well, the "aggregated error" method essentially just "presumes" prejudice from the existence of multiple errors, even in the absence of any reasoned analysis demonstrating how the multiplicity of the errors affected the outcome in a way that each did not individually. As the Court made clear in *Mickens*, such presumptions are rarely applied in the Sixth Amendment context generally and *never* applied in the context of a typical claim of ineffective assistance of counsel brought pursuant to *Strickland*. *See Mickens*, 535 U.S. at 166-74.

There is no question that abandoning the careful, analytical approach to prejudice mandated by *Strickland*, in favor of the "gut feeling" approach to prejudice encouraged by the aggregated error method, would render a court's task in resolving claims of ineffectiveness much easier. *See Harris*, 64 F.3d at 1439 (finding prejudice solely on basis of number of errors by counsel "obviate[s] the need to analyze the individual prejudicial effect of each deficiency"). However, as the High Court recently has reiterated, "'[s]urmounting *Strickland*'s high bar is never an easy task. [*Harrington*, *supra*, 131 S.Ct., at 788] (quoting *Padilla v. Kentucky*, 559 U.S. [356, 371], 130 S.Ct. 1473, 1484 [(2010)])." (Internal quotation marks omitted.) *Cullen*, 131 S. Ct. at 1408. Thus, "[t]he *Strickland*

standard must be applied with scrupulous care." *Id.*[107]

In reaching its conclusion to the contrary, the habeas court, noting *Strickland's* assertion that a defendant "must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different;" *Strickland*, 466 U.S. at 694; reasoned that, "[i]f each error must be assessed separately to determine prejudice, there would have been no reason for the Supreme Court to refer to errors in the plural in this portion of its seminal opinion." MOD:132. As an initial matter, it is highly questionable whether this semantic choice by the *Strickland* Court has any relevance whatsoever to the issue of cumulative error theory, which the *Strickland* case itself did not involve. It is far more likely that the *Strickland* Court's reference to "errors" when making the above-quoted statement simply reflected the Court's assumption that lower courts addressing constitutional claims of ineffective assistance of counsel would, in the vast majority of cases, be dealing with multiple "errors" by counsel, rather than simply one error.

Furthermore, if *Strickland*'s mere use of the plural when defining the prejudice standard were as important as the habeas court makes it out to be, then presumably it also would be true that the Court intended that prejudice could *only* be found when there were multiple "errors" by counsel. However, such a proposition could not be reconciled with the

---

[107] The ill-conceived premise of any aggregate error method is perhaps best summarized by the Tennessee Court of Criminal Appeals in *McKinney v. State*, W200602132CCAR3PD, 2010 WL 796939 (Tenn. Crim. App. Mar. 9, 2010), a case relied upon by the habeas court. *See* MOD:133 n.74. In *McKinney*, the court erroneously asserts that "[w]hile it remains the burden of the Petitioner to 'prove prejudice,' *see Strickland*, 466 U.S. at 693, the Petitioner is not required to demonstrate how the result would have been different." *Mckinney*, 2010 WL 796939 at *37. However, contrary to this assertion by the *McKinney* Court, there is nothing in *Strickland* which supports the illogical proposition that a petitioner can meet his burden of "prov[ing] prejudice" without ever having to explain *how* the petitioner was prejudiced.

Court's recognition that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639 (1986), citing *Strickland*, 466 U.S., at 693-696 and *United States v. Cronic*, 466 U.S. 648, 657, n.20, 104 S.Ct. 2039 (1984). In short, *Strickland*'s reference to "errors" rather than "error" is far too thin a reed upon which to support the habeas court's sweeping conclusions about the *Strickland* Court's purported view of cumulative error.

