No. ________

In The

Supreme Court Of The United States

STATE OF CONNECTICUT,

Petitioner,

v.

MICHAEL SKAKEL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

APPENDIX VOLUME III TO PETITION FOR WRIT OF CERTIORARI

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STATE OF CONNECTICUT

DOCKET NO. CV 10 4003762 : SUPERIOR COURT

MICHAEL SKAKEL (Inmate # 301382):
JUDICIAL DISTRICT OF TOLLAND

V. : AT ROCKVILLE

WARDEN : OCTOBER 23, 2013

MEMORANDUM OF DECISION

I

PROCEDURAL HISTORY

This habeas case, which stems from a 2002 murder conviction, has a long and singular procedural history. A brief overview is appropriate in order to place the issues at hand in proper context.[1] On October 31, 1975, fifteen-year-old Martha Moxley was found bludgeoned to death near her residence in

[1] The court need not discuss at length the details of the offense as those are fully set forth in the Supreme Court's opinion on the petitioner's direct appeal of the judgment of conviction. See *State v. Skakel*, 276 Conn. 633, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S.Ct. 578, 166 L.Ed.2d 428 (2006). Factual details and procedural history will be noted as appropriate to the court's discussion of the issues presented for its determination.

the Belle Haven section of Greenwich, Connecticut. In 1998, a grand jury was convened to investigate the victim's murder pursuant to General Statutes § 54–47a et seq. After hearing testimony, the grand jury, in 2000, issued its finding of probable cause that the petitioner was guilty of the murder. Thereafter, on January 19, 2000, twenty-five years after the slaying, the petitioner was arrested and charged with the victim's murder. Since, at the time of the murder, the petitioner was fifteen years of age, the charge was originally brought in the juvenile division of the Superior Court even though the petitioner, by then, was thirty-nine years old. Throughout the criminal proceedings, the petitioner was represented by Attorney Michael Sherman of the Stamford Bar and the state was represented by (then) State's Attorney Jonathan Benedict. Both attorneys were assisted by associated counsel. After a hearing, the juvenile court ordered the case transferred to the criminal division of the Superior Court. When the petitioner appealed the juvenile court's decision to transfer the case to the adult docket, our Supreme Court dismissed the appeal, holding that the juvenile court's transfer order did not constitute a final judgment. *In re Michael S.*, 258 Conn. 621, 784 A.2d 317 (2001).

Thereafter, the case proceeded on the court's regular criminal docket.[2] The next moment of

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[2] The case was tried in the Stamford–Norwalk Judicial District, *State v. Skakel*, Docket No. FST CR00–135792T.

significance in the criminal case was the probable cause hearing at which witnesses testified for the state and were subject to cross examination by the defense.[3] One of these witnesses, Gregory Coleman, later died before the commencement of trial. Thereafter, commencing on May 7, 2002, the case was tried to a jury which, on June 7, 2002, found the petitioner guilty of murder in violation of General Statutes (Rev. to 1975) § 53a–54(a). Subsequently, on August 29, 2002, the trial court, *Kavanewsky, J.*, sentenced the petitioner to a term of incarceration of twenty years to life. The petitioner remains incarcerated pursuant to the court's sentence.

The petitioner appealed his conviction on September 17, 2002, in which he made the following claims: (1) the case was improperly transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court; (2) the petitioner's prosecution was time barred by the five-year statute of limitations for felonies that was in effect when the victim was murdered in 1975; (3) the state failed to disclose certain exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963); (4) the trial court improperly permitted the state to introduce the prior sworn testimony of Gregory Coleman into evidence

[3] See General Statutes § 54–46a (requiring probable cause hearing for defendants charged with crimes punishable by death, life imprisonment without possibility of release or life imprisonment).

in violation of the petitioner's constitutionally protected right of confrontation under the sixth amendment; (5) the trial court improperly permitted the state to present evidence of several incriminating statements that the petitioner made while a resident at Elan, a school for troubled adolescents in Maine, which violated the petitioner's due process rights under the federal and state constitutions; (6) evidentiary improprieties entitle the petitioner to a new trial; and (7) the State's Attorney engaged in pervasive misconduct during closing arguments.

Rejecting all of his claims, the Supreme Court affirmed the petitioner's conviction. *State v. Skakel*, 276 Conn. 633, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S.Ct. 578, 166 L.Ed.2d 428 (2006).

On August 25, 2005, while the direct appeal was pending, the petitioner filed a petition for a new trial, alleging the existence of newly discovered evidence which, he claimed, entitled him to a new trial. In this proceeding, the petitioner asserted the existence of the following: (1) newly discovered evidence of third-party culpability, specifically statements from Gitano Bryant, implicating two of Bryant's former high school classmates, Adolph Hasbrouck and Burton Tinsley, in the victim's murder; (2) newly discovered evidence of witnesses who directly contradicted Coleman's testimony that the petitioner had confessed to killing the victim; (3) new exculpatory evidence that the state had failed to disclose in the underlying trial, specifically: (a) a

composite sketch of an individual seen nearby the murder scene by a private security guard at approximately 10 p.m. on the evening of the murder; (b) profile reports regarding Kenneth Littleton and Thomas Skakel (T. Skakel) prepared by inspectors in the State's Attorney's office; and (c) time lapse data prepared by the same individuals chronicling Littleton's actions before and after the victim's murder; (4) new evidence concerning an agreement between Leonard Levitt, a writer, and Frank Garr, an inspector in the State's Attorney's office and the state's lead investigator in this murder, that may have demonstrated that Garr had a personal financial stake in the successful prosecution of the petitioner.

After an evidentiary hearing, the trial court, *Karazin, J.*, denied the petition for a new trial on October 25, 2007. As to the petitioner's claim regarding newly discovered evidence of third-party culpability, the court concluded that Bryant's statements, although admissible, were not credible because they lacked any genuine corroboration, and therefore would not produce a different result in a new trial. As to the petitioner's claim regarding newly discovered evidence contradicting Coleman's testimony, the court concluded that the evidence presented by the petitioner was not newly discovered as, with due diligence, these witnesses could have been located by defense counsel at trial. The court concluded, as well, that the testimony of these witnesses was not likely to result in an acquittal or a

retrial. As to the petitioner's claim that he should have been granted a new trial because of the state's pattern of failing to disclose exculpatory evidence, the court found that the composite sketch, the profile reports, and the time lapse data did not constitute newly discovered evidence as, with due diligence, they could have been discovered by defense counsel. Finally, as to the petitioner's claim regarding an alleged book deal between Garr and Levitt, the court found that this evidence was not newly discovered on the basis that trial counsel had not diligently pursued his opportunity to question Garr during trial proceedings. The court further found that, had Garr's intent to write a book about the prosecution of the petitioner, if proven, been disclosed to the jury at the petitioner's criminal trial, such evidence would not have yielded a different verdict.

The petitioner unsuccessfully appealed the trial court's decision denying his petition for a new trial. On review, our Supreme Court affirmed, holding that the trial court did not abuse its discretion in concluding that the petitioner had not satisfied the prerequisites for a new trial. *Skakel v. State*, 295 Conn. 447, 991 A.2d 414 (2010).

Because the respondent argues that this court is bound by certain judicial determinations in the petition for new trial litigation, it is appropriate to briefly review the bases for the courts' determinations at trial and on appeal with particular regard to which of the trial court

determinations were integral to the Supreme Court's affirmance. In its memorandum of decision, the court, *Karazin, J.*, made these determinations: With regard to the evidence contradicting Coleman's testimony at the probable cause hearing, Judge Karazin noted that Coleman named three persons, one of whom was likely present when the petitioner confessed to killing the victim: John Simpson, Alton James and Cliff Grubin. Attorney Sherman's investigator, Vito Colucci, had been unable to make contact with any of the three witnesses, but the petitioner's investigator in connection with the new trial petition, Keith Weeks, testified that he was able to locate Simpson, James and Grubin. Judge Karazin found that Attorney Sherman's search was insufficient on the basis of the court's determination that all three witnesses could have been found prior to trial by the same methods subsequently employed to find them. Therefore, the court found, the petitioner failed to prove that this evidence was newly discovered. The trial court also opined that this evidence would not likely yield a different result on the basis that it was cumulative and, in some respects, not entirely exculpatory. Judge Karazin observed that both James and Grubin testified that they did not hear the petitioner confess to the murder, and they acknowledged that they were friendly with the petitioner at Elan. The trial court noted that Simpson testified that while he did not hear the petitioner confess to Coleman that he killed the victim, both men were sitting to his left and he is deaf in his left ear, and Simpson was writing the

nightly reports at that time and was not focused on their conversation. The trial court noted, as well, that Simpson further testified that the petitioner asserted that on the evening of the murder, he was drinking and partying and there were periods of time that he may not remember, but he did not remember killing the victim. On the basis of these findings, the trial court held that Grubin and James offered no material, noncumulative evidence regarding Coleman, and that Simpson's testimony, while partially impeaching Coleman, was not sufficiently material as to warrant a new trial. On appeal, the Supreme Court agreed with the trial court's determinations regarding Gitano Bryant and Garr's possible book deal. As to the three witnesses offered to impeach Coleman's testimony, the Supreme Court agreed with the trial court's finding that Attorney Sherman failed to exercise due diligence to locate the three witnesses, and therefore, the trial court did not abuse its discretion in denying the petition for a new trial on the ground that the petitioner failed to meet his burden of establishing that the evidence produced by these witnesses was newly discovered. The Supreme Court did not, however, opine on the trial court's findings regarding the substance of the testimony offered by these three witnesses.

Thereafter, the petitioner filed the present petition for a writ of habeas corpus on September 27, 2010, amended for the final time on May 17, 2013. The petition consists of three counts. In the first

count, comprising 365 separately numbered paragraphs, the petitioner sets forth his claim that he was denied the effective assistance of counsel by Attorney Sherman. In the second count, the petitioner alleges that Attorney Sherman labored under an actual conflict of interest while representing him; and, in the third count, the petitioner alleges that, in the underlying criminal prosecution, the state suppressed information to which he was entitled pursuant to *Brady v. Maryland*, supra, 373 U.S. 83.

As to the first count regarding the ineffective assistance of counsel, the petitioner's claims may be grouped and assessed in these categories: (1) mishandling of his third-party culpability claim regarding Kenneth Littleton and failure to assert other available third-party claims; (2) failure to diligently pursue the petitioner's alibi defense; (3) failure to investigate and counter the testimony of prosecution witnesses Gregory Coleman and John Higgins regarding the petitioner's alleged confessions while a resident of the substance treatment facility known as Elan; (4) failure to adequately counter arguments made by the prosecution to the jury, such as the state's claim that placing the petitioner in Elan was part of a family cover-up; (5) failure to employ and utilize expert testimony regarding Elan; (6) failure to adequately select an impartial jury; (7) failure to adequately pursue the possibility that Frank Garr secretly had made an agreement to publish a book regarding the

prosecution of the petitioner, thus giving the state's lead inspector a financial interest in the outcome of the trial; (8) failure to seek to suppress tapes unlawfully seized from Richard Hoffman by the state; (9) failure to adequately prepare for and present an effective closing argument; (10) failure to challenge the state's use of the Sutton Reports; (11) failure to pursue discovery from the state regarding, specifically, the profile reports prepared on T. Skakel and Kenneth Littleton by the Greenwich police department and failure to pursue receipt of the report of a forensic psychiatric interview of Littleton conducted by Kathy Morall, M.D.; (12) failure to provide an age-appropriate photograph of the petitioner at the time of trial; (13) failure to permit the petitioner to testify at his criminal trial;[4] (14) failure to adequately prepare the witnesses presented in the petitioner's defense; and (15) failure to file a motion to exclude the state's evidence of crime scene reconstruction and a request for a *Porter*[5] hearing.[6]

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[4] At the habeas hearing, the petitioner did not testify that Attorney Sherman would not permit him to testify; rather, he claimed that he was poorly advised not to testify.

[5] *State v. Porter*, 241 Conn. 57, 80–90, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S.Ct. 1384, 140 L.Ed.2d 645 (1998).

[6] The petitioner, in a 365–paragraph count alleging multiple instances of ineffectiveness, may have framed his claims slightly differently, but in the court's view they are (continued...)

In the second count, the petitioner alleges that his trial counsel was burdened with an actual conflict of interest while representing him in the underlying criminal matter.

In the third count, the petitioner alleges that the state's failure to turn over a document referred to as the Morall report to him during the underlying proceedings violated the prescriptions of *Brady v. Maryland*, supra, 373 U.S. 83.

On November 13, 2012, the respondent filed two motions for summary judgment or dismissal in the petitioner's habeas case, based on procedural default and collateral estoppel arguments, respectively. On March 1, 2013, the court, *Sferrazza, J.*, denied the respondent's motion for summary judgment or dismissal premised on procedural default. *Skakel v. Warden*, Superior Court, Judicial District of Tolland, Docket No. CV 10 4003762 (March 1, 2013, *Sferrazza, J.*) As to the respondent's motion for summary judgment or dismissal premised on collateral estoppel, the court, *Sferrazza, J.*, denied the motion in part and granted the motion as to those claims involving the petitioner's improper transfer from the juvenile court and prosecutorial misconduct. Id. As to the prosecutorial misconduct claims, Judge Sferrazza found that our Supreme

(...continued)
fairly and adequately captured in this recitation of fifteen issues.

Court had addressed these claims on direct appeal in *State v. Skakel*, supra, 276 Conn. 742, in which the court, on review, had determined that "virtually identical allegations against the state arising from closing argument were groundless." Id., citing *State v. Skakel*, supra, 276 Conn. 750–70. As a result, the court determined "[t]hat ruling by the Supreme Court disable[d] the petitioner from proving ineffective assistance by Attorney Sherman on that issue because no impropriety occurred at all." Id.

Having set forth the procedural genealogy of this petition, the court next turns to an overview of the law pertinent to habeas corpus jurisprudence.

II

OVERVIEW OF PERTINENT LAW

"A criminal defendant's right to the effective assistance of counsel ... is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution ... To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." (Citations omitted.) *Small v. Commissioner of Correction*, 286 Conn. 707, 712, 946 A.2d 1203, cert. denied, 555 U.S. 975, 129 S.Ct. 481, 172 L.Ed.2d 336 (2008). To establish a claim of ineffective assistance of trial

counsel, the petitioner has the burden to establish that "(1) counsel's representation fell below an objective standard of reasonableness, *and* (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance." (Emphasis in original; internal quotation marks omitted.) *Johnson v. Commissioner of Correction*, 285 Conn. 556, 575, 941 A.2d 248 (2008), citing *Strickland v. Washington*, supra, 466 U.S. 687.

"To satisfy the performance prong, a claimant must demonstrate that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed ... by the [s]ixth [a]mendment." ' *Ledbetter v. Commissioner of Correction*, 275 Conn. 451, 458, 880 A.2d 160 (2005), cert. denied, 546 U.S. 1187, 126 S.Ct. 1368, 164 L.Ed.2d 77 (2006), quoting *Strickland v. Washington*, supra, 466 U.S. 687. "It is not enough for the petitioner to simply prove the underlying facts that his attorney failed to take a certain action. Rather, the petitioner must prove, by a preponderance of the evidence, that his counsel's acts or omissions were so serious that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment, and as a result, he was deprived of a fair trial." *Harris v. Commissioner of Correction*, 107 Conn.App. 833, 845–46, 947 A.2d 7, cert. denied, 288 Conn. 908, 953 A.2d 652 (2008).

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice ... are guides to determining what is reasonable, but they are only guides. 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 ...

"Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable ... 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 defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy ...

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." (Internal quotation marks omitted.) *Bryant v. Commissioner of Correction*, 290 Conn. 502, 512–13, 964 A.2d 1186 (2009).

Under the second prong of the test, the prejudice prong, the petitioner must show that "counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." (Internal quotation marks omitted.) *Strickland v. Washington*, supra, 466 U.S. 687; *Michael T. v. Commissioner of Correction*, 307 Conn. 84, 101, 52 A.3d 655 (2012). "The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Internal quotation marks omitted.) *Bryant v. Commissioner of Correction*, supra, 290 Conn. 522. Ultimately, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied on as having produced a just result." *Strickland v. Washington*, supra, 466 U.S. 686.

Finally, as to the petitioner's ineffectiveness of counsel claim, and in light of the petitioner's representation at trial by privately retained counsel, the court notes that the standards by which the performance of retained counsel and appointed counsel should be measured are the same. That is, there is no sliding scale embedded in the constitution, affording financially capable defendants any more or less constitutional protection than indigent defendants who are served by appointed counsel. See *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *Myers v. Manson*, 192 Conn. 383, 472 A.2d 759 (1984). Plainly put, the question is not whether the petitioner got his money's worth; rather, the court's task is to assess whether counsel's representation provided the petitioner a reasonable measure of the constitution's promise made to all without regard to financial circumstances.

As to the second count claiming a conflict of interest, "[i]n a case of a claimed [actual] conflict of interest ... in order to establish a violation of the sixth amendment the [petitioner] has a two-pronged task. He must establish (1) that counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance." (Internal quotation marks omitted.) *Santiago v. Commissioner of Correction*, 87

Conn.App. 568, 583, 867 A.2d 70 (2005). "To demonstrate an actual conflict of interest, the petitioner must be able to point to specific instances in the record which suggest impairment or compromise of his interests for the benefit of another party ... A mere theoretical division of loyalties is not enough ." (Internal quotation marks omitted.) Id., 584. "Once a petitioner has established that there is an actual conflict, he must show that a lapse of representation ... resulted from the conflict." (Internal quotation marks omitted.) Id.