In any event, the Court's use of the plural in the one statement seized upon by the habeas court says nothing, by itself, about whether multiple "errors" should be evaluated individually to determine what effect each may have had on the result of the proceeding or, instead, may be evaluated cumulatively. Moreover, even if the Court's use of the plural was intended by the *Strickland* Court to signal that a cumulative error approach is permissible generally, the Court's use of this term would be just as consistent with the "interrelated error" method of evaluating multiple errors as it would be with an "aggregated error" method and, thus, lends no greater support to one side of the debate over the other.[108]

---

[108] In an attempt to circumvent controlling Appellate Court precedent, the habeas court also overrode the petitioner's concession below that the application of any cumulative error theory was rejected in *Diaz v. Comm'r of Correction*, 125 Conn. App. 57, 6 A.3d 213 (2010) and *Adorno v. Comm'r of Correction*, 66 Conn. App. 179, 186, 783 A.2d 1202 (2001). *See* Petitioner's Posttrial Brief at 56. The habeas court distinguished *Diaz* and *Adorno* on the ground that those cases only addressed "non-constitutional errors" by counsel, whereas the errors at issue in this portion of the habeas court's decision allegedly were "constitutional" errors. MOD:132 n.73. However, while the habeas court baldly asserted that "*Adorno*, like *Diaz*, states only that a court may not aggregate non constitutional errors in order to find ineffectiveness;" *id.*; the court failed to cite to any particular page of either *Adorno* or *Diaz* where the Appellate Court made any statement of the kind.

Furthermore, the habeas court does not explain what it means by the terms "non-

Finally, none of the courts that presume that an "aggregated error" method is constitutionally sound suggest how such an analysis can be applied with any objectivity and consistency. Are five non-prejudicial errors in a lengthy murder trial more or less "cumulatively" prejudicial than seven non-prejudicial errors in a shorter larceny case? How do cases involving six errors that appear to have had absolutely no effect on the verdict and two errors that may have had some effect (although not enough individually to have demonstrated prejudice) compare to cases involving three errors that have had no effect and three errors that may have had some effect? It should be apparent that permitting courts to abandon their constitutional obligation to engage in a reasoned, legal analysis of

---

constitutional errors" and "constitutional errors" in the *Strickland* context. To the extent the habeas court is suggesting that *Strickland* has different standards, or requires a different analysis, when counsel's acts or omissions relate to a constitutional right versus a non-constitutional right, the habeas court cites no authority for such a proposition, nor is the respondent aware of any. Nor does the habeas court explain how the alleged errors by counsel in this case (at least those that it suggested might be sufficiently prejudicial under a cumulative error theory) were clearly "constitutional" in nature in a way that the errors by counsel at issue in *Diaz* and *Adorno* were not.

Just as importantly, the habeas court's attempt to justify its failure to follow appellate precedent by distinguishing between "constitutional errors" by counsel and "non-constitutional errors" by counsel fails because it is inconsistent with the analytical framework for reviewing sixth amendment claims under *Strickland*. For sixth amendment purposes, defense counsel does not commit "constitutional errors." Rather, defense counsel's actions, as well as his or her omissions, are evaluated to determine (1) whether they are inconsistent with prevailing professional norms that counsel reasonably may have chosen to undertake (or not undertake) and (2) whether those acts and omissions were sufficiently prejudicial, as that term is defined in *Strickland*. It is only *after* a court finds that both prongs of this test have been met that the state is then considered to have violated the defendant's constitutional right to the effective assistance of counsel. Put another way, counsel's acts and/or omissions, even if professionally unreasonable, are not themselves "constitutional errors" unless and until both prongs of the *Strickland* test have been demonstrated. Consequently, it is not possible for a court to characterize errors by counsel as "constitutional errors," for purposes of determining whether they would be subject to a "cumulative error" theory of prejudice under the habeas court's interpretation of *Diaz* and *Adorno,* when such errors have, as yet, only been analyzed under one prong of the *Strickland* test.

prejudice in favor of a purely mathematical one is not only inconsistent with Sixth Amendment caselaw from the High Court, but also ill-advised policy and a recipe for a jurisprudential nightmare.

In sum, there is no support in *Strickland*, or any other case law from the High Court, to support an "aggregated error" method of establishing prejudice, a method which improperly relieves a petitioner of his burden of establishing a logical nexus between the errors complained of and their adverse effect on the actual deliberative process by the jury in the case. Indeed, it is no more justifiable to base prejudice merely on the sheer number of non-prejudicial errors by counsel than it is to base harmful error merely on the sheer number of non-harmful errors by a trial court, a proposition this Court consistently has rejected. *State v. Tillman*, 220 Conn. 487, 505, 600 A.2d 738 (1991), *cert. denied*, 505 U.S. 1207 (1992); *see also State v. Colon*, 272 Conn. 106, 218, 864 A.2d 666 (2004), *cert. denied*, 546 U.S. 848 (2005); *State v. Robinson*, 227 Conn. 711, 747, 631 A.2d 288 (1993).

On the other hand, as the Commissioner already has acknowledged, this does not mean that counsel's errors must always be evaluated in isolation from one another when determining whether, and to what degree, these errors may have influenced the outcome of the proceeding. In a given case, under the "interrelated error" method, it certainly may be appropriate, when evaluating the likely effect of counsel's errors on factual findings critical to the verdict, to evaluate whether the consequences flowing from a combination of particular errors that were logically interrelated were likely to have been greater than if each error had occurred alone. *See e.g. Com. v. Johnson*, 600 Pa. at 344-45.

C. There Is No Support For A Finding Of Relief Based Upon A Theory Of "Interrelated Error" In This Case

As potential support for a theory of cumulative error in this case, the habeas court

stated as follows:

> [T]he court finds that Attorney Sherman's representation was constitutionally deficient in several other areas, but none of these deficiencies, separately considered, entitled the petitioner to a new trial. In this category, the court includes the following: (1) Attorney Sherman's failure to investigate a third party culpability claim based on Bryant's narration and Attorney Sherman's mishandling of the third party culpability claim against Littleton; (2) Attorney Sherman's failure to respond to the state's claims that the masturbation story was a recent fabrication and that the petitioner was placed at Elan as part of a family cover-up; (3) Attorney Sherman's handling of jury selection; (4) Attorney Sherman's closing argument; (5) Attorney Sherman's failure to present expert testimony regarding the coercive nature of the environment at Elan; and (6) Attorney Sherman's failure to seek suppression of the Hoffman tapes.

MOD: 127-28. Following this recitation of the alleged deficiencies by Sherman that the court considered pertinent to a cumulative error analysis, the court briefly reiterated and summarized the findings it previously had made in support of its determination that Sherman was deficient in these respects, but the court made no effort to articulate any particular relationship between any of the deficiencies. *Id.*: 128-31. After expressly stating that it "need not reach the interesting claim made by the petitioner regarding the cumulative effect of Attorney Sherman's constitutional missteps;" *id.*: 131; the court nevertheless engaged in a legal analysis of the viability of a cumulative error analysis in the context of a sixth amendment claim. *Id.*: 131-34. After doing so, the court commented that it considered the cases holding in favor of cumulative error analysis in the sixth amendment context to be "persuasive", [109] but reiterated nonetheless that it "need not reach the

[109] In *Lindstadt v. Keane*, 239 F.3d 191, 200 (2d Cir. 2001), the primary case relied upon by the habeas court, the Second Circuit actually applied both methods of determining cumulative error. In the initial part of its opinion, the *Lindstadt* Court found prejudice from certain error by counsel that, in combination, "prevented Lindstadt from offering something akin to an alibi." *Lindstadt*, 239 F.3d at 200. This rationale is perfectly consistent with the "interrelated error" method of analyzing prejudice.

question of whether it is proper to aggregate constitutional errors in order to determine prejudice in a habeas case since the court has determined that certain errors of counsel, as stated, were so impactful that counsel's failures in each instance prejudiced the petitioner." *Id.*: 134.