With respect to the third count, which alleges that the state's failure to disclose certain materials constituted a violation of *Brady v. Maryland*, supra, 373 U.S. 83, the law is clear that petitioner has the dual burden of proving the existence of such a violation and, if so, that the undisclosed information is material. Id. In demonstrating a *Brady* violation, a defendant is not limited to a showing that the undisclosed information is exculpatory; rather, a defendant need only demonstrate that the undisclosed information is helpful to the defense. For example, under *Brady*, a state would be required to disclose information that a witness has a financial interest in testifying for the prosecution, or that a witness anticipated a favorable plea arrangement in return for being a prosecution witness. See *Cone v. Bell*, 556 U.S. 449, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009); *Banks v. Dretle*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); *Adams v. Commissioner*, 309 Conn. 359, 71 A.3d 512 (2013). Improperly

undisclosed information will be found to be material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (Internal quotation marks omitted.) *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

III

DISCUSSION

Having set forth the procedural history of this habeas petition, an overview of the petitioner's claims, and the general principles of law pertinent to habeas jurisprudence, the court turns now to the issues at hand. The court's analysis tracks the categories into which it has sorted the petitioner's claims.

As a preliminary matter, the court notes that three attorneys offered expert opinions in the course of the habeas hearing. Attorney Michael Fitzpatrick of the Bridgeport Bar testified on behalf of the petitioner's claims regarding the ineffective assistance of counsel. Attorney Fitzpatrick, who was admitted to the Connecticut Bar in 1987, concentrates his practice in the area of criminal law. A former president of the Connecticut Criminal Defense Lawyers Association, he testified that he has handled fourteen murder cases, three capital felony cases and defended close to thirty felony

trials. Attorney Fitzpatrick's testimony covered the span of ineffectiveness claims propounded by the petitioner. While the court does not agree with all of Attorney Fitzpatrick's conclusions, the court, generally, found his testimony to be credible, insightful and properly grounded on the application of controlling law to the facts at hand. Also testifying on behalf of the petitioner's claims was Attorney Ronald Murphy of the New Britain Bar. Admitted to the Connecticut Bar in 1983, Attorney Murphy practices in the areas of civil and criminal trial advocacy. A former president of the Connecticut Criminal Defense Lawyers Association, he has also taught courses in trial advocacy and professional responsibility as an adjunct member of the University of Connecticut Law School faculty. He also has represented a number of lawyers before the state's various grievance committees. Attorney Murphy's testimony was offered by the petitioner in furtherance of his conflict of interest claims regarding Attorney Sherman. The court found Attorney Murphy to be an insightful, credible, and helpful witness. While not fully embracing Attorney Murphy's opinions on the difficult conflict questions presented by this petition, the court found Attorney Murphy's testimony to be informative and illuminating. Finally, the court heard expert opinion testimony from Attorney Mark Dubois of the New London Bar. Attorney Dubois, who testified at the behest of the respondent commissioner, was admitted to the Connecticut Bar in 1978. He is currently the president-elect of the Connecticut Bar

Association and has served over the years on numerous bar committees dealing with issues of legal ethics and professional responsibility. Additionally, from 2003 until 2011, he served in the Judicial Branch as the State's Chief Disciplinary Counsel, a position in which he was responsible for the handling of hundreds of cases involving questions of legal ethics and professional responsibility in the context of disciplinary procedures. In addition to this significant responsibility, Attorney Dubois has served as a member of the Quinnipiac and University of Connecticut Law School faculties, teaching courses in legal ethics and professional responsibility, topics on which he has also written. As with Attorney Fitzpatrick and Attorney Murphy, the court has neither rejected nor embraced all of Attorney Dubois' opinions. And, as with Attorney Fitzpatrick and Attorney Murphy, the court found Attorney Dubois to be an insightful, credible, and helpful witness on the topic for which he was asked to testify. While the court bears the ultimate responsibility for decision-making in this challenging matter, the court appreciates the diligence, illumination, and commitment to the profession that these attorneys brought to this habeas proceeding.

The court turns now to its assessment of the issues at hand.

A
Ineffective Assistance of Counsel Claims

Failure to Properly Assert Third–Party Claims

The petitioner asserts several claims regarding third-party culpability. In sum, the petitioner claims that Attorney Sherman was ineffective in his handling of the third-party culpability defense regarding Kenneth Littleton. He claims that Attorney Sherman was ineffective for failing to adequately investigate and present a third-party culpability claim regarding Gitano Bryant, and he claims that he was denied the effective assistance of trial counsel due to Attorney Sherman's failure to assert a third-party culpability claim regarding T. Skakel. The court agrees that Attorney Sherman was ineffective in his handling of the Littleton third-party defense, but the court finds that the petitioner was not prejudiced by Attorney Sherman's lapses in regard to Littleton. The court believes, as well, that Attorney Sherman was ineffective in his failure to adequately investigate Bryant's account of his activities on October 30, 1975, in conjunction with a potential third-party culpability defense, but the court does not find that the petitioner was prejudiced by Attorney Sherman's failure regarding Bryant. On the other hand, the court finds that the petitioner was denied the effective assistance of counsel by Attorney Sherman's failure to assert a third-party culpability claim against T. Skakel, and the court further finds that if Attorney Sherman had presented a third-party culpability defense centered on T. Skakel, there is a reasonable probability that

the outcome of the trial would have been different. The court deals with these claims in order.

At the outset, it is appropriate to briefly survey the principles that guide the availability of a third-party culpability claim to a criminal defendant. Our Supreme Court has recognized the right of a defendant to introduce evidence that someone other than the defendant committed the crime but, in order to be allowed to pursue such a claim, the defendant must present evidence that directly connects the third party to the crime and not merely evidence that raises a "bare suspicion that some other person may have committed [it.]" (Internal quotation marks omitted.) *State v. Hedge*, 297 Conn. 621, 635, 1 A.3d 1051 (2010). Since the petitioner's underlying criminal trial, our Supreme Court has made it clear that the rules regarding the admissibility of third-party culpability are tied to the issue of reasonable doubt. The court has stated: "A trial court's decision, therefore, that third-party culpability evidence proffered by the defendant is admissible, necessarily entails a determination that the proffered evidence is relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt." (Internal quotation marks omitted.) Id., citing *State v. Arroyo*, 284 Conn. 597, 609–10, 935 A.2d 975 (2007). *Arroyo* instructs us, as well, that if a defendant is entitled to present evidence of third-party culpability, so, too, the defendant is entitled to a jury instruction on third-party culpability. *State v. Arroyo*, supra, 284 Conn.

608–09. In other words, the court has determined that the criterion for allowing such evidence is the same as the criterion for a defendant's entitlement to a corresponding instruction. Id. This charge, the court observes, is helpful to a defendant who has been permitted to present third-party culpability evidence. The charge, as set forth on the judicial branch website, now states as follows: "There has been evidence that a third party, not the defendant, committed the crime[s] with which the defendant is charged. This evidence is not intended to prove the guilt of the third party, but is part of the total evidence for you to consider. The burden remains on the state to prove each and every element of the offense beyond a reasonable doubt. It is up to you, and to you alone, to determine whether any of this evidence, if believed, tends to directly connect a third party to the crime[s] with which the defendant is charged. If after a full and fair consideration and comparison of all the evidence, you have left in your minds a reasonable doubt indicating that the alleged third party, <insert name of third party>, may be responsible for the crime[s] the defendant is charged with committing, then it would be your duty to render a verdict of not guilty as to the accused, <insert name of defendant>."[7] See Conn. Civil Jury

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[7] The court is mindful that in the case at hand, Attorney Sherman did not request a charge on third-party culpability and the court gave no such charge. Since, however, the petitioner has not alleged that Attorney Sherman was ineffective for failing to seek such an instruction, the court makes no assessment in this regard except to say that if a (continued...)

Instruction 2.6–10, available at http://www.jud.ct.gov/JI/criminal/part2/2.6–10.htm.

a
Kenneth Littleton

The petitioner's third-party claims regarding Littleton are centered on a certain sketch, on Attorney Sherman's handling of this defense at trial and on the adequacy of Attorney Sherman's closing argument in this regard.

(...continued)
third-party culpability claim had been made in regard to T. Skakel, this court believes that such a charge would have been warranted and, most likely, would have been given. In reaching this conclusion, the court is mindful that *State v. Arroyo*, supra, 284 Conn. 597, was decided in 2007, approximately five years after the petitioner's criminal trial and thus, the right it pronounces may not have been available, as such, in 2002. On the other hand, although *Arroyo* explicitly states that such a charge must be given where third-party culpability evidence has been permitted and adduced, *Arroyo* states, as well: "We reiterate that a charge that is an accurate statement of the law, is relevant to an issue in a case and is reasonably supported by the evidence must be given." *State v. Arroyo*, supra, 284 Conn. 610. Based on that statement of guiding principle, this court has reason to believe that the court in the underlying criminal trial would have, in the exercise of its discretion, given a similar charge under circumstances in which it had permitted corresponding evidence assuming it found the charge to be reasonably supported by the evidence. As discussed, infra, evidence regarding the culpability of T. Skakel, if presented as third-party culpability evidence, would have warranted such a charge or, at a minimum, similar language as part of the court's instructions on reasonable doubt.

As to the sketch, the following additional historical information is pertinent. On October 30, 1975, Kenneth Littleton was serving his first day as the Skakel family tutor. Then twenty-three years old, he was also a teacher at the school attended by some of the Skakel children. While it is undisputed that Littleton accompanied some of the Skakels to dinner at the Belle Haven Country Club, returning to the Skakel residence at approximately 9:15 p.m., his later whereabouts are less certain. It is clear that he did not leave the Skakel residence with others to go to the Terrien house shortly after 9 p.m. as he was seen in the home after the vehicle had left. Littleton reported to the police that he watched the movie, "The French Connection," which began that evening at 9 p.m. and concluded at approximately 11:10 p.m. Although he did not do so initially, during the course of the long investigation, Littleton acknowledged that at around 10 p.m., he walked out of the residence and to the end of its driveway in response to a request from the Skakel maid that he investigate the sound of barking dogs that had disturbed her. Thus, Littleton placed himself outside the Skakel residence nearby the likely crime scene at a time, by some reports, close to the victim's death.

Also relevant to this claim is the report of Belle Haven private security officer Charles Morganti. Early in the investigation, Morganti told the Greenwich police department (Greenwich police) that at approximately 8 p.m. on October 30, 1975, he

observed and spoke with a white male who was walking north on Field Point Road.[8] He indicated, as well, that between 9:30 p.m. and 10 p.m., while he was in the vicinity of Otter Rock Drive, he saw a person from a distance of approximately one hundred yards walking in a northerly direction through a yard on Otter Rock Drive, across from the Skakel residence. Morganti believed that the person on Field Point Road at 8 p.m. was the same person he saw later in the evening. Thereafter, Morganti assisted the police in preparing a composite sketch of the person he saw. Attorney Sherman did not obtain a copy of the composite before or during the petitioner's criminal trial. This court need not now discuss whether Attorney Sherman was deficient in not obtaining the sketch because that question was answered by the Supreme Court on direct appeal

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[8] During Skakel-related proceedings, several maps and photographs of Belle Haven have been introduced. From a map introduced at the hearing on the petition for a new trial and at the habeas trial, it appears that Field Point Drive runs generally east and west and is south of the Moxley and Skakel residences, and that Otter Rock Drive runs generally north and south and intersects with Field Point Drive. The Skakel residence is at the intersection of Otter Rock Drive and Walsh Lane on the northeast side of the intersection. Walsh Lane runs generally east and west and is north of Field Point Drive. The Moxley residence borders the south edge of Walsh Lane and is separated from Otter Rock Drive by one home and a vacant lot. From this geography and Morganti's physical location, it is apparent that the person Morganti espied from a distance at approximately 10 p.m. was walking in a direction away from him.

and reiterated by the court on appeal from the trial court's denial of the petition for a new trial. In both instances, the court opined that Attorney Sherman was deficient in not specifically pursuing the sketch since he had been put on notice of its existence.

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. This court agrees with the commissioner that the issue of the sketch is somewhat of a nonstarter. Although there has been no direct evidence of the basis for the sketch, it is 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 that the sketch was likely based on Morganti's 8 p.m. face-to-face meeting. But we know, from police reports, that the individual Morganti met at approximately 8 p.m. was Charles 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. In short, whether or not Morganti saw Littleton outside at 10 p.m. likely would not have been answered by viewing the sketch. Therefore, notwithstanding Attorney Sherman's ineffectiveness in failing to obtain the sketch, the court is not persuaded that its use at trial would have been an aid to Attorney Sherman's presentation of a third-party culpability defense regarding Littleton.

The petitioner claims also that Attorney Sherman was deficient in arguing his claim of third-party culpability regarding Littleton to the jury. The petitioner asserts that Attorney Sherman essentially abandoned any third-party culpability claim in his jury argument. Attorney Fitzpatrick testified to his belief that Attorney Sherman's argument on third-party culpability actually harmed the defense. The court agrees that the record supports the conclusion that Attorney Sherman's argument on third-party culpability regarding Littleton was deficient. At the outset, the court notes that at no time during argument did Attorney Sherman place the notion of third-party culpability in context. Thus, although he argued that the evidence against Littleton was as strong as that against the petitioner, he did not argue to the jury that if they had a reasonable doubt concerning Littleton's culpability, their duty would

be to acquit the petitioner. And, although he argued from the evidence that Littleton's alleged confession was no less persuasive than the petitioner's alleged confessions, he derailed his own argument by stating to the jury: "Ken Littleton, I have no clue, no clue whether or not Ken Littleton did this or didn't do this." June 3, 2002 Criminal Trial Transcript, p. 36. And, at another point, Attorney Sherman told the jury that he felt very bad for Littleton who he characterized as a pathetic person. It is difficult to harmonize such statements with an effort to sow the seeds of reasonable doubt premised on Littleton's potential culpability for the murder. Finally, in this regard, it is noteworthy that Attorney Sherman did not once argue or even mention the petitioner's entitlement to the presumption of innocence, the concept of reasonable doubt, or the state's obligation to prove guilt beyond a reasonable doubt. Thus, the jury was given no template, no roadmap, from Attorney Sherman to guide its understanding of the evidence, in general, and the third-party culpability evidence in particular.

Attorney Sherman's ineffectiveness in presenting and arguing third-party culpability regarding Littleton did not, however, prejudice the petitioner sufficiently for this court to conclude that, had Attorney Sherman effectively handled this aspect of the trial, there is a reasonable likelihood its outcome would have been different. In the court's view, the claim of culpability against Littleton was likely doomed to fail because Littleton had been given

immunity from prosecution and because the evidence against Littleton was scant at best.

At the beginning of Littleton's testimony, he confirmed to the jury that he had been granted immunity from prosecution by the state in 1998, before he testified before the grand jury. Knowing that, it is difficult to envision how jurors would have harbored a reasonable doubt that a person, essentially exonerated by the state, may nevertheless have committed the murder. Additionally, the core of the third-party claim against Littleton was his alleged confession purportedly made while he was blacked out in the back seat of a car driven by his (then) wife, Mary Baker. Attorney Sherman argued that Littleton had stated to Baker, while the two of them were driving north from New York City and while Littleton was in a blackout, that he had murdered the victim. Attorney Sherman argued, as well, that Littleton had made this admission to others. Indeed, there was trial evidence that Littleton had said as much. During her direct testimony, however, Baker explained that Littleton's "admission" was, in fact, a ruse. She testified that, at the suggestion of inspectors from the State's Attorney's office, she told a fabricated story to Littleton that, while he was in a blackout, he had admitted killing the victim. She confirmed on direct and insisted on cross examination that Littleton had not, in fact, ever made such an admission to her, and she affirmed her belief that Littleton did not, in fact, commit the

murder. While there was some discrepancy between Garr and Inspector John F. Solomon, whom Garr replaced, as to which of them put Baker up to this ruse, and Solomon denied that he insinuated this story into Baker's conversation with Littleton, he ultimately acknowledged that Baker had woven this tale for Littleton at their suggestion. From this testimony, a jury reasonably could have concluded that Littleton's alleged confession was, in fact, a product of the ruse, inspired by the hope harbored by inspectors from the State's Attorney's office that Littleton might, while conscious, acknowledge culpability for the murder.[9]

Other evidence against Littleton was, in the court's view, insufficient to create reasonable doubt as to whether he was the murderer. True, Littleton initially informed the Greenwich police that once he returned to the Skakel residence from the Belle Haven Club he did not leave the home that evening, and later he acknowledged that, at approximately 10 p.m., he walked to the end of the driveway in response to a housemaid's request that he investigate the loud barking of dogs. Thus, he gave

[9] The trial evidence on this point is extensive. In sum, while Littleton remained a suspect, Garr and Solomon arranged for Baker to meet Littleton in a Massachusetts motel room and to tape her interview of Littleton. In preparation for this meeting, they suggested Baker tell Littleton that he had admitted to the murder while he was in a state of blackout in the hopes that he might, then, make a damaging admission. Their efforts were to no avail.

the police inconsistent statements. And, perhaps, he could have been the person seen by Morganti at 10 p.m. at a point beyond the end of the driveway and in the general vicinity of the crime scene. But this evidence, alone, would not have entitled the petitioner to even assert a third-party culpability claim against Littleton as it would not have directly tied him to the murder. Finally, although Sherman was in possession of substantial material relating to Littleton's episodically bizarre and drug-infused activities after 1975, including some criminal conduct, little if any of this information would have been admissible at trial due to its lack of relevance to trial issues.[10] Accordingly, Attorney Sherman's deficiencies in his presentation of a third-party culpability claim regarding Littleton did not prejudice the petitioner.[11]

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[10] At trial, the court forbade Attorney Sherman from introducing evidence that Littleton had twice been convicted of burglary in Massachusetts on the basis that those convictions were more than ten years prior to the trial.