As discussed *supra*, other than reiterating the deficiencies that it found to be insufficiently prejudicial individually and expressing its view that the state's case against the petitioner was not strong; MOD: 134-35; the habeas court, like the petitioner, made no effort at all to articulate how the "cumulative effect" of the six cited deficiencies even arguably demonstrated prejudice sufficient to satisfy the second prong of *Strickland*, let alone articulate any logical nexus between the alleged errors that would render them

---

Nevertheless, the *Lindstadt* court then proceeded to address two additional deficiencies by counsel that it expressly evaluated, in conjunction with the other deficiencies, under an "aggregated error" method, citing *Strickland* as support. *See Lindstadt*, 239 F.3d at 204 ("We assess the impact of these errors in the *aggregate. See Strickland*, 466 U.S. at 695-96 . . . .") (Emphasis in original). Significantly, however, the court's citation to *Strickland* tends to contradict the aggregate error method and support, instead, only the interrelated error method applied earlier in the *Lindstadt* opinion. The cited portion of *Strickland* states: "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Strickland*, 466 U.S. at 695-96. However, there is nothing in this statement that addresses any theory of "cumulative error" at all. Furthermore, it would have made no sense for the High Court to be implicitly suggesting, in this passage, that some errors that had a "pervasive effect" on the evidence and "alter[ed] the entire evidentiary picture" should then be aggregated with others that had an "isolated, trivial effect" in evaluating prejudice – presumably, the first type of errors *alone* would warrant a finding of sufficient prejudice to grant relief under the Sixth Amendment, regardless of the impact of the trivial ones. The more reasonable interpretation is that the *Strickland* Court was simply defining the different types of errors, some that are "pervasive" and sufficiently prejudicial to warrant relief and others that are more properly viewed as "isolated" and "trivial" and, therefore, not worthy of relief. Moreover, if anything, the Court's explicit use of the term "isolated" in characterizing the latter type of errors arguably lends further support only to the "interrelated error" method by emphasizing that errors that are non-prejudicial individually also do not warrant relief if they are "isolated" errors, i.e., errors that bear no logical relationship to each other such that their combined effect might logically support a theory of prejudice sufficient to warrant relief.

subject to the more appropriate "interrelated error" analysis. In the absence of such a reasoned, qualitative analysis, consistent with *Strickland*, it may be inferred that, notwithstanding his assertion to the contrary, the petitioner was seeking relief solely on a theory, consistent with an improper "aggregated error" approach, that the mere piling on of unrelated, non-prejudicial errors would be sufficient to demonstrate prejudice. For the reasons discussed *supra*, such an approach is inconsistent with the dictates of *Strickland* and, accordingly, there is no basis for finding that the alleged errors that the habeas court found to be insufficiently prejudicial individually would warrant habeas relief nevertheless under a "cumulative error" or "cumulative effect" theory as properly applied.

D. In The Alternative, Even If This Court Were To Adopt The "Aggregated Error" Theory, There Also Is No Basis For Relief Because The Habeas Court's Failure To Find Any Discernable Prejudice From Counsel's Alleged Deficiencies Individually Undermines Any Finding Of Discernable Prejudice In The Aggregate

Finally, even assuming *arguendo* that this Court were to consider applying an aggregated error method in this case, this petitioner would not be entitled to relief. As an initial matter, for the reasons argued *supra*, it is the Commissioner's position that the habeas court erred in finding deficient performance with respect to any of the claims of ineffectiveness and, consequently, there are no constitutional deficiencies to which a cumulative error analysis would apply. *See Hoxsie v. Kerby*, 108 F.3d 1239, 1245 (10th Cir. 1997) (Cumulative error analysis "does not apply . . . to the cumulative effect of non-errors"), *cert. denied*, 522 U.S. 844 (1997).

Moreover, even accepting the habeas court's ruling on its own terms, this is not a case in which the court found that petitioner showed some degree of prejudice from each of counsel's alleged errors such that, lumped together, this prejudice might add up to an

amount sufficient to meet the *Strickland/Harrington* standard of prejudice, i.e., prejudice rendering it just slightly shy of "more probable than not" that the verdict would have been different but for these alleged errors. *Harrington*, 131 S. Ct. at 791-92. On the contrary, with respect to the third party culpability claims, the court found that any alleged deficiencies with respect to such a claim against Littleton had *no* discernable effect on the outcome of the case because the claim was primarily based on what everyone agrees was a false confession by Littleton and any remaining evidence against Littleton "would not have entitled the petitioner *to even assert a third party culpability claim* against Littleton." (Emphasis added) MOD:25-26. The court further found that a third party culpability claim against Bryant also had *no* discernable effect on the outcome of the case because the court doubts Bryant even would have cooperated with Sherman; because the statements he provided not only lacked trustworthiness, because the statements themselves were essentially "self-*exculpating*," but also lacked any corroboration; and also because Bryant had a reputation that demonstrated a lack of veracity. (Emphasis added) MOD:31-33.