[11] It is perhaps noteworthy that Attorney Sherman had evidence that at one juncture or more Littleton had indicated an interest in being examined under sedation. He stated that he was interested in clarifying his memory as to whether T. Skakel was wearing the same clothes when he showed up to watch "The French Connection" that he had worn to dinner earlier in the evening at the Belle Haven Club. Likely because Attorney Sherman had no interest in pursuing a third-party culpability claim regarding T. Skakel, this avenue was only minimally explored.

b
Gitano Bryant, Adolph Hasbrouck and Burton Tinsley

The petitioner also claims that Attorney Sherman should have asserted a third-party culpability claim regarding Gitano Bryant, Adolph Hasbrouck and Burton Tinsley.[12] The following additional information and procedural history is pertinent to this claim. After the petitioner's conviction, Crawford Mills, who then lived in Belle Haven and was friendly with Bryant, contacted the petitioner's cousin, Robert F. Kennedy, Jr., and told him that Bryant had related to him that Hasbrouck and Tinsley, and not the petitioner, had killed the victim.[13] Although Bryant initially told Mills that he could relay this information to others, he wanted his name kept out of the story. Ultimately, however, he agreed that his name could be associated with it. After Kennedy contacted Bryant directly, Bryant agreed to a taped interview with a private investigator working on behalf of the petitioner. Thereafter, on August 24, 2003, Bryant submitted to an unsworn videotaped interview with Vito Colucci

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[12] It is not clear from the pleadings or from the petitioner's briefs whether this claim is limited to the alleged culpability of Bryant, or is intended to include Hasbrouck and Tinsley. Since the court finds no merit to this claim as to any of the three, it is not necessary for the court to determine the precise aim of this allegation.

[13] Crawford Mills is now deceased.

in Miami, Florida. The interview was made an exhibit at the habeas hearing. In it, Bryant, an African American, indicated that he was the owner of a tobacco company engaged in the importation of cigarettes and was married with children. He indicated that in 1975, he was living in Manhattan, but had previously lived in Greenwich, where he had attended the Brunswick School. He stated that he knew and was friendly with several teenagers from Belle Haven. He stated that, after moving to New York, he had befriended Hasbrouck and Tinsley, both of whom lived in the city, and that the trio had on more than one occasion during the fall of 1975 visited with friends in Belle Haven, and on one occasion had participated in a dance attended by the victim. Bryant stated that Hasbrouck was African American and Tinsley was perhaps Caucasian and Indian, or Caucasian and Asian. Bryant indicated that on October 30, 1975, the trio had taken the train to Greenwich, arriving between 6 p.m. and 6:30 p.m., and from there they went to the Walker home in Belle Haven where, Bryant stated, he had often spent overnights. He indicated that the trio walked over to the Belle Haven Club but did not enter, and that they roamed around the Belle Haven area with a group of friends, drinking beer and smoking pot. At one point, he stated, he was seated in a circle of eight to ten people in an area in back of the Skakel home. He indicated that Hasbrouck and Tinsley had stated during the evening that they intended to go "caveman" on someone, signifying their intent to sexually assault and drag a girl, that Hasbrouck had

a particular "liking" for the victim, and that he wanted to go "caveman" on her. Bryant stated that he left Belle Haven around 9 p.m. and returned to the city, while the other two remained behind and spent the night at the home of a mutual friend, Geoffrey Byrnes.[14] Bryant stated that he again saw Hasbrouck and Tinsley the following Monday when they told him that they had accomplished their objective of going "caveman" on someone. To him, it was obvious that they were talking about the murder of Martha Moxley.

Subsequently, in 2006, in conjunction with the petitioner's then pending petition for a new trial, Bryant was deposed where he declined to answer any questions on the basis of his fifth amendment right not to incriminate himself. Hasbrouck and Tinsley similarly asserted their fifth amendment rights when they were deposed. At the hearing on the petition for a new trial, Bryant's videotaped statement was admitted into evidence as a statement against penal interest. The court, nevertheless, found against the petitioner on this issue in his quest for a new trial on the basis that Bryant's statement was not credible.

The issue now arises in a slightly different context. In this proceeding, the petitioner claims that Attorney Sherman was ineffective for failing to

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[14] Byrnes died within a few years of the murder.

investigate and then advance this claim of third-party culpability in his criminal trial.

At the habeas hearing, Attorney Sherman testified that Mills had contacted him either before or after the trial, stating that he knew who killed the victim, and that he had dismissed Mills as a crackpot. And, he claimed that he had not been given any information specific to Bryant before the trial. The more credible evidence is to the contrary. The court heard evidence from Margerie Walker Haur, now of Ridgeway, Connecticut, who, as a fifteen-year-old teenager grew up on Mayo Avenue in Belle Haven, where she had been a close friend of the victim. She testified that she knew Bryant in 1975, and that he and her brother, Neil, had been classmates at the Brunswick School. She indicated that Mills had relayed Bryant's story to Neil, who, in turn, repeated it to her. She indicated that her brother was frightened by the story and thought they should tell someone about it. Accordingly, she indicated, she related Bryant's story to Garr in person and to Attorney Sherman by phone before the trial in 2002. Her impression was that neither Garr nor Attorney Sherman seemed interested in the account. In addition to speaking with Garr and Attorney Sherman, she wrote to Dorothy Moxley, the victim's mother, on May 24, 2002, in which she recounted Bryant's tale. While Garr denied meeting Walker, and Attorney Sherman stated he had no recollection of such a conversation, the court credits

her testimony as accurate and true.[15] A close friend of the victim, Walker has no reason to fabricate a story nominally favorable to the petitioner's cause. Additionally, her relatively contemporary letter to Dorothy Moxley lends credence to her account. The court believes Attorney Sherman and Garr had been informed of Bryant's tale before the trial. Given 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.

That said, the court is not satisfied that reasonable investigation of Bryant's tale would have brought any benefit to the petitioner's defense. At the outset, the court cannot conclude with any degree of certitude what degree of cooperation Attorney Sherman could have obtained from Bryant. History has demonstrated that, when placed under oath, Bryant, Hasbrouck, and Tinsley all balked. As to the videotaped statement obtained in 2003, even if the court could project the likelihood that Bryant would respond in similar form to an investigator working for Attorney Sherman, and would have provided an essentially similar statement, the court

[15] At the habeas hearing, Garr initially testified that he did not meet with Walker. When confronted with Walker's appointment book notation which memorialized her meeting with Garr, he then stated that he did not talk at length with her regarding Bryant's story, and then he agreed, on cross examination, that it would be inaccurate to state that he did not talk with Walker.

does not believe that such a statement, without corroboration, would have entitled the petitioner to assert a third-party claim against Bryant, Hasbrouck, or Tinsley.

As noted, in order to be entitled to assert a claim of third-party culpability, a defendant must be able to adduce evidence that directly connects the third party to the crime. It is insufficient to show merely that someone else had the requisite motive; nor is mere suspicion that another committed the crime sufficient. See *Bryant v. Commissioner*, supra, 290 Conn. 514–15, 964 A.2d 1186 (2009); *State v. Anwar S.*, 141 Conn. App. 355, 373 n. 11, 61 A.3d 1129 (2013).

As to Bryant, while his statement may be against penal interest because it places him in the vicinity of the crime on October 30, 1975, there is nothing in his statement that directly connects him to the Moxley murder. To the contrary, Bryant's story is self-exculpating. Similarly, even if Bryant's statement could be used against Hasbrouck and Tinsley, that claim, twice removed, supports only Bryant's supposition that when Hasbrouck and Tinsley said they had gone "caveman" on someone, they were referring to the victim. On such a thin reed, it is difficult to forecast that a court would have

permitted the petitioner to advance a third-party culpability claim against Hasbrouck or Tinsley.[16]

Additionally, the state had evidence in its possession that would have eroded confidence in Bryant's story. For example, although he claimed that he, Hasbrouck, and Tinsley were among nearly a dozen people roaming Belle Haven on "mischief night," no one else from Belle Haven available to testify at trial could confirm their presence on the evening in question.[17] Similarly, no one testified during the habeas hearing to seeing any of the three in Belle Haven that evening. Also, while Bryant claimed, in his videotaped statement, that he frequently stayed at the Byrnes home overnight and that's where Hasbrouck and Tinsley stayed on

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[16] In coming to this conclusion, the court is mindful that hair fibers were taken from a sheet found covering the victim and that one fiber had "negroid" characteristics while another had "Asian" characteristics. Assuming that Bryant is correct that Hasbrouck is African American and that Tinsley is a mixture of Caucasian and Indian, or Caucasian and Asian, these unexamined hairs create, at best, a curiosity but by no means an identification. Additionally, there is no indication that these hairs discovered on the sheet placed over the victim's body several hours after her death were present during the commission of the crime several hours earlier. To the court, this hint of a connection to Tinsley or Hasbrouck, while factually intriguing, is no more than tenuous.

[17] The court heard evidence that the night before Halloween was referred to as "mischief night" because, on this evening, teenagers would typically engage in harmless pranks and other frivolities in the neighborhood.

October 30, 1975, Geoffrey Byrnes stated by deposition that, as a general proposition, the Byrnes household did not have overnight guests during that time period.

Finally, even if a court would permit introduction of the Bryant tape as part of a third-party culpability claim, his credibility would be substantially tarnished on the basis of testimony adduced by the commissioner during the habeas trial. Attorney Richard Alexander of Austin, Texas, testified that in 1991, while he was a partner in a large law firm with an Austin office, he hired Bryant as an associate attorney on Bryant's representations that he was then a member of the Maryland and Washington D.C. Bars. Alexander indicated that, as was the practice, Bryant was hired with the understanding that his retention would require that he take and pass the Texas Bar examination. Subsequently, after Alexander had been led to believe that all new associates had passed the Texas Bar, he learned that Bryant had failed. And, on further inquiry, Alexander discovered that Bryant was not, in fact, a member of either the Maryland or D.C. Bar. As a consequence, Bryant was discharged. The court appreciates the willingness of Attorney Alexander to journey to Connecticut to provide this testimony which the court credits as true and accurate. At trial before a jury, this trail of deceit would likely erode any confidence in Bryant's credibility and thus nullify any potential impact of his tale. Accordingly, while Attorney Sherman

should have pursued this lead, if he had done so, it likely would not have been helpful to the petitioner. He was not prejudiced by this particular lapse.

c
Thomas Skakel

The petitioner claims, as well, that Attorney Sherman should have asserted a third-party culpability claim against his older brother, T. Skakel, who was seventeen at the time of the murder, and that Attorney Sherman's failure to do so denied him the effective assistance of counsel. He claims that if Attorney Sherman had pursued this avenue with respect to T. Skakel, there is a reasonable likelihood that he would have been acquitted. The court agrees both in regard to Attorney Sherman's ineffectiveness and to the prejudice it caused the petitioner. Attorney Sherman's failure to point an accusatory finger at T. Skakel was and is inexplicable. Given the evidence of T. Skakel's culpability available to Attorney Sherman before trial, there was no reasonable basis for his failure to shine the light of culpability on T. Skakel.

At the habeas trial, Attorney Sherman testified that he did not seek to assert a third-party claim regarding T. Skakel because he believed the evidence against Littleton was stronger and that, as a matter of trial strategy, he is not a fan of using a "buffet table of alleged suspects." April 16, 2013

Habeas Trial Transcript, p. 173. While this court is mindful of its obligation to accord considerable deference to strategic choices made by trial counsel, the law does not command ignorance to substantial evidence that choices made by counsel were unreasonable under the circumstances then known or within the grasp of counsel's knowledge. In this instance, given the strength of evidence regarding T. Skakel's direct involvement with the victim at the likely time of her death, consciousness of guilt evidence concerning T. Skakel's activities on the evening in question, the circumstantial evidence of his sexual interest in the victim, and T. Skakel's history of emotional instability, counsel's failure to pursue a third-party claim against T. Skakel cannot be justified on the basis of deference to strategic decision making. If Attorney Sherman was, in fact, committed to the notion that only one third-party culpability defense should be asserted, a proposition this court believes may well be within trial counsel's informed discretion, he unreasonably chose a third party against whom there was scant evidence and ignored a third party against whom there was a plethora of evidence.

The evidence then available to Attorney Sherman was as follows. T. Skakel and his siblings were interviewed by the Greenwich police during the weekend of October 31, 1975. In his interview, T. Skakel indicated that he was last with the victim at approximately 9:15 p.m. outside the Skakel residence. He indicated, generally, that after he had

returned from the Belle Haven Club with other family members, some of them, including the petitioner, had been joined by the victim, Geoffrey Byrnes, and Helen Ix in a Lincoln Continental automobile (the Lincoln) owned by the Skakels and parked in the family's driveway and, there, they listened to music. At some point, T. Skakel indicated to the police, he joined the group, getting into the front seat with the petitioner and the victim. After a while, he indicated, his older brother, Rushton, Jr., stated that he needed to use the Lincoln to take James Terrien home and, accordingly, he, the victim, Byrnes and Ix alighted from the car.[18] He indicated that after speaking with the victim for a few moments,[19] he went into his room to complete a homework assignment on Lincoln Log Cabins until about 10:15 p.m., when he joined Littleton with whom he watched the chase scene from the movie, "The French Connection." He indicated that he was with Littleton watching the movie for approximately fifteen minutes.[20]

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[18] It is interesting that in the early Greenwich police reports, it was generally observed that the petitioner was among those who had left in the car for the Terrien home. At this point, whether or not the petitioner had gone to the Terriens was not an issue in contention.

[19] Other witnesses observed that T. Skakel and the victim were "jostling" with each other and that the victim wound up in the bushes, having been pushed by T. Skakel.

[20] The TV Guide for the time period, an exhibit at trial, indicated that "The French Connection" began at 9 p.m. and (continued...)

Several years later, however, T. Skakel changed his story. In the early 1990s, the family patriarch, Rushton Skakel, Sr. (Rushton, Sr.), retained an organization known as Sutton Associates to investigate the circumstances of the victim's death. In the course of this investigation, both the petitioner and T. Skakel were interviewed and both made statements regarding their conduct in the evening of October 30, 1975, that were inconsistent with their initial statements to the Greenwich police. In a 1994 interview, T. Skakel now reported that at approximately 9:15 p.m., he left the house and entered the Lincoln where he encountered the victim, the petitioner, Ix and Byrnes, and that soon thereafter, after he and the victim had left the car, they went to an area off the driveway where they began to "make out." He indicated that at around 9:30 p.m., he and the victim commenced a consensual sexual encounter about fifty feet to the rear of the Skakel house. This encounter, T. Skakel claimed, lasted until approximately 9:50 or 9:55 p.m. During this encounter, T. Skakel told the interviewer, he fondled the victim's breasts and her vagina. He indicated that he did not remove her bra, but that he opened her pants and slightly pushed them down. He stated that after they both were

(...continued)
ended at 11 p.m. Further investigation by the Greenwich police discerned that the chase scene began at 10:25 p.m. and concluded at 10:32 p.m. Assuming that T. Skakel was truthful that he spent about fifteen minutes with Littleton, he would have arrived in the room slightly after 10:15 p.m.

masturbated to orgasm, they each rearranged their clothes and the victim then hurried across the lawn toward her home.[21] T. Skakel claimed that he then returned home and went to his father's room to work on a homework assignment concerning Lincoln Log Cabins before joining Littleton to watch the chase scene in “The French Connection.” The Greenwich police file reflects that Littleton had stated to the police that between 9:30 p.m. and 10 p.m., he had gone to T. Skakel's room looking for him, only to find his room empty. The Greenwich police learned, as well, from T. Skakel's school, that there had been no such homework assignment on Lincoln Log Cabins as claimed by T. Skakel. 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.

At trial, the jury heard only that when the Lincoln left the Skakel property, T. Skakel and the victim were standing together in the driveway. Significantly, the jury heard nothing regarding a sexual encounter between T. Skakel and the victim.

[21] In the criminal trial, the jury heard evidence from state's witnesses that the victim had been wearing jeans with buttons at the fly. In other words, the jeans did not have a zipper; rather, the fly was opened by unbuttoning it. The autopsy report reveals that when the victim was found, her jeans were pulled down and the top four of its buttons were unbuttoned, leaving only the bottom button fastened. The autopsy report also indicated that her panties had been rolled down.

However, it is reasonable to conclude that in a competently presented third-party culpability claim regarding T. Skakel, a jury would have heard testimony that T. Skakel claimed that he had been engaged with the victim in a consensual sexual encounter to the rear of the Skakel property after 9:15 p.m. on October 30, 1975, during which he unfastened her jeans and partially lowered her pants while he and she engaged in mutual masturbation, that no living person could account for T. Skakel's whereabouts between 9:15 p.m. and approximately 10:17 p.m. when he joined Littleton to watch the chase scene from "The French Connection"; that T. Skakel initially had lied to the Greenwich police about his whereabouts and activities after approximately 9:15 p.m. that evening, and he had lied to Littleton about having worked on a homework assignment in his father's room.[22] The jury would also have heard that no one ever reported seeing the victim alive after she and T. Skakel were seen together in the Skakel driveway as the Lincoln left for the Terrien home at approximately 9:15 p.m. Based on the availability of this evidence to Attorney Sherman, this court has little doubt that the trial court would have permitted the petitioner to assert a third-party culpability claim regarding T. Skakel.

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[22] Contrary to the commissioner's claim, Littleton and T. Skakel do not provide alibis for one another. In fact, their statements, taken together, demonstrate that they did not see each other from shortly after 9:15 p.m., when T. Skakel was seen in the kitchen in the presence of Littleton, until shortly after 10:15 p.m. Each, in essence, deprived the other of an alibi.

T. Skakel's amended statement admitting a sexual encounter with the victim was available to Attorney Sherman and would have been admissible as a statement against penal interest. The following additional information is pertinent to this evidentiary point. Although, in the initial stages of the investigation, Rushton, Sr. generally made his family members and his household available to the Greenwich police without requiring search warrants or legal process, once the police began to focus on T. Skakel as a suspect, Rushton, Sr. retained Attorney Emmanuel Margolis for the family and, specifically, for T. Skakel. Attorney Margolis immediately shut off police access to T. Skakel and thereafter indicated that if T. Skakel was subjected to any legal process, he would assert his fifth amendment right not to testify. However, in April of 2002, before the commencement of trial, Attorney Margolis permitted Attorney Sherman to interview T. Skakel. While in the presence of Attorney Margolis, Attorney Sherman, and Attorney Throne, a young attorney recently graduated from law school hired by Attorney Sherman to assist in the petitioner's defense, T. Skakel repeated the story of a sexual interlude with the victim that he earlier had told Sutton Associates. Since it was clear to Attorney Sherman and would become clear to the court that T. Skakel would not testify at trial, the court likely would have declared him unavailable for testimony with the result that Attorney Throne could have

been called as a witness to testify to T. Skakel's inculpatory statement.[23]

The claim of third-party culpability regarding T. Skakel would have been buttressed by the state's own evidence as certain aspects of T. Skakel's story are in harmony with the state's forensic testimony. In addition to the evidence already noted that when the victim's body was discovered, the upper four buttons of her jeans were unbuttoned, Henry Lee, Ph.D., Director Emeritus of the State's Forensic Laboratory, testified as a state's witness that microscopic examination of the victim's fingernails revealed no foreign DNA. Importantly, he indicated his belief that while the victim had been dragged several feet, the dragging did not explain the disposition of her pants and panties. Instead, Dr. Lee opined, the victim's pants and panties had been pulled down before she had incurred any injuries.[24]

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[23] Well before the trial, T. Skakel's statements to Sutton Associates had been leaked to the press with the result that his admissions were abroad by 2002. While Attorney Throne would be the most readily available witness to T. Skakel's admissions, it is reasonable to believe that the court may also have permitted the Sutton interviewer to give evidence in this regard as well since T. Skakel's statement to Attorney Sherman and Attorney Throne in the presence of his own counsel clearly constituted a waiver of the attorney-client privilege.

[24] Dr. Lee based his conclusion that the victim's panties had been rolled down before she had been dragged on the absence of any leaf matter in the rolled-up area of the panties.

Dr. Lee confirmed, as well, that the victim had no defensive wounds. In short, it is a fair reading of Dr. Lee's testimony that he concluded that the unbuttoning of the victim's jeans was not part of an assault on her and that her jeans had been unbuttoned before she was assaulted. From a review of the Greenwich police investigative file, available to him before the trial, Attorney Sherman would also have learned that Connecticut's (then) Chief Medical Officer, Elliot Gross, M.D., agreed with Dr. Lee. Regarding findings by Dr. Gross before he wrote his formal autopsy report, a Greenwich police report dated November 10, 1975, indicates: "The dungarees worn by the victim have five metal button type fasteners at the front fly area, and he reported that the top four of these were unbuttoned, which leads us to believe that the buttons were unfastened by the perpetrator and did not come loose during the dragging process. The back waist band of the dungarees was turned down on the outside." Surely, Attorney Sherman could have argued to the jury that the absence of any foreign DNA in the victim's fingernails was a strong indication that the unbuttoning of her jeans was consensual, thus giving credibility to the beginning portion of T. Skakel's account of his sexual liaison with the victim.

On the basis of T. Skakel's admission that he had unfastened the victim's jeans while, he claimed, they were engaging in a consensual sexual act, and the absence of any defensive wounds on the victim's body, and the fact that the victim's jeans were found

unbuttoned when her body was discovered, counsel could reasonably have urged the jury that T. Skakel's admission of a sexual encounter with the victim shortly before 10 p.m. should create reasonable doubt as to the petitioner's guilt. In sum, Attorney Sherman could have drawn the jury's attention to T. Skakel's recitation of his sexual encounter with the victim, and specifically to T. Skakel's report that he opened the victim's jeans in the course of fondling her. Attorney Sherman could have also brought to the jury's attention Dr. Lee's conclusion that the victim's jeans had been unfastened before the assault and that she had no defensive wounds. Attorney Sherman further could have brought to the jury's attention T. Skakel's claim that once his sexual encounter with the victim was completed, both fastened their clothes and the victim headed toward her home. With that evidence, Attorney Sherman could have argued to the jury the improbability that the victim started home without fastening her pants, or that while en route home, she unbuttoned them again. Attorney Sherman could have argued, as well, that the improbability of those two scenarios suggest that the victim never had the opportunity to refasten her jeans once they had been unbuttoned and that the physical evidence reasonably supports a belief that what may have started as a consensual encounter between the victim and T. Skakel, may have turned terribly bad. In making this argument, Attorney Sherman could have emphasized to the members of the jury that they need not draw any conclusions as to which

scenario was the most probable, but that they need only to consider those scenarios in determining the existence of reasonable doubt regarding the petitioner's guilt.

Additionally, to buttress his third-party claim against T. Skakel, Attorney Sherman could have asked Littleton whether he was certain T. Skakel was wearing the same clothes when he saw him after 10:15 p.m. that he had worn to dinner at the Belle Haven club earlier in the evening. He could have asked Littleton whether, in fact, how T. Skakel was clothed at 10:15 p.m. was an issue that had bothered Littleton ever since the murder and was a reason that Littleton had, at one time, expressed an interest in being hypnotized or questioned while under the influence of sodium pentothal.[25] Attorney Sherman could confidently have asked these questions because he would have known, from reading the Greenwich police file, that Littleton had stated that he wanted to take sodium pentothal to see if he could recall what clothes T. Skakel was wearing when he next saw him that evening after returning home from the club.

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[25] Littleton expressed his concern about his recollection of T. Skakel's attire during his telephone conversation with his former wife, Mary Baker. The conversation was taped by inspectors Garr and Solomon. The transcription of this conversation is contained in the Greenwich police file which was available to Attorney Sherman before trial.

In addition to this physical evidence, and the consciousness of guilt evidence regarding T. Skakel's initial false story and his non-existent homework assignment, Attorney Sherman could have adduced evidence suggestive of T. Skakel's increasing appetite for the victim in the days and weeks leading up to the night of the murder. At trial, the victim's diary was offered into evidence by the State through the testimony of Dorothy Moxley, and admitted over defense objections.[26] As noted by the Supreme Court on the direct appeal: “Entries recorded in the victim's diary in the two months preceding her murder disclose the victim's friendship with the defendant and Thomas Skakel, and also revealed the sometimes flirtatious nature of her relationship with Thomas Skakel.” *State v. Skakel*, supra, 276 Conn. 651. If read with a consideration of T. Skakel's involvement in mind, a jury reasonably could have found that the victim's diary also revealed a growing sexual tension between T. Skakel and the victim. While in most circumstances, the victim's notations could perhaps be viewed as a normal teenage reaction to another's flirtatious behavior, Attorney Sherman could have argued that, in this instance, certain entries reflected the victim's concern over T. Skakel's advancing interest and aggressiveness toward her in the weeks and days before her murder.

[26] The court admitted the diary as a statement of the victim's then state of mind; see Connecticut Code of Evidence § 8–3(4); and pursuant to the residual exception to the hearsay rule. See Connecticut Code of Evidence § 8–9.

The first mention of T. Skakel in the victim's diary is on September 4, 1975, in a notation simply indicating that he was among a group of people with whom she had spent some time on that day. On September 7, 1975, the diary indicates that the victim went to the Skakel house. On September 12, 1975, there is a notation that the victim, with several others, including both the petitioner and T. Skakel, went driving “in Tom's car.” This notation indicates that “I was practically sitting on Tom's lap cause I was only steering, he kept putting his hand on my knee.” She indicates, as well, “Then I was driving again and Tom put his arm around me. He kept doing stuff like that.” On October 4, 1975, the victim described being at a dance. She wrote: “Tom S. was being such an ass. At the dance he kept putting his arms around me and making moves.” Finally, as to the relationship between the victim and T. Skakel, the Greenwich police investigative file indicates that on April 3, 1976, while being interviewed, the victim's friend Allison Moore reported that she had spoken with the victim earlier in the week of the murder and that the victim had said she intended, on “mischief night,” to “spray Tom Skakel's room with shaving cream.” The report continues: “Allison went on to say that the victim also told her that Tom Skakel wanted to date her, but that she had said ‘No.’ She also related that the victim told her that Tom was very aggressive, going

on to say that the victim also said that she thought that Tom was strange."[27]

T. Skakel's evident sexual interest in the victim and his tale of a sexual encounter with the victim are not inconsistent with a profiling report prepared by Joseph Jachimczyk, M.D., the (then) retired medical examiner for Harris County, Texas.[28] In October 1975, the Greenwich police reached out to Dr. Jachimczyk at the suggestion of the Detroit police department, with which the Greenwich police had consulted on the manner of its investigation. In a December 18, 1975 letter to Dr. Jachimczyk, (then) Captain Thomas Keegan of the Greenwich police

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[27] This Greenwich police report was prepared by Detective Lunney and countersigned by Captain Keegan. Since both testified for the prosecution in the underlying criminal trial, they were available for questioning by Attorney Sherman either on cross examination or as part of the defense case.

[28] Dr. Jachimczyk's three-page report was dated February 3, 1976, and was part of the Greenwich police file. At trial, when Attorney Sherman offered the first page only, Attorney Benedict suggested that the entire report be admitted. Ultimately, counsel agreed to offer only page one, which sets forth the author's belief that the victim's death occurred at approximately 10 p.m. If Attorney Sherman had asserted a culpability claim against T. Skakel, the balance of this report would likely have been helpful to him even though the state could have argued that some of the author's conclusions regarding a rage killing by an immature person could be applicable to the petitioner as well. In this court's view, evidence pointing equally to two individuals provides fodder for a reasonable doubt argument.

detective division sought Dr. Jachimczyk's assistance in developing a profile of the assailant.[29] In response, Dr. Jachimczyk wrote to Keegan by letter dated February 3, 1976. In addition to stating his belief that the time of death was most consistent with approximately 10 p.m ., he provided additional insights relevant to a third-party culpability against T. Skakel. He indicated a belief that the victim probably recognized the person confronting her. He stated as well: "What may have begun as a simple prank, which ultimately got out of hand, or what may have constituted a sex proposition which was rejected, could have caused her attacker to strike her

[29] Interestingly, the letter's author, Keegan, stated that even though the medical examiner could not pinpoint the victim's time of death, "our assumption is that death occurred about 10 p.m., October 30th, as investigation shows that two neighborhood dogs were highly agitated shortly before 10 p.m. We feel that even though there was no school the next day, the child left the Skakel house and was headed home because her friends were not going to remain out any longer that night. We have interviewed four hundred people and no one saw the child after 9:30 p.m. on the night in question. It seems highly unlikely, we feel, that a lone fifteen-year-old female would engage in mischievous acts (shaving cream, toilet paper throwing, etc.)." Since Keegan was present and testified at the trial, Attorney Sherman could have called him as a defense witness to elucidate, from Keegan, the basis of his belief that the murder had occurred at approximately 10 p.m. This testimony would have been relevant to the petitioner's alibi claim. Keegan's letter and the February 3, 1976 response of Dr. Jachimczyk are in the Greenwich police investigative file, which had been made available to Attorney Sherman before the commencement of trial.

with the golf club with the end breaking off." Dr. Jachimczyk opined, as well: "The facets of this case, therefore, suggest that her attacker was someone known to her and not a stranger, who has a probable unstable personality, homosexually inclined, either panicked following what may have started out as a prank, or became so angry upon being rejected that he engaged in an 'overkill.' The probability of this being the act of a stranger is in our opinion very remote."[30] While Dr. Jachimczyk's opinion does not exculpate the petitioner, the fact that it may point equally to the petitioner and to T. Skakel provided Attorney Sherman with a basis for arguing for the existence of reasonable doubt regarding the petitioner's guilt because, arguably, his findings would have created reasonable doubt, as well, as to T. Skakel's culpability.

Also, as to evidence of T. Skakel's culpability, Attorney Sherman had substantial background evidence available to him of T. Skakel's mental and emotional instability and his penchant for violent outbursts. The Greenwich police investigative report contains a notation that on February 17, 1976, while Franz Josef Wittine, the Skakel's gardener, was being interviewed, he indicated that "he had

[30] 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 the trial. If read, they reasonably could have informed his choice of third-party culprits.

observed on several occasions T. Skakel leave the house for the purpose of walking, carrying a golf club from the house. Mr. Wittine further related that he had observed out-breaks of rage on the part of T. Skakel in the past, but of late the outbursts had subsided." The Greenwich police investigative file also indicates that on March 15, 1976, when James Marr was interviewed, he related that he had been employed by the Skakel family from 1960 until 1970, and that he had been driving a Skakel car when its rear door was opened and T. Skakel fell out, fracturing his head. He indicated that "after his release from the hospital and the ensuring years Tom would have what he termed as 'fits' and temper tantrums which would only last for a short period of time and at any one of these episodes could be squelched by himself with just a stern reprimand." The report continued: "Mr. Marr went on to relate that Tom did get very angry from time to time as a result of an argument with his family and when he did get angry, he would destroy and cause damage only to his own property." Attorney Sherman also had available to him the affidavit prepared by Keegan in conjunction with an effort by the police to obtain a warrant for the arrest of T. Skakel for the murder. In that affidavit, which had become an exhibit at trial, Keegan asserted: "That on numerous occasions Thomas Skakel has displayed acts of violence and rage, and on one occasion he slashed an oil painting of himself across the groin area" and "that a check of the medical and psychological records of Thomas Skakel revealed that he had

suffered a skull fracture at age four, and as a result suffered from frequent and quite sudden outbursts of severe physical violence, incontinence, and threats against siblings." Since Keegan was present for trial, he was available to being called as a witness by Attorney Sherman in conjunction with a third-party culpability claim against T. Skakel where Attorney Sherman could have asked Keegan about the basis of these statements, thus providing further reason for the jury to have entertained a reasonable doubt as to the petitioner's guilt.

Finally, as to information contained in the Greenwich police investigative file available to Attorney Sherman regarding the potential culpability of T. Skakel, there is a report dated April 8, 1976, by Detective James Lunney of the Greenwich police of his interview of the mother of Helen Ix, who was a friend of the Skakel family. Lunney reported that a Mr. Roosevelt of the Whitby School, which T. Skakel had attended, "[s]uggested strongly to Mr. Skakel that he should not allow the police to see Tommy's file from the school because it contains a doctor's report of Tommy's mental condition on the fact that he blacked out. She also stated that she had the picture that Tommy allegedly damaged. She stated that he had cut the picture with a broom stick and it caused a 2" cut on the mid-thigh. This was done after a fight with Michael." Finally, as to T. Skakel, Attorney Sherman also had access to the Sutton Reports, which contain significant data relevant to T. Skakel's emotional

instability and psychological profile.[31] While these entries and documents do not directly foresee a rage attack against the victim, they provide pathways to evidence that, in the court's view, would have contributed to a fact finder's reasonable doubt of the petitioner's guilt.[32]

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[31] Attorney Sherman also had an affidavit prepared by Keegan in support of an arrest warrant application for T. Skakel brought by the Greenwich police to the State's Attorney's office. This affidavit sets forth allegations that T. Skakel suffered from "frequent and quite sudden outbursts of severe physical violence, incontinence, and threats against siblings." Although this warrant application was introduced in evidence during the trial, its contents were not used by Attorney Sherman to point the finger at T. Skakel as a likely third-party culprit but rather, the court assumes, to demonstrate that the police, at one juncture, considered him to be a suspect. For third-party culpability purposes, the warrant application contained allegations that, on reasonable diligence, could have led to admissible evidence regarding T. Skakel.

[32] That is not to say that the Greenwich police reports would have, themselves, been admissible. Since these reports contained statements purportedly made by laypeople not charged with the duty to make the statements, there is no reason to believe they would have been admissible as business entries. See *The Milford Bank v. Phoenix Contracting Group, Inc.*, 143 Conn.App. 519, 536 __ A.3d __ (2013) (discussing business entry requirements). For other reasons, the Sutton Reports, themselves, may not have been admissible. Nevertheless, each of the cited Greenwich police entries and the Sutton Reports provide an investigative gateway for a reasonably competent and diligent defense attorney to seek and obtain admissible evidence on the subject(s) covered.

Counsel's task, of course, would not have been to convince the jury that T. Skakel committed the murder; rather, he needed only to argue that the direct and circumstantial evidence regarding T. Skakel's potential culpability should, at least, create a reasonable doubt in the minds of the jury as to the petitioner's guilt. 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 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.[33] Had he done so, there is a

[33] The court declines to speculate on what reason(s) Attorney Sherman may have had for not shining the light of culpability on T. Skakel. At the habeas hearing, and in addition to stating his disinclination as a general matter to assert third-party culpability against more than one person, Attorney Sherman stated that if he thought he had a basis for focusing on T. Skakel he would have readily done so. On the basis of the extent and strength of inculpatory information concerning T.
(continued...)

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.