With respect to closing argument, including counsel's alleged failure to respond adequately with respect to the "masturbating in a tree" issue, the court articulated *no* discernable effect on the outcome of the case. Rather, it concluded that the jury instructions reminding the jury of its responsibility to "fasten its attention to the evidence" rendered it unlikely that the jury overlooked any such evidence, even if, in the habeas court's view, it was not adequately addressed by defense counsel in closing argument. MOD:108.

With respect to defense counsel's allegedly inadequate response to the issue surrounding why the petitioner was sent to Elan, the court concluded that it had *no* effect on

the outcome of the case because the debate as to exactly what reason or reasons explained the petitioner's presence at Elan in the first place was, at best, "tangential to the main issues in the case." MOD:81.

With respect to jury selection, the court found that counsel's alleged deficiency had *no* discernable effect on the outcome of the case because there was no suggestion of actual bias on the part of B.W. and, in fact, his responses during *voir dire* tended only to undermine any suggestion of bias. MOD:93-94 and n.58.

With respect to the absence of expert testimony on the coercive environment at Elan, the court correctly found that it had *no* discernable effect on the outcome of the case because, by Ofshe's own admission, such testimony simply would have had no relevance to the highly inculpatory statements made by the petitioner in more private conversations with the various witnesses from Elan who testified to those statements. MOD:87-88.

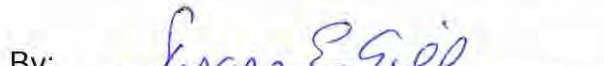
With respect to the Hoffman tapes, the court found that counsel's alleged deficiency had *no* discernable effect on the outcome of the case because, regardless of whether Attorney Sherman was mistaken on the issue of standing, any effort to suppress the tapes ultimately would have been fruitless. MOD:104-05.

In sum, the habeas court did not find that any of the six bases upon which the court found counsel deficient had any discernable effect on the outcome of this case. Accordingly, even if this Court were to apply an "aggregated error" analysis of prejudice in the context of this case, the petitioner still would not have met his burden of demonstrating prejudice sufficient to establish, by a standard just shy of more probable than not, that the outcome of his trial would have been different. *Harrington*, 131 S. Ct. at 791-92.

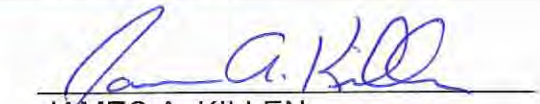
CONCLUSION

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,
COMMISSIONER OF CORRECTION

By: 

SUSANN E. GILL
Supervisory Assistant State's Attorney
Fairfield Post Conviction Unit
1061 Main Street
Bridgeport, CT 06604
Tel. (203) 579-6506
Fax (203) 382-8401
Juris No. 409671

By: 

JAMES A. KILLEN
Senior Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau

JOHN C. SMRIGA
State's Attorney
Judicial District of Fairfield

JONATHAN C. BENEDICT
Former State's Attorney
Judicial District of Fairfield

LEONARD C. BOYLE
Deputy Chief State's Attorney for Operations
Office of the Chief State's Attorney

KEVIN T. KANE
Chief State's Attorney
Office of the Chief State's Attorney

August, 2014

CERTIFICATION

The undersigned attorney hereby certifies that this brief complies with all provisions of Connecticut Rules of Appellate Procedure § 67-2.

SUSANN E. GILL
Supervisory Assistant State's Attorney

CERTIFICATION

The undersigned attorney hereby certifies that this brief and appendix does not contain any name or other identifying information that is prohibited from disclosure and has been redacted in compliance with the provisions of Connecticut Rules of Appellate Procedure § 67-1.

SUSANN E. GILL
Supervisory Assistant State's Attorney