2
Failure to Adequately Present the Alibi

The petitioner claims that he was denied the effective assistance of counsel on the basis of his assertion that Attorney Sherman failed, adequately, to present his alibi defense. Specifically, the petitioner claims that Attorney Sherman failed to investigate and then to present the testimony of Dennis Ossorio, an independent witness who would have testified that the petitioner was at the Terrien home, a location approximately twenty minutes distant from the murder site during the time period in which the victim was most likely murdered.

The following procedural and uncontested factual history is relevant to this claim. The jury heard evidence that the petitioner, with his siblings Rushton, Jr., Thomas, John, Julie, David and Stephen, their cousin James Terrien (aka Dowdle), Julie's friend Andrea Shakespeare, and the family tutor, Kenneth Littleton, left the Skakel residence in Belle Haven for dinner at the Belle Haven Club at

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(...continued)
Skakel then available to Attorney Sherman, the court does not find that statement to be credible.

approximately 6:15 p.m. and returned to the Skakel home shortly before 9 p.m. The jury heard testimony, as well, that earlier than 9 p.m., the victim had been out with her friend, Helen Ix, in the neighborhood enjoying the activities of "mischief night." Shortly after the group returned from the Belle Haven club, the victim and Ix came to the Skakel residence and soon thereafter, the petitioner, a friend, Geoffrey Byrnes,[34] the victim, and Ix entered the Lincoln to talk and listen to music. They were soon joined in the car by T. Skakel. Soon thereafter, at approximately 9:15 p.m., Rushton, Jr., John Skakel, Skakel and Terrien came to the car and indicated they needed to use it to take Terrien to his home, approximately 20 minutes away. It is undisputed that when Terrien, Rushton, Jr. and John Skakel entered the Lincoln, T. Skakel, Ix, Byrnes and the victim alighted from it, and that Ix and Byrnes shortly left for their respective homes, leaving T. Skakel and the victim standing together in the Skakel driveway. Whether the petitioner remained in the Lincoln en route to the Terrien home or got out of the car at the Skakel residence was significantly contested at trial because this issue related directly to the petitioner's alibi defense. He claimed, in sum, that he could not have committed the crime because the victim was murdered between 9:30 p.m. and 10 p.m. while he was still at the Terrien's home. While Terrien, Rushton, Jr. and

[34] Byrnes was deceased by the time of the petitioner's criminal trial.

John indicated that the petitioner went with them to the Terrien home, Ix testified that she could not remember. Her testimony on this point was significantly contested. On direct, she indicated her uncertainty. On cross by Attorney Sherman, she stated that she thought the petitioner was in the car as it left but she was not positive. After Ix testified, the state presented testimony from Shakespeare that the petitioner was at the Skakel home after the Lincoln departed. And, in rebuttal, the state presented testimony from Julie Skakel relevant to whether or not the petitioner had left in the Lincoln. When Julie Skakel testified at trial to an uncertain memory of the events of the evening, the state was able to use, as statements pursuant to *State v. Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d 598 (1986), the fact that she had testified at earlier hearings that, at approximately 9:20 p.m., she saw a figure darting by just outside the house to whom she called out: "Michael, come back here." Even though Julie Skakel testified that she did not know who the darting figure was, the jury was given the clear indication that, at least at that moment on October 30, 1975, she must have thought it was the petitioner. The state also adduced evidence that, at the same point in time, Julie was unable to state whether any cars remained in the driveway. The import of this evidence was the suggestion that since Julie Skakel thought she saw the petitioner dart past the house at a point in time after the Lincoln had left the area, he did not, in fact, go to the

Terrien residence. From the state's perspective, Julie's testimony could be harmonized with Shakespeare, who, as noted, testified to her belief that the petitioner had not gone to the Terrien home on the evening in question.

The contest regarding whether the petitioner had left the area in the Lincoln continued with the testimony of Terrien, Rushton, Jr., and Georgeann Dowdle, Terrien's sister. While Terrien and Rushton, Jr. testified that the petitioner was present in the Terrien home, Dowdle could only say that she heard the Skakel cousins' voices because she was in a different room and only within hearing range. She did say, however, that she had earlier told the police that the petitioner was there that evening. Significantly, Dowdle testified before the grand jury in 1998 that she had been in the company of her "beau" at the Terrien residence when the Skakel cousins were there.

Even though Attorney Sherman was privy to Georgeann Dowdle's testimony before trial from his access to the transcript of her grand jury testimony, he did not, at any time, attempt to learn the identity of Dowdle's "beau." During closing arguments, both the state and the defendant pointed to trial evidence on the disputed question of whether the petitioner was away from Belle Haven between the hours of approximately 9:15 p.m. and 11:15 p.m. In his challenge to the petitioner's alibi claim, Attorney Benedict predictably argued that all the alibi

witnesses were related to the petitioner, a point that was echoed by the court in its charge regarding the credibility of witnesses and in the specific context of the petitioner's alibi claim.

The petitioner argues that Attorney Sherman was ineffective in not further investigating his alibi claim and, specifically, in not investigating arid discovering the identity of Dowdle's “beau,” whom she stated during her grand jury testimony had been present with her at the Terrien home.

At the habeas trial, Dennis Ossorio, now seventy-two years old, testified that in 1975, he, as a psychologist, was operating a program for women. He indicated that he then had a personal connection to Dowdle and that he had been at the Terrien home in the evening hours of October 30, 1975, visiting with Dowdle and her daughter. He testified that, while there, he had visited with the Skakel brothers, including the petitioner, and Terrien, while they were watching the Monty Python show on television. He indicated that he was in and out of the room where the others were watching Monty Python while Dowdle was putting her daughter to bed. Finally, he indicated that he left the Terrien residence at about midnight and was not sure whether the Skakels had left before him. Thus, Ossorio's testimony supported the petitioner's claim that during the likely time of the murder, he was away from Belle Haven, as he indicated. To the court, Ossorio was a disinterested and credible witness with a clear recollection of

seeing the petitioner at the Terrien home on the evening in question. He testified credibly that not only was he present in the home with Dowdle and that he saw the petitioner there, but that he lived in the area throughout the time of the trial and would have readily been available to testify if asked. He indicated that while he was aware of the general parameters of the state's claim against the petitioner, he did not pay close attention to the trial and he did not come forward because he was unaware of the significance of the particular information he possessed. He indicated that he had not been contacted by Attorney Sherman or by the state in conjunction with the investigation or trial. To the court, Ossorio was a powerful witness in support of the petitioner's alibi claim.

In response to this claim, the commissioner makes two replies. First, the commissioner argues, the petitioner never informed Attorney Sherman of Ossorio's presence. Second, the commissioner argues that since the time of death was not limited in the charging instrument to the hours in which the petitioner claims to have been away from the area, there is no prejudice to Attorney Sherman's failure to investigate and utilize Ossorio in support of the petitioner's alibi defense. In short, the commissioner claims that Attorney Sherman's failure to locate and utilize Ossorio was not prejudicial because the jury could still have found the petitioner guilty of murder even if it believed he had been at the Terrien home

between the hours of 9:15 p.m. and 11:15 p.m.[35] The court considers each in turn.

As to the claim that the petitioner did not inform Attorney Sherman of the presence of Ossorio, the court is aware that, generally, defense counsel is entitled to rely on information provided by a defendant to guide an investigation and that counsel's failure to locate witnesses unidentified by a defendant, generally, will not be regarded as deficient. See, e.g., *Robinson v. Commissioner of Correction*, 129 Conn. App. 699, 21 A.3d 901, cert. denied, 302 Conn. 921, 28 A.3d 342 (2011). But that is not the situation the court confronts. Here, even though Attorney Sherman testified at the habeas hearing that the petitioner had never informed him of Ossorio's presence and, indeed, he had never heard Ossorio's name until shortly before the habeas hearing, he was on notice from 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." Thus, decisional law that it is not ineffective for defense counsel to fail to

[35] There was evidence that the group watched the Monty Python show at the Terrien home, after which they hung around for another fifteen to twenty minutes before leaving for the Skakel home. From evidence adduced at the trial, it is apparent that the Monty Python show began at 10 p.m. and lasted for one half hour. Assuming the accuracy of the testimony that the group spent some idle time after watching television, they would have arrived back at the Skakel residence at approximately 11:15 p.m.

investigate a witness unless the defendant has informed counsel about that witness is not availing to the commissioner because Attorney Sherman was on notice of the presence of this person. Had Attorney Sherman read and considered Dowdle's grand jury testimony, which was made available to him before the trial, he would have learned of the presence of an unrelated person in the Terrien household. And, had Attorney Sherman made reasonable inquiry, he would have discovered Ossorio and gleaned that Ossorio was prepared to testify that the petitioner was present at the Terrien home during the evening in question. He would have learned, as well, that Ossorio was a disinterested and credible witness.

Moreover, Attorney Sherman's failure to investigate in this regard cannot be attributed to any strategic decision under these circumstances. Here, the petitioner asserted an alibi defense. Attorney Sherman's failure to follow up on information available to him in support of that defense that there was an unrelated and identifiable person in the Terrien home in addition to Skakel relations was deficient because he knew or should have known of the presence of an unrelated person in the Terrien home under the particular circumstances of this case. That is, notwithstanding the failure of the petitioner to bring this person to Attorney Sherman's attention, Attorney Sherman was on notice of this important information. Since he already knew, or should have known, of the existence of this person,

he cannot reasonably rely on the petitioner's failure to also bring this to his attention. See *Gaines v. Commissioner*, 306 Conn. 664, 51 A.3d 948 (2012).

The commissioner argues, nevertheless, that the petitioner was not prejudiced by Attorney Sherman's lack of diligence on the basis of evidence it adduced at trial that the victim could have been murdered any time between 9:30 p.m. and 1 a.m. on the following day, and based on the absence of a precise time of death in the charging information. Thus, the commissioner claims, there is not a reasonable probability the outcome of the trial would have been different even if defense counsel had solidified the petitioner's absence from the Belle Haven area from approximately 9:15 p.m. until 11:15 p.m.

As the petitioner points out, however, during the trial the state vigorously contested the petitioner's claimed absence from the area between the hours of 9:15 p.m. and 11:15 p.m. Indeed, a fair reading of Attorney Benedict's closing argument suggests that he, too, acknowledged the strength of evidence that the victim likely had died at approximately 10 p.m. For example, while Attorney Benedict argued to the jury that the time of death was not integral to the charging document and that the jury could find the petitioner guilty even if they believed his alibi, Attorney Benedict strenuously argued that the petitioner had not, in fact, gone to the Terrien residence as claimed, and that it was the defendant's presence at the crime scene at approximately 10 p.m.

that likely caused the Ix dog to bark in such an unusually disturbed manner. Additionally, even though the state adduced evidence that the time of death could have been anytime between 9:30 p.m. and 1 a.m. on the next day, there was weighty evidence that the murder took place while the petitioner claimed to have been absent from the Belle Haven area. Furthermore, the trial record suggests that the jury, in its deliberations, was particularly interested in whether the petitioner had been away from the area as claimed by the defense. In short, even though the state did not pinpoint the time of death in its charging document, the time when the murder took place was, in fact, a significantly contested trial issue.

The following additional information is pertinent to the petitioner's ineffectiveness claim regarding his alibi defense. The victim's body was discovered at approximately noon on October 31, 1975. At trial, the state called William Carver, M.D., who was, at the time of trial, the State's Chief Medical Examiner. Although Dr. Carver did not participate in the autopsy of the victim, he was able to testify from the record completed by Elliot Gross, M.D., who had performed the autopsy. Thus, Dr. Carver did not testify from his personal examination, but rather from the record as prepared by Dr. Gross. Based on the condition of the victim's body, Dr. Carver stated that the precise time of death would be difficult to pinpoint, but he stated his belief that the victim died closer to 9:30 p.m. on October 30, 1975, than when

her body was discovered the next day. On cross, he acknowledged that the condition of the victim's body was consistent with her death occurring between 9:30 p .m. and 10 p.m. He acknowledged, as well, in response to the state's question on redirect, that the condition of the body was consistent with a broader time span, such as between 9:30 p.m. and midnight to 1 a.m. As noted, infra, also testifying at trial was Joseph Jachimczyk, M.D., a forensic pathologist who had been the Chief Medical Examiner for Harris County, Texas for thirty-five years. Dr. Jachimezyk had been contacted by the Greenwich police at the suggestion of members of the Detroit police department whom the Greenwich police had consulted in regard to their investigation. He was asked to prepare a profile of the likely killer based on his analysis of crime scene information provided to him by the Greenwich police.

Dr. Jachimczyk opined that the time of death was approximately 10 p.m. His opinion was based on autopsy findings, the victim's history of curfew compliance and the report of barking dogs at approximately 10 p.m. As to the autopsy report, Dr. Jachimczyk provided scientific support for his view that the victim died at approximately 10 p.m. based on the condition of the body with respect to digestion, blood pooling and rigor. He opined that his view was buttressed by the report of the victim's mother that the victim had a curfew of either 9:30 p.m. or 10:30 p.m., depending on whether it was a school night, and that the victim had always been

compliant with respect to curfew. Lastly, he noted that a neighbor, Helen Ix, had reported that her dog had been barking in a frightened and unusual manner for twenty to twenty-five minutes between 9:30 p.m. and 10 p.m. while facing in the direction of the Moxley home. The court notes that while Ix was called by the state and testified, as well, that the dog had a particular aversion to the petitioner, thus implying that the dog was, in fact, barking at the petitioner, this testimony would only have been inculpatory as to the petitioner if the victim had been killed in that time frame and if the petitioner had been in the Belle Haven area instead of at the Terrien residence several miles away. Thus, if the jury believed that the petitioner had been at the Terrien home during these hours, the dog's unusual behavior between 9:30 p.m. and 10 p.m. could have been viewed as exculpatory in regard to the petitioner.[36]

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[36] This court is aware, from a review of the Greenwich police file that a Mr. Bjork, reported that he observed his dog, a springer spaniel, walk to the edge of his property, which bordered on the Moxley property, and "then walking to the area of the pine tree where the body of the victim was subsequently found, Mr. Bjork related that the dog would first walk to the area of the willow tree on the southwest corner of the Moxley property, where two large spots of blood were found, and then walk from this spot to the pine tree. At the time, Mr. Bjork related that he placed no significance in the action. He related that this was approximately 9:50 p.m." This report was filed on April 8, 1976. Since the jury did not hear this evidence and there is no claim by the petitioner that trial counsel was ineffective for not presenting this evidence, the court draws no (continued...)

Finally, as to the question of prejudice regarding Attorney Sherman's failure to present Ossorio's alibi testimony, the court notes that the jury deliberated for four days, beginning on June 4, 2002, and reaching a verdict on June 7, 2002. During the jury's deliberations, on June 5, 2002, the jury asked to have read back the testimony of Julie Skakel, Andrea Shakespeare and Helen Ix. With this request, the jury also provided a note which stated, in part: "We would like to limit Helen Ix's testimony to the discussion of who was in the driveway and who left in the car." Significantly, the focus of the testimony of each of these witnesses was whether the petitioner had left the Belle Haven area at approximately 9:15 p .m. in the Lincoln car to go to the Terrien residence. Thus, even though the court charged the jury that they need not fix the time of death in order to find the petitioner guilty, the jury showed particular interest in the petitioner's whereabouts between 9:15 p.m. and 11:15 p.m.

Given the weighty evidence that the victim was murdered in the time range of 9:30 p.m. to 10 p.m. on October 30, 1975, the importance of the petitioner's alibi defense to the fact finders cannot fairly be discounted. And, given the importance of

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(...continued)
conclusions from it regarding ineffectiveness. The court simply notes that such evidence, if presented, would have further buttressed the petitioner's claim regarding the approximate time of death and, by extension, the importance of his alibi defense.

the petitioner's alibi defense, its persuasiveness would have been greatly enhanced by the testimony of Ossorio, an independent and credible witness to the petitioner's presence at the Terrien household during the relevant evening hours of October 30, 1975. The court finds that there is a reasonable probability that had Attorney Sherman discovered the identity of Ossorio, readily available to him on reasonable inquiry due to Dowdle's pretrial testimony, and if Attorney Sherman had presented the testimony of this disinterested and credible witness to the jury, the outcome of the trial would have been different.

3
Failure to Adequately Impeach State's Witnesses Gregory Coleman and John Higgins

a
Gregory Coleman

For the state, Gregory Coleman's testimony was a cornerstone to its claim that the petitioner had made several admissions of culpability for the murder. And, for the defense, Coleman was a particularly troublesome witness. Although the state presented other witnesses who testified that the petitioner made inculpatory statements that one could reasonably infer related to the murder, and John Higgins testified that the petitioner had made a direct admission of culpability to him, Coleman's testimony included a detailed narration of the

petitioner's alleged involvement in the murder, which, Coleman claimed, the petitioner had provided to him while they were both residents at Elan. In short, from the record, it is apparent that Coleman was a most significant witness for the state.

Coleman testified before the grand jury, at the reasonable cause hearing in the Juvenile Division of the Superior Court, and at the probable cause hearing once the petitioner had been arrested. On April 18, 2001, between the date of the probable cause hearing and the underlying criminal trial, Coleman died. Accordingly, at trial, his testimony from the probable cause hearing was read into the record, as well as some of his earlier testimony either as inconsistent or as consistent prior testimony.[37] In essence, Coleman testified that while he was a resident of Elan in 1979, he had been

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[37] At trial, Christopher Morano, (then) Deputy Chief State's Attorney, acted the role of Coleman, reading his answers as Attorney Benedict and Attorney Sherman, in turn, read their examinations and cross examinations. Part of the petitioner's claim of ineffectiveness is that Attorney Sherman should have anticipated the antiseptic effect of this process as opposed to having a live witness and, therefore, he should not have placed such reliance on his earlier cross examination of Coleman. To the court, the prospect of having Coleman's testimony read into the record with no opportunity for live cross examination or to demonstrate his demeanor on the witness stand presented a difficult dilemma for Attorney Sherman, but one, nevertheless, that required careful consideration and planning before trial. At the habeas hearing, the court heard no evidence that either took place.

assigned to guard the petitioner who had been returned from an escape. He claimed that even though the petitioner was under guard, he was permitted to have music with him. His clear inference was that the petitioner was accorded special privileges at Elan. He stated that while he was guarding the petitioner, the petitioner told him that he was going to get away with murder because he was a Kennedy. On questioning by Attorney Benedict, Coleman claimed that the petitioner then told him that he had murdered a young girl in Greenwich by driving a golf club into her head, and that two days after the murder he had returned to her body and masturbated on it. Coleman claimed that the petitioner told him he had committed the murder in a woody area and that he had been upset because the victim had spurned his advances. Coleman claimed that one of three other people, John Simpson, Alton Everette James or Cliff Grubin, was present during this conversation and likely heard the petitioner's confession.[38] Coleman also testified to a second incident involving a group therapy session in which the petitioner screamed that he was sorry for the death of Martha Moxley. He stated that years after he left Elan, he contacted a news station in Rochester, New York, and reported

[38] At one point in his testimony, Coleman stated that the third person heard the conversation and then, on cross examination, stated that the person might have heard it. Later, however, he returned to his claim that the third person did, in fact, hear what he claimed the petitioner said.

that the petitioner had admitted the murder to him while they were both at Elan. Shortly thereafter, Coleman was contacted by Garr.

The petitioner faults Attorney Sherman for his failure to locate, investigate, and call the three named individuals as witnesses to the first conversation on the basis of his belief that none of them would verify Coleman's story. Additionally, the petitioner claims that an investigator working for Attorney Sherman spoke with two police officers from Rochester, New York, Coleman's hometown, and these officers told the investigator that Coleman was a serious drug abuser completely lacking in credibility. The petitioner faults Attorney Sherman for not presenting the testimony of these officers regarding Coleman's reputation for truthfulness in the Rochester community.[39]

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[39] The petitioner also claims that Attorney Sherman should have investigated Coleman's financial circumstances in order to demonstrate that Coleman was in desperate need of funds and, therefore, to impeach him on the basis that he would lie in order to receive the reward then being offered in conjunction with the conviction of the murderer. Finally, the petitioner claims that Attorney Sherman should have sought to speak with a lawyer who had represented Coleman and who, apparently, was willing to come forward with evidence that Coleman was not a trustworthy person. As to the first claim, it is the court's view that the jury could readily infer from Coleman's admitted substantial substance abuse that he had financial needs. The court rejects the petitioner's second claim as the court does not accept the proposition that a constitutionally effective lawyer, in this instance, would have (continued...)

Attorney Sherman's response to these claims is, essentially, that he so completely destroyed Coleman's credibility on cross examination that he believed no reasonable jury would credit his tale. The petitioner's expert, Attorney Fitzpatrick, in turn, testified that Attorney Sherman's failure to impeach Coleman's credibility with these witnesses was a significant strategic error born of an overabundance of self-satisfaction with his cross examination. Whether Attorney Sherman's assessment of his cross examination was borne of naiveté, hubris, or ignorance, the court agrees with Attorney Fitzpatrick's assessment that Attorney Sherman's decision not to pursue Simpson, James, and Grubin reflected a significant and impactful lack of judgment.

From the record, the court believes that Attorney Sherman effectively pointed out during cross examination that Coleman had given varying testimony regarding some aspects of his account. Most significantly, Coleman admitted that he testified before the grand jury that the petitioner had confessed five or six times. In his probable cause testimony, however, Coleman testified that the petitioner made one specific admission while he had

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sought unprofessional behavior from Coleman's former attorney who, by both New York and Connecticut law, would remain bound by his obligation of loyalty and confidentiality notwithstanding Coleman's death.

had been guarding the petitioner in the presence of Simpson, James or Grubin. He agreed that, in the second incident, he and the petitioner were part of a "screaming session" in which the petitioner had been instructed to scream that he was sorry. Thus, it would be a fair inference from this portion of Coleman's cross examination that the petitioner's alleged statements in the "screaming session" were not, in fact, a confession, but merely a response to a forceful prompt.[40] Attorney Sherman effectively examined Coleman regarding his substance abuse, eliciting from him the admission that he had been high on heroin at the reasonable cause hearing, and that after he testified before the grand jury, he had to be taken to a clinic because of the ill effects of withdrawal on that day. Coleman admitted, as well, that he had been incarcerated on more than one occasion, including a stint at Attica in New York. Attorney Sherman also pointed out, through questioning, the substantial delay in time between the petitioner's purported confession and Coleman's subsequent report to the Rochester media. Finally, Attorney Sherman elicited from Coleman the fact that he had asked Garr for financial assistance in conjunction with his attendance at Skakel hearings.

[40] Coleman testified that "screaming sessions" constituted a form of therapy in which participants in groups of six to eight individuals were prompted to scream certain statements as a form of catharsis.

In spite of the vigor of Attorney Sherman's examination, however, Coleman never varied from his narration of what he claimed the petitioner stated to him while he was guarding him after he had been returned from an escape from Elan. He repeatedly claimed that the petitioner had told him he'd get away with murder because he was a Kennedy and, when asked to explain, the petitioner told Coleman that he had killed a young girl in Greenwich in a woody area because she had rejected his advances and, two days later, he had masturbated on her body. He also repeated his claim that Simpson, James or Grubin was present with him and the petitioner and heard the petitioner's confession. Thus, Coleman was unwavering in the essence of his claim.

After the petitioner's conviction, his new counsel located Simpson, James and Grubin, and their testimony was offered in conjunction with the petition for a new trial.[41] There, Grubin testified

[41] Neither Simpson, James nor Grubin testified live at the habeas trial. Rather, this court allowed the introduction of their testimony from the petition for a new trial. After a colloquy with the court, the commissioner agreed that Simpson and James were unavailable. As to Grubin, who lives in Spain, the petitioner's counsel indicated that he contacted Grubin in Spain, who stated that he was not available to come to Connecticut for trial. The commissioner maintained the view that in spite of Grubin's continued residence in Spain, and his unwillingness to voluntarily travel to Connecticut, he was not unavailable. The court disagreed and permitted the admission and use of Grubin's earlier testimony on the basis of his present
(continued...)

that he had never guarded the petitioner at Elan and had never heard him confess to the murder or brag that he would get away with murder because he was a Kennedy. Grubin also testified that he knew Coleman well at Elan as he had roomed with him in a transitional trailer before their respective departures from Elan. He testified that Coleman was not a truthful person and that, on one occasion, Coleman told him that he considered himself to be a "pretty good liar." Grubin testified that he asked the petitioner once about the murder and the petitioner replied that he was concerned that one of his brothers, Thomas, may have committed the crime. Grubin acknowledged, as well, that in speaking with an investigator for the petitioner's habeas counsel, he told the investigator that he would not want to testify about the petitioner's concern regarding his brother.[42]

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unavailability. It is the court's view that even without Grubin's testimony, the testimony of Simpson and James, particularly Simpson who identified himself as the third person present during the alleged recitation, significantly erodes the reliability and credibility of Coleman's recitation that the failure of Attorney Sherman to bring them sufficiently prejudiced the petitioner to entitle him to a new trial, even without Grubin's confirmation that he was not party to such a conversation.

[42] The court is aware that its assessment of Grubin's testimony varies from Judge Karazin's in the petition for a new trial. In addition to finding Grubin's testimony to be cumulative, Judge Karazin considered somewhat inculpatory Grubin's stated unwillingness to fully report the petitioner's
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Alton James testified that after leaving Elan, he graduated from college and then from the University of Chicago Kent School of Law, from which he received both a juris doctor and a master's degree in business administration. He indicated that he had been a member of a large law firm, then Deputy Assistant Secretary of the Department of Commerce and was, at the time of his testimony, engaged in the practice of law. He indicated that he recalled guarding the petitioner on more than one occasion and stated that he never heard the petitioner confess to a murder. Nor did he ever hear the petitioner state that he was a Kennedy and he'd get away with murder. He testified that Coleman never told him that the petitioner had confessed to him. James also offered his opinion that based on his knowledge of Coleman at Elan, he was not a trustworthy person.[43]

(...continued)
conversation with him. However, read in context, it appears that Grubin was referring only to the petitioner's concern that his brother Thomas may have been the killer and the petitioner's unwillingness to openly discuss this concern. In this court's view, Grubin's testimony in this regard reflects only a desire to protect the petitioner's privacy regarding his musings about his brother. Diligent judges may reasonably and respectfully disagree over the meaning of statements captured in a record, particularly where the record is readily available for independent review.

[43] It is also noteworthy that James testified that John Higgins, discussed infra, was the sort of person who would readily disclose anything to Elan staff in order to make himself look good to them. This testimony, if offered, would have had (continued...)

James indicated he has had no contact with the petitioner since Elan.

John Simpson testified that after leaving Elan he attended college, graduating from Pennsylvania State University in 1984, and that he was then employed as a credit manager for a finance company. He stated that he had been an Elan resident from October 1978, until approximately February 1980. Simpson recalled guarding the petitioner with Coleman on one occasion after the petitioner had returned to Elan after an escape. He indicated that he, Coleman, and the petitioner were in a room apart from others, with Coleman standing and the petitioner sitting, both on his left side. He indicated, as well, that in addition to being deaf in his left ear, he was not paying particular attention to Coleman and the petitioner as he was engaged in writing a report. He stated that suddenly, Coleman exclaimed that the petitioner "just admitted that he killed this girl." Simpson stated that he turned to the petitioner and asked him if he had just made such an admission to which the petitioner responded "No." Simpson then confronted Coleman by asking him how he could say that the petitioner had just confessed to murder when the petitioner denied saying any such thing and Coleman replied that when he asked the petitioner if he had killed the

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bearing on the reliability strength of testimony offered by Higgins.

girl, the petitioner didn't reply and that he had a "shit eating grin." Simpson stated that Coleman said that it was the petitioner's reaction to the question, and that he didn't deny it. Simpson explained that it had become evident upon his questioning of the petitioner that he had made no such admission. Simpson stated, as well, that he never heard such an admission at any other time; nor did he ever hear the petitioner claim that he'd get away with murder because he was a Kennedy. In sum, Simpson not only denied hearing the petitioner make an admission or brag that he would get away with murder because he was a Kennedy, but his recitation of the incident directly contradicts Coleman's testimony.

Simpson also opined, based on his observations of Coleman at Elan, that Coleman was envious of the petitioner. Simpson stated that Coleman had told him that the petitioner was a Kennedy and that he didn't have to work for anything. He believed that Coleman did not like the petitioner. Furthermore, on the basis of his observations of the relationship between Coleman and the petitioner, Simpson stated that he did not believe that the petitioner would ever confide in Coleman. Finally, Simpson stated that, to his knowledge, the petitioner was never accorded any special privileges at Elan; in fact, it was his view that the petitioner was harshly treated there. Simpson acknowledged on cross examination that while he and the petitioner were working as staff at Elan and living in an apartment away from the

facility, he asked the petitioner about the murder. Simpson indicated that the petitioner said he had been a suspect, but he denied having committed the murder. He indicated further that on the evening of the murder, the petitioner said that he had been drinking and that he certainly didn't remember doing anything like that. Finally, Simpson indicated that he never heard the petitioner make any admission regarding the murder of the victim.

At trial on the petition for a new trial, the court, *Karazin, J.*, determined that the testimony of these three individuals did not constitute new evidence because, with diligence, the petitioner's counsel could have located them in the same manner as new counsel had done. The Supreme Court agreed. The court opined: "It is highly significant that this evidence is not newly discovered in the sense that the petitioner did not know of the existence of these witnesses prior to trial. Coleman had identified these witnesses years before trial. Moreover, the petitioner should have known that Coleman's testimony, if credited, could be a key piece of evidence in the state's case. Attorney Sherman apparently concluded, however, 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]. Attorney Sherman had James' contact information in the spring of 2002, but could

not ‘connect’ with him. *No* effort was made to locate Simpson or Grubin prior to or during the trial. Therefore, we fully agree with the trial court's conclusion that Attorney Sherman had failed to exercise due diligence to locate the three witnesses.” (Emphasis in original; internal quotation marks omitted.) *State v. Skakel*, supra, 295 Conn. 513.

In the petition for new trial, the court, *Karazin, J.*, also opined that the testimony of Grubin, James, and Simpson would not have entitled the petitioner to a new trial because it was cumulative and not entirely exculpatory. The commissioner now claims this court is bound by Judge Karazin's conclusions. The court respectfully disagrees. At the outset, the court notes that Judge Karazin's findings regarding the cumulative nature of this testimony constitute dicta because, in any event, the trial court held that their evidence was not newly discovered. Additionally, on appeal, the Supreme Court agreed with the trial court's finding that this evidence could have been discovered with due diligence, without reaching the question of whether it was, at any rate, cumulative. Finally, the court is aware that the doctrine of collateral estoppel, even if applicable to a determination not necessary to the court's adjudication, does not apply under these circumstances. See *Williams v. Commissioner of Correction*, 10 Conn. App. 94, 104, 917 A.2d 555, cert. denied, 282 Conn. 914, 924 A.2d 140 (2007) (finding that the proceedings in a petition for a new trial and the proceedings in a habeas petition are

"legally distinct and ... the disposition of one does not preclude the other under the doctrine of collateral estoppel").

To some extent, of course, the testimony of Simpson, James and Grubin was cumulative. Each of them, as did other witnesses at the criminal trial, testified to never hearing the petitioner admit to killing the victim. Their purpose, however, was not to echo other testimony in this regard, but rather to contradict Coleman's testimony that one of them heard the petitioner's narration of killing the victim. In this regard, their testimony was singularly important and not repetitive. Since each of them denied ever hearing a confession from the petitioner, the aggregate effect of their testimony was to directly contradict Coleman in a manner no other witnesses could. Moreover, Simpson's testimony that he, indeed, was with Coleman when Coleman claimed that the petitioner had admitted the killing and that, when confronted, Coleman acknowledged that the petitioner had not confessed the murder directly contradicts Coleman's version of the incident.

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 had 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.[44]

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[44] The petitioner also claims that Attorney Sherman was deficient for his failure to contact and call as witnesses two Rochester police officers. At the habeas trial, Attorney Sherman's investigator, Vito Colucci, testified that, on his own initiative, he contacted officers by the names of Cashman and Gerbino of the Rochester police department before the trial to see what he could learn about Coleman. He stated that Cashman indicated his disbelief that the state was going to rely on Coleman as, in his view, he had "zero credibility." Colucci reported a similar conversation with Gerbino, a homicide detective who indicated a willingness to testify regarding Coleman. Colucci indicated that after speaking with these officers, he reported the conversations to Attorney Sherman and urged him to call the officers, and that Attorney Sherman reported that he would take care of it. Colucci indicated credibly that three weeks after this conversation he again asked Attorney Sherman about it, and Attorney Sherman said that he would get to it. That was the last Colucci heard on the subject of having either or both officers testify. Neither testified at trial. From the record, it is apparent that Attorney Sherman did nothing with this information. Since, however, neither officer testified at the habeas hearing and neither was subject
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b
John Higgins

As to Higgins, the court comes to a different conclusion. John Higgins testified that he was an Elan resident from May 1978, until sometime in early 1980. He claimed that at one point, while he was on "night owl" duty, he was sitting on a porch with the petitioner while the petitioner was talking to himself for approximately two hours.[45] During this time period, Higgins claimed, the petitioner said to himself that he didn't know whether he had done it, that he may have done it, that he didn't know what happened, and "eventually he came to the point that he did do it, he must have done it, I did it." Higgins stated that this progression took place without conversation and that he was just listening to the petitioner, who was sobbing during this recitation. Higgins also claimed that during the porch-side incident, the petitioner told him that on the evening of the murder, he had been at a party at

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to cross examination, this court cannot, with any degree of certainty, come to any conclusion regarding the issue of prejudice based on what they purportedly stated to Colucci. Accordingly, the petitioner cannot prevail on this claim.

[45] Higgins testified that "night owl" duty took place overnight and consisted of periodic headcounts to ensure the presence of all residents and that, from time to time during the evening, another person who roamed the premises during the evening hours would come by to receive the night owl's report.

his house and that he had gone through some golf clubs in his garage, and he related that he was running through some woods with a golf club in his hands when he then looked up and saw pine trees and the next thing he remembered is that he woke up in his house. On cross examination, Higgins reiterated that the petitioner had told him that he had gone to his garage and that he was as sure about this aspect of the petitioner's story as he was about the balance of the petitioner's recitation.[46] Higgins also claimed that he had no recollection of the petitioner being the subject of any general meetings while he was at Elan. As to the petitioner's alleged emotional recitation, Higgins stated that he came to the conclusion that the petitioner really did not know what happened on the evening of the murder and that even though the petitioner admitted to the murder, he did not come to the conclusion that the petitioner did it as "[p]eople say things." Higgins stated that he related this story to another Elan resident, Harry Kranick on the next day. He acknowledged, however, that even though one of his functions during the evening of the porch incident was to write notes of what transpired, he made no notes of this alleged conversation. In short, he did not report this information to any of the Elan staff. Nor did he tell anyone else for several years. He

[46] In asking this question, Attorney Sherman reflected his understanding of earlier trial evidence that the Skakel home had no garage. He made this point in closing argument while discussing Higgins.

testified that fifteen to twenty years after leaving Elan, he told Chuck Seigen, another former Elan resident with whom he had become associated in business. He admitted that, at some point, Kranick informed him that there was a $50,000 reward offered for information regarding the murder and that, thereafter, he called either "A Current Affair" or "America's Most Wanted," but hung up without relating his information. Even though he admitted discussing the reward with Garr when contacted by him, he denied having any interest in receiving any reward. Rather, he said, he testified because when asked, Dorothy Moxley would not release him from his obligation to come forward and because he had been tricked by Garr. Higgins also testified that when Garr contacted him and, that contrary to his initial representations concerning anonymity, Garr taped their phone conversations and ultimately told him he would have to testify. Garr, Higgins acknowledged, introduced the notion that the petitioner may have blacked out during the evening of the murder. While Higgins admitted that he initially lied to Garr about certain aspects of the porch incident, he was consistent in his recitation of what he claimed transpired.

Before the state called Higgins to testify, the state presented Charles Seigen as a witness. Seigen stated that he had been an Elan resident for approximately eighteen months starting in February 1978. He discussed the ferocity of the general meetings and stated, as to a general meeting

involving the petitioner, that the staff was never satisfied with any answer given by the subject of a meeting and that the intent of the meeting was to inflict punishment. He indicated that the petitioner's involvement in the Moxley murder was a pretty well-known fact at Elan and that the petitioner frequently was asked about it. Seigen indicated that, in such circumstances, the petitioner would cry, shake his head and state that he didn't know. Seigen stated that the petitioner had stated that he was drunk, that he had suffered a blackout, and that he had been stumbling. He indicated that sometime after leaving Elan, he spoke with Higgins, who related what the petitioner had said to him. On cross examination, Seigen acknowledged that he never heard the petitioner admit to the murder and that he was shocked by Higgins's claim of a confession because he had never heard one.

As to Higgins, the petitioner claims that Attorney Sherman inadequately attacked his credibility. Specifically, the petitioner claims that Attorney Sherman should have talked in advance of trial with Seigen, and based on Seigen's knowledge of Higgins, should have asked Seigen to testify as to Higgins's general reputation for truthfulness. Seigen testified at the habeas hearing. He indicated that while at Elan, Higgins never stated that the petitioner had made a confession. He indicated that, after Elan, he and Higgins had been in a business relationship for a short period in Chicago and that it had not worked out. He indicated that, at Elan, Higgins was

regarded as a "stool pigeon" and was not viewed as truthful. On cross examination, however, Seigen stated that he formed the opinion in 2000 that Higgins was not a truthful person.

The court is not persuaded by the evidence regarding Higgins that Attorney Sherman could have improved on the petitioner's posture by recalling Seigen as a witness to impeach Higgins's credibility. Indeed, the court's impression of Seigen is that his assessment of Higgins's character appears to have darkened well after their shared time at Elan and may have been motivated by disappointments in their own business and personal relationships. The court finds this claim lacking in merit.

4

Failure to Rebut State's Claim that Placing Petitioner in Elan was Part of Family Cover-up

One of the prosecution's themes during trial was that Rushton, Sr. made efforts to shield the petitioner from the investigative eye of the Greenwich police. Specifically, the state introduced evidence from Littleton that when he got home from school on the day that the victim's body was discovered, there were about twenty lawyers in the house and that on the next day, he took the older Skakel children to the family's ski house in Windham, New York for the weekend at the direction of one of the lawyers. Additionally, the

prosecution strongly implied through its cross examination of former Elan residents and then asserted during closing argument that the petitioner had been sent to Elan by the family as a means to shield him from the police investigation. During the trial, Attorney Sherman dealt with this claim as it related to lawyers at the Skakel home and the departure of some of the children for New York on the day after the victim's body had been discovered. Attorney Sherman elicited testimony from James McKenzie, who had been an associate attorney assigned to the Skakel corporate office in New York City in 1975, that he had been the sole attorney dispatched from New York to the Skakel home and that he was sent there to provide some adult supervision to the children until their father could return from a trip.[47] Attorney Sherman adduced testimony from Lunney, as well, that there was only one lawyer at the Skakel home in the afternoon of October 31, 1975. As to the Windham trip, Littleton acknowledged on cross examination that he had told investigators in 1992 that it had been his idea to take the children to Windham. However, as to the state's claim that the petitioner had been sent by the family to Elan to shield him from the Greenwich police investigation, Attorney Sherman was mute. In

[47] There was trial evidence that Rushton, Sr. was the CEO of a corporation. A widower and father of seven children at home, he employed a housekeeper and chauffeur and, as of the date of the murder, had employed Littleton to serve as a residential tutor.

spite of a trove of information available to him that would have put the lie to this claim, he offered no response to it.

The following additional procedural and factual background is pertinent to this issue. During the evidence portion of the trial, the state attempted to sow the seed that the Skakel family had placed the petitioner in Elan to protect him from the Greenwich police investigation through its effort to place the petitioner's Elan file in evidence and through its cross examination of former Elan patients. On May 20, 2002, during the state's presentation of evidence, Attorney Benedict attempted to place the petitioner's Elan file in evidence. He argued: "There is also, before the Court now, evidence that the defendant's literally paper thin file which consists only of education and employment records as was seized from Elan contrasts drastically with all other files of that era, all of which included, based upon the offer, extensive note taking materials. In addition, it is before the court and the jury, in fact, that evidence that Joseph Ricci was fully aware of the situation vis-a-vis the defendant and involvement in homicide because he confronted the defendant with it in that notorious general meeting. And clearly in 1978, the only way he could have had any such knowledge would have been through the defendant's family which I submit corroborates Dorothy Rogers' testimony of the explanation that defendant gave

her for why he was at Elan."[48] May 17, 2002 Criminal Trial Transcript, pp. 5–6. This argument clearly alerted Attorney Sherman to the state's cover-up theme regarding the petitioner's presence at Elan. The theme continued through the state's cross examination of Elan witnesses and culminated in the state's closing argument. When Sarah Peterson, a former Elan patient, testified for the defense, the state's cross examination included several questions suggesting that Peterson's parents were the likely source of information to Elan concerning her background. Again, during the state's rebuttal examination of Julie Skakel, the petitioner's sister, Attorney Benedict asked her several questions related to the petitioner's having been sent to distant schools after the murder and he asked her whether her father had sent the petitioner to Elan, to which she answered that she did not know.[49] The

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[48] Ricci was the director of Elan. Rogers, who was incarcerated at the time of her May 16, 2002 testimony, stated that the petitioner had told her while they were both patients at Elan that his family had put him there because they were scared he might have committed the murder and they were trying to hide him from the police so the police could not put him in jail.

[49] Apparently, by this point Attorney Sherman understood the implication of questions regarding the Skakel family's role in sending the petitioner to Elan because, on cross examination, he asked Julie Skakel whether the family had sent the petitioner to Elan to hide him from the police. The court sustained the state's objection on the basis that the (continued...)

state's claim that the Skakel family sent the petitioner to Elan to hide him from the police and out of fear culminated in the state's closing argument during which Attorney Benedict said to the jury:

> 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 we can do to make sure this doesn't happen again. And where does that ring the truest, at

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(...continued)
witness had said, on direct, that she did not know who sent the petitioner to Elan.

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 out of that ring until he explained why he killed her and then being forced to wear a sign, confront me on the murder of my neighbor.

Where did Ricci get that information? Certainly 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, because that's what they decided that they had to do with the killer living under their roof.

June 3, 2002 Criminal Trial Transcript, pp. 129–31.[50]

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[50] One of the anomalies of this case is that, in the petitioner's direct appeal, the Supreme Court rejected his argument that this portion of Attorney Benedict's argument was improper. The Supreme Court based its opinion, in part, on the fact that there was evidence to support Attorney Benedict's argument and on its belief that "[t]he police had no contact with Elan officials while the defendant was a student there." *State v. Skakel*, supra, 276 Conn. 759. Apparently, neither (continued...)

(...continued)
counsel informed the court of the several Greenwich police reports available to both the state and Attorney Sherman reflecting that, indeed, there was contact between the Greenwich police and Elan. These reports reveal that there was such contact as early as April 1978. The Greenwich police had received information that the petitioner had been arrested in Windham, New York as a result of a motor vehicle incident and in which he had been charged with unlicensed operation, speeding, failure to comply and driving while intoxicated (DWI) and that, after being presented in court, the petitioner had pleaded guilty to all the charges except the DWI, that the DWI was held in abeyance and that later, on the same day, the petitioner was taken, by plane to a hospital in Maine. Greenwich police reports continue to indicate that on May 12, 1978, Lunney had been in touch with the Auburn, Maine police department which confirmed the petitioner's presence at Elan. A Greenwich police report also notes a subsequent conversation between Attorney Sheridan, a Skakel family lawyer, and (then) Deputy Chief Keegan, in which Sheridan not only confirmed Skakel's presence at Elan but gave Keegan the name of Skakel's doctor and permission for the police to speak with the doctor. The Greenwich police file indicates subsequent direct contacts between Elan and the Greenwich police. There is a report that on November 15, 1978, Lunney spoke with Carmella Cuccero at Elan, who advised him that the petitioner had left Elan by himself. There is a subsequent report dated November 16, 1978, indicating that Mr. Skakel had contacted the Greenwich police and advised that the petitioner had returned to Elan. This report contains, as well, a notation that Lunney spoke with Cuccero at Elan, who confirmed that the petitioner had returned to the facility. Following a November 29, 1978 report that the petitioner had again escaped Elan, there is a report dated December 12, 1978, by Lunney that he contacted Elan and spoke with Staff Supervisor John Overend, who indicated that the petitioner was still at large and, finally, there is a report dated February 26, 1979, indicating that
(continued...)

In the court's view, Attorney Sherman was derelict in his 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. Since the Greenwich police reports were available to him, Attorney Sherman should have known that the Greenwich police had been made well aware of the circumstances of the

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(...continued)
Cuccero had verified that the petitioner had returned to the school on December 13, 1978. On the basis of these reports, it is evident that Attorney Benedict's assertions to the jury that Elan clearly did not get its information regarding the petitioner from the police and that he was sent to Elan to hide from the police could readily have been contradicted. However, because our Supreme Court had already ruled, albeit on inaccurate information, that this argument did not constitute prosecutorial misconduct, the court, *Sferrazza, J.*, ruled on the motion for summary judgment that the petitioner could not claim, in this habeas matter, that counsel failed to object to this argument on the basis of prosecutorial misconduct. That is not to say that the court believes that Attorney Benedict had personal knowledge of the Greenwich police's contact with Elan. To the contrary, based on this court's knowledge of Attorney Benedict's long history of professional service to Connecticut and his reputation for integrity, the court does not believe it is at all likely that he had been made aware of the Greenwich police department's knowledge of the circumstances of the petitioner's admission to Elan or of the Greenwich police department's direct contacts with Elan staff while the petitioner was a resident. Nevertheless, Attorney Benedict is charged with the constructive knowledge of these facts since they were clearly known by the police and, likely, by his own investigative staff, which, the court assumes, was familiar with the contents of the Greenwich police file.

petitioner's admission to Elan and he should have offered evidence in response to the state's false claim in this regard. During the habeas trial, the petitioner testified that he objected to this evidence and he implored Attorney Sherman to counter it. When asked during the habeas trial about his failure to counter the state's claim of cover-up, Attorney Sherman's answers reflected an ignorance of the resources at his hand. If he had read the Greenwich police file, he readily could have questioned Lunney and Keegan about their contacts with the New York and Maine police and their direct contacts with Elan. While the court has no reason to believe either police officer would have denied such contacts, Attorney Sherman could have used the Greenwich police reports to rebut any such suggestion. With the resources available to him, Attorney Sherman could have defeated this false claim during the evidence portion of the trial which, in turn, would have prevented Attorney Benedict from crystalizing the claim in closing argument. Attorney Sherman's failure in this regard was not a matter of tactical choice. It was a negligent omission, a failure of effectiveness.[51]

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[51] The commissioner argues that this precise issue is not properly before the court on the basis that it was not specifically pleaded. In response, the petitioner claims that the issue is contained within a paragraph setting forth a generalized claim of ineffectiveness at trial. On this notice issue, the court agrees with the commissioner. However, as noted, there was testimony on this issue during the habeas trial without objection by the commissioner. Moreover, once the (continued...)

Notwithstanding Attorney Sherman's inexcusable lapse in regard to the state's false claim of cover-up as it related to the reason for the petitioner's presence at Elan and the feigned lack of contact between the Greenwich police and Elan, the court is not convinced that if Attorney Sherman had diligently handled this issue there is a reasonable likelihood the outcome of the trial would have been different. The court views this evidence as tangential to the main issues in the case. In sum, while this theme may have put the Skakel family, and, by inference, the petitioner in a poor light, the court does not believe there is a reasonable likelihood that

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court discovered this issue in its review of the Greenwich police reports and brought its concern to the attention of counsel, the court offered the commissioner an opportunity to open the evidence and to present testimony in response to this claim. The commissioner, however, opted instead to preserve its claim of surprise and prejudice, claiming that Lunney is now deceased and therefore unable to respond. The court finds this position somewhat disingenuous. At the outset, it is the court's view that the Greenwich police reports, in the main, are likely business records to the extent they contain statements made by people charged with making them. See *The Milford Bank v. Phoenix Contracting Group, Inc.*, supra, 143 Conn. App. 536. And, to the extent the reports contain statements from volunteers, Attorney Sherman had these reports well in advance of the trial in time to attempt to track down the declarants. Lastly, since Keegan testified at trial and is, to the court's knowledge, still available, the commissioner could have brought him to the habeas court if, indeed, there could be any point in trying to rebut what the Greenwich police reports clearly reflect.

if Attorney Sherman had effectively dealt with this claim, the outcome of the trial would have been different. Accordingly, the court does not find that the petitioner was prejudiced by Attorney Sherman's lapse in this regard.

5
Failure to Obtain Expert on Coerced Statements

The petitioner claims he was denied the effective assistance of counsel by his trial counsel's failure to present expert testimony on the coercive environment of the rehabilitation facility known as Elan and, specifically, on the unreliability of any inculpatory statements purportedly made by the petitioner regarding the murder in response to the assaultive mode of questioning then prevalent at Elan. The following additional procedural and factual background is relevant to this claim.

In the petitioner's criminal trial, the state presented evidence that the petitioner was admitted to Elan during 1978. At the time, Elan was a residential substance abuse treatment facility located in Poland Springs, Maine.[52] During the trial,

[52] As noted infra, the jury did not hear testimony that the petitioner had been charged with several motor vehicle violations in Windham, that he pleaded guilty to all the charges except the charge of DWI, and that the DWI charge was held in abeyance while the petitioner was taken in handcuffs to Elan. Rather, the jury was given the impression from the state that (continued...)

the state presented testimony from Elan residents. Charles Seigen stated that he had been a resident during the petitioner's stay at Elan and that he had attended a general meeting of approximately one hundred residents after the petitioner had returned from having run away. At this meeting, Seigen stated, Elan's director, Joseph Ricci, pummeled the petitioner with the accusation that he had murdered the victim, and that Ricci "sort of" announced the petitioner's involvement in the murder. He further stated that in response to Ricci's assaultive questioning, the petitioner cried, shook his head and stated that he didn't know if he had committed the murder and that he had been very drunk and had suffered a blackout. On cross examination, Seigen acknowledged that he never heard the petitioner state that he had committed the murder. He offered, however, that another patient, John Higgins, told him that the petitioner had made such an admission privately to him while at Elan. Seigen stated that he was shocked by Higgins's claim because he had not personally ever heard the petitioner directly admit the murder. The state also called Dorothy Rogers, a former Elan patient who, at the time of her testimony, was incarcerated. She testified that when she spoke with the petitioner at Elan, he told her that on the night of the murder he had been drinking and that he could not remember what he

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(...continued)
the petitioner was sent to Elan by his family to avoid the investigative spotlight of the Greenwich police.

had done that evening. She testified, as well, that the petitioner told her that his family had put him in Elan to hide him from the police because they were scared that he might have committed the murder. On cross, Rogers admitted that the petitioner never told her that he had committed the murder. She stated, as well, that in a group session, people were trying to get the petitioner to admit that he had committed the murder.

Former Elan patient John Higgins also testified. As discussed in the preceding section of this decision, Higgins testified as to a conversation with the petitioner, during which the petitioner discussed blacking out on the night of the victim's murder, and made a progression of statements, including statements that he didn't know whether he had committed the murder, that he may have done it, that he didn't know what happened, that he did do it and that he must have done it. The state also called Elizabeth Arnold to testify. Arnold stated that she had been a resident at Elan in 1978 and 1979, and that she had participated in group sessions with the petitioner at which he had stated that he didn't know what happened on the evening of the murder, that he had been very drunk and that he had blacked out. She stated that the petitioner had indicated that he did not know if he had committed the murder or if his brother had. Arnold indicated that, later, in a private conversation with her, the petitioner told her that he didn't know if he had committed the murder but that he may have done so.

On cross examination, Arnold acknowledged the brutality of the general meeting after the petitioner had been returned from an escape, and that the petitioner had been placed in a boxing ring and assaulted by other patients.

Another former Elan resident, Alice Dunn, testified for the state that she attended the general meeting after the petitioner had been returned from an escape at which Elan's director, Ricci, brought up the murder, and that Ricci was verbally assaultive in his questioning about it. Dunn testified that later that same day she had a private conversation with the petitioner during which he told her he didn't know what happened on the night of the murder. When she testified on direct that the petitioner did not admit to having committed the murder, the court permitted the state to introduce her prior grand jury testimony in which she had testified that the petitioner told her that he might have done it. Dunn testified, as well, that after the petitioner had been returned from his escape he was required, for a substantial period of time, to wear a sign that read: "Confront me on why I murdered Martha Moxley." Finally, as to Elan, the state presented the testimony of Gregory Coleman.[53] As discussed infra,

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[53] The record reflects that Coleman initially testified before the grand jury and then at the Superior Court for Juvenile Matters on June 20, 2000, in conjunction with a hearing on whether there was reasonable cause to transfer the case to the adult docket. Coleman also testified at the probable cause hearing once the matter had been transferred. Because (continued...)

Coleman testified that the petitioner had confessed to the victim's murder while they were at Elan in the presence of Simpson, Grubin or James, one of whom, he claimed, also heard the confession.

On the basis of the state's claims that the petitioner made admissions while residing at Elan, the petitioner asserts that his trial counsel should have introduced expert testimony concerning Elan's coercive means with the intent of persuading the jury that any statements purportedly made by the petitioner in this environment would be unreliable. Toward that end, the petitioner offered the testimony of Richard Ofshe, Ph.D. at the habeas hearing. Dr. Ofshe, who is now a professor emeritus in the department of sociology at the University of California, Berkeley, holds a doctorate in sociology from Stanford University. In 1979, he was awarded a Pulitzer Prize for public service for work he did as a member of a team that investigated and reported on the influence and behavior control methods (then) being used by a substance abuse treatment program known as Synanon in conjunction with various government charges then being brought against Synanon. In summary, Dr. Ofshe testified that based

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Coleman died in August 2001, between the date of the probable cause hearing and the trial, his hearing on probable cause testimony was admitted on the basis of his unavailability. As noted, infra, in Coleman's absence, (then) Deputy Chief State's Attorney Christopher Morano, acted in his stead by reading his prior testimony before the jury.

on his preliminary study of Elan, he believed that it was patterned after Synanon in regard to the methods utilized at Elan to control residents and to attempt to conform their behaviors, and that Elan may have been even more violent than Synanon in its coercive manner. He indicated that if he had been asked to testify at the petitioner's underlying criminal trial, he would have explained that the purpose of coercive questioning of a resident was not to solicit truthfulness, but rather to achieve submissiveness and conformity to program rules. In Dr. Ofshe's opinion, without interpretation by an expert such as himself, jurors would be unlikely to understand that the principal goal of Elan's program was to break a resident's resistance to the program, to teach him to conform and that the best way to achieve such conformity would be to accede to accusations, even at the expense of honesty, if that was the only means of achieving the appearance of conformity. Dr. Ofshe also stated that Elan, like Synanon, used residents to monitor and report the behaviors of one another, and therefore, if a resident had admitted to past criminal behavior, the person to whom the admission was made would be expected, even required, to immediately report the admission to the staff. Thus, Dr. Ofshe stated, the fact that a former resident now admits that he or she did not report any alleged admission should make a factfinder suspicious that any such admission ever took place.

In support of his claim that Attorney Sherman should have presented expert testimony regarding Elan's coercive and abusive program and its goal of subjugating residents to program rules, the petitioner points, as well, to instances in the trial in which the court did not permit Attorney Sherman to pose questions to Elan residents about the program beyond incidents directly involving the petitioner.[54]

At the habeas trial, 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. In making this choice, Attorney Sherman missed the point. In the court's view, reasonably diligent counsel would have sought to introduce the testimony of an expert such as Dr. Ofshe because such testimony, if admissible, would have been helpful in setting the temper and tone of Elan for the jury.[55] Such testimony also would have put the

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[54] Indeed, the trial record supports Dr. Ofshe's testimony in this regard. On more than one occasion when Attorney Sherman attempted to elicit testimony from a former Elan resident as to Elan's general approach toward residents regarding the purposes of general and group meetings, the court prevented a response and instructed Attorney Sherman to confine his questioning to occurrences directly involving the petitioner.

[55] While Dr. Ofshe has testified in more than one hundred cases involving coerced confessions by the police, he has not similarly testified to the effect of non-police coercive techniques. Nevertheless, in the court's view, Dr. Ofshe's (continued...)

petitioner's ambiguous and arguably inculpatory statements allegedly made at group sessions into a different context. As admitted, the jury could have seen these statements as buttressing the claims made by Coleman and Higgins of more direct admissions. Put in context, however, Attorney Sherman could have argued that these statements spoke only of the violent and coercive nature of Elan. By giving the jury an understanding that the purpose of aggressive and coercive accusations was not to obtain truthful answers but, rather, to subjugate the petitioner to the program's control, Attorney Sherman could have given the jury an insight not gleaned from the testimony permitted from individual residents. However, Dr. Ofshe acknowledged that his expertise would not have permitted him to opine on the truthfulness of the petitioner's alleged responses to individual questioning away from a group setting; nor would it have provided an explanation for his claimed direct

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expertise on Synanon and its striking similarities to Elan would likely have qualified him to testify concerning the program's overall approach, including its focus on control and subjugation and, in particular, 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. If permitted, however, it is highly likely that a court would provide a limiting instruction that Dr. Ofshe's testimony is not offered to impeach the credibility of other witnesses or to assess their truthfulness. Such a limiting instruction, no doubt, would lessen the value of this testimony to the defense.

admissions to Coleman or Higgins. Dr. Ofshe testified, as well, that his assessment of the Elan program and, in particular, a resident's responses to a coercive verbal assault, would not encompass a resident's narrative report of a past event. Thus, his insights would not have been of particular use in helping the jury assess the accuracy or reliability of the reports of the petitioner's alleged narrations of the events of October 30, 1975. Accordingly, the court concludes, while Dr. Ofshe's explanation of Elan's program would have established a context for the jury's understanding of Elan and likely the petitioner's responses during general meetings, his testimony would have assisted the jury in evaluating Coleman's and Higgins's claims only to the extent that their failures to contemporaneously report these alleged admissions would have, itself, been a violation of the rules requiring peers to report on one another. The court is not convinced that there is a reasonable likelihood that expert testimony thus limited would have led to a beneficial outcome for the petitioner.

6

Ineffective Jury Selection

The petitioner claims that defense counsel's performance during jury selection was constitutionally deficient. Specifically, the petitioner claims that there was no reasonable basis for Attorney Sherman to have selected two particular jurors, each of whom the petitioner claims evinced

sufficient bias to have been disqualified from jury service. The petitioner claims, as well, that he was prejudiced by Attorney Sherman's selection of these jurors.

The following undisputed procedural history and facts are relevant to the petitioner's jury selection claims. Jury selection commenced on April 2, 2002, and was completed on April 24, 2002. On April 4, 2002, Bryan Wood was selected as the fourth juror. By that time, Attorney Sherman had exercised three peremptory challenges of the nineteen the court had made available to each side. During individual voir dire, Wood indicated that he had known Attorney Sherman for approximately ten years. He testified that he was a serving police officer with the Darien police department. He offered that he knew and liked Detective Lunney whom he had known for four to five years as they belonged to the same motorcycle club. Additionally, Wood offered the information that a criminal client of Attorney Sherman's had assaulted him and that when Attorney Sherman applied for and received acceleration for his client, Wood opposed it. When Wood responded in the affirmative to Attorney Sherman's question of whether he had obtained accelerated rehabilitation for his client, Attorney Sherman quipped: "Yeah, I knew that. I just wanted them to hear that." Wood acknowledged, as well, that Attorney Sherman had cross examined his wife in an unrelated case. When asked whether Wood's wife was angry with Attorney Sherman as a consequence of that occurrence, Wood

responded: “No, she knows your reputation, but no, she wasn't angry.” During his voir dire of Wood, Attorney Sherman also indicated that the state would be calling Dr. Henry Lee as an expert witness and asked Wood if he would give extra weight to Dr. Lee's testimony on the basis of his reputation. Wood responded that he may have heard a lecture by Dr. Lee. When asked if he could impartially assess Dr. Lee's testimony, he indicated that he thought he would give Dr. Lee's testimony some weight but stated, as well, his anticipation that the defense would be calling its own expert. Attorney Sherman responded by indicating that, indeed, the defense would not offer expert testimony to rebut Dr. Lee. Ultimately, Wood indicated that he would assess Dr. Lee's testimony as he would the testimony of any other witness. He indicated, as well, that he could be fair if seated as a juror in this case.

On April 9, 2002, Laura Copeland was questioned as a potential juror. At this junction, five jurors had been selected; Attorney Sherman had utilized three peremptory challenges. On questioning, Copeland indicated that her good friend's mother knew Dorothy Moxley, but she had never met Mrs. Moxley. She indicated that she thought it would be a little awkward for her to explain an acquittal to her friend and that she might feel defensive about an acquittal, given her mother's friendship with Mrs. Moxley. She also indicated that a friend's father had been murdered and she testified that it could be difficult for her, as a juror, to separate herself from feelings

that might arise because her oldest child and the victim were the same age. When asked how she would separate herself from her feelings, she responded, “I don't know that I can. It's a huge part of who I am.” Nevertheless, she asserted that she believed she could be fair and impartial if selected as a juror.

On behalf of the petitioner, Attorney Fitzpatrick testified that there was no reasonable basis for the selection of these two jurors. In essence, he claimed that their selection by Attorney Sherman had been whimsical. The court agrees with respect to Wood; the choice of Copeland, however, presents a closer question.

The sixth amendment to the United States constitution provides that in all criminal prosecutions the defendant has the right to a jury trial, a right made applicable to the states through the fourteenth amendment of the constitution. See *State v. Labrec*, 270 Conn. 548, 854 A.2d 1 (2004). Additionally, the right to a fair trial includes the right to a body of impartial jurors. See *Gentile v. State Bar of Nevada*, 501 U.S. 10:0030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). As noted by the United States Court of Appeals for the Sixth Circuit, “[a]mong the most essential responsibilities of defense counsel is to protect his client's constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense.” *Miller v. Francis*,

269 F.3d 609, 615 (6th Cir.2001), cert. denied, 535 U.S. 10:0011, 122 S.Ct. 1592, 152 L.Ed.2d 509 (2002). That said, the court recognizes that whether or not to exercise a peremptory challenge regarding a particular jury is best viewed as a matter of trial strategy best left to the judgment of the defendant and his counsel. One court has opined: "Where counsel is alleged to have provided ineffective assistance by virtue of a tactical or strategic judgment claimed to have been erroneous, that judgment must have been 'manifestly unreasonable' before there will be relief from conviction." *Commonwealth v. Myers*, 51 Mass.App.Ct. 627, 632, 748 N.E.2d 471 (2001). This rubric seems particularly applicable to jury selection which, to be successful, requires more of a sixth sense and the use of intuition than perhaps any other part of trial conduct. Where there is a reasonable justification for seating a juror, therefore, courts should not second guess the decision of counsel to do so. The court views the seating of Copeland in that context. While many defense lawyers may well have asked that she be excused or, that failing, exercised a peremptory challenge, Attorney Sherman's instincts that she could be fair and impartial, if selected, were supported by the colloquy during voir dire during which she evinced that internal struggle as well as her commitment to fairness. While Copeland's answers reflected a tension between her personal sensitivities and the objective requirements of service, Attorney Sherman could reasonably have concluded that he could rely on her integrity and

spoken commitment to follow the court's instructions. The court does not find that Attorney Sherman's acceptance of Copeland as a juror was constitutionally deficient.

As to Wood, however, Attorney Sherman's acceptance of him as a juror stretches the normal deference accorded counsel in this arena beyond its reasonable bounds. Like Attorney Fitzpatrick, this court can find no reasonable basis for Attorney Sherman to have taken a chance with this potential juror. Indeed, the court believes that based on Wood's answers to Attorney Sherman's questions, there is a substantial likelihood the court would have excused him for cause upon request.[56] That failing, Attorney Sherman had an abundance of peremptory challenges available to him at that juncture in the process. While the court gives great deference to counsel's determinations in the jury selection process, they must be grounded in more than whim or hubris.

To obtain relief in a claim of ineffective assistance during jury selection, however, a petitioner carries a particularly heavy burden of demonstrating that the juror selected was biased against the defendant. While the court has found no Connecticut appellate

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[56] It is interesting to note that in questioning Wood, Attorney Sherman went first. Following Attorney Sherman, Attorney Benedict's questioning was neither probing nor exhaustive, consuming two pages of transcript.

decisional law directly on point, opinions from other jurisdictions are helpful. An appellate court in Utah has opined that in order to satisfy the prejudice prong of *Strickland* in a claim of ineffective assistance regarding jury selection, a petitioner must show that trial counsel's actions “allowed the seating of an actually biased juror.” (Internal quotation marks omitted.) *State v. Arriaga*, 288 P.3d 588, 591 (Utah App.2012), cert. denied, 298 P.3d 69 (Utah 2013). See also *Burton v. State*, Docket No. CR 09–892, 2011 Ark. LEXIS 458 (Ark. September 15, 2011). To prevail on an allegation of ineffective assistance of counsel with regard to jury selection, a petitioner first has the heavy burden of overcoming the presumption that jurors are unbiased. To accomplish this, a petitioner must demonstrate actual bias, and the actual bias must have been sufficient to prejudice the petitioner to the degree that he was denied a fair trial.” *Burton v. State*, supra, 2011 Ark. LEXIS 458, *2–3. In this instance, while Wood's friendship with Lunney, a fellow police officer and significant state's witness, Wood's evident admiration of Dr. Lee and his less than pleasant interactions with Attorney Sherman over a period of time, shone brightly the red lights that should have prompted Attorney Sherman to seek his recusal, the trial record does not reveal that Wood was actually prejudiced against the petitioner.[57] Indeed, Wood

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[57] As to Wood's relationship to Lunney, since Attorney Sherman had access to the Greenwich police file, he knew, or should have known, that Lunney had played a significant role (continued...)

stated his belief that he could be fair and suggested that even though he would likely not pick himself as a juror if in Attorney Sherman's shoes because of the presumed bias against police officers in criminal cases, he believed that he could act independently of those influences. Since the petitioner has failed to demonstrate that Wood was actually biased against him, his jury selection claim fails for want of prejudice.[58]

(...continued)
in the police investigation. Attorney Sherman, therefore, could readily have anticipated that Lunney would be an important witness for the state at trial.

[58] In some jurisdictions, courts appear willing to impute juror bias on the basis of a juror's close ties to the prosecution. For example, the Colorado Supreme Court has recognized two forms of bias in potential jurors: "Bias in fact or bias conclusively presumed as a matter of law." *People v. Macrander*, 828 P.2d 234, 239 (Colo.1992). The Colorado court distinguished the two forms of bias in this manner: "The latter form of bias is rooted in the potential juror's relationships or circumstances ... while actual bias is a state of mind that prevents a juror from deciding the case impartially and without prejudice to a substantial right of one of the parties." (Citation omitted; internal citations omitted.) *People v. Pena–Rodriguez*, Docket No. 11CA0034, 2012 Colo.App. LEXIS 1836, *26, 2012 WL 5457362 (Colo.App. November 8, 2012). Accordingly, the Colorado Appellate Court has determined that actual bias should be found in a situation in which a juror has a "close association with not only the law enforcement establishment, but also with this crime scene, and with the co-employee who had attended to this murder victim." *People v. Rogers*, 690 P.2d 886, 888 (Colo.App.1984). In similar vein, the Oklahoma Supreme Court has opined: "The law recognizes that
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prospective jurors may be excused for either implied bias or actual bias. Bias is implied for any of several statutory grounds, generally involving some relation between the prospective juror and the defendant or complaining witness, or the juror's prior involvement with the case itself." *Underwood v. State*, 252 P.3d 221, 255 (Okla.App.2011), cert. denied, —— U.S. ——, 132 S.Ct. 1019, 181 L.Ed.2d 752 (2012). Considering a claim of ineffective assistance of counsel during jury selection, the United States Court of Appeals for the Sixth Circuit observed: "[B]ias may be actual or implied. Actual bias is bias in fact-the existence of a state of mind that leads to an inference that the person will not act with impartiality. The doctrine of presumed or implied, as opposed to actual, bias provides that, in certain 'extreme' or 'exceptional' cases, courts should employ a conclusive presumption that a juror is biased. We may presume bias only where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances. Examples of such a relationship are that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Treesh v. Bagley*, 612 F.3d 424, 437 (6th Cir.2012). To the contrary, see *State v. King*, 190 P.3d 1283 (Utah 2008), in which the Utah Supreme Court appears to reject the notion of implied bias based on a prospective juror's relationships or situation. Since this court has found no pertinent Connecticut Appellate guidance on the question of whether Connecticut recognizes the doctrine of implied bias, this court declines to assess whether such an imputation should be made as to Wood on the basis of his friendship with Lunney, his esteem for Dr. Lee, and his somewhat turbulent relationship with Attorney Sherman. To do so, in this court's view, would be disrespectful to Wood who,
(continued...)

Failure to Cross Examine Frank Garr on Book Deal

The petitioner asserts that trial counsel was ineffective on the basis of his claim that counsel failed adequately to pursue evidence that Frank Garr had a financial interest in the successful prosecution of the petitioner in the underlying criminal trial. The petitioner's reasoning in this regard is that if trial counsel had pursued this avenue of evidence, he could have demonstrated that Garr had a financial interest in the outcome of the case and that, if proven, this financial interest would have sufficiently undermined the credibility of the prosecution that it is reasonably likely he would have been acquitted. The following facts and procedural history are pertinent to this claim.

In 1975, Garr was a dispatcher with the Greenwich police and later, as a detective, he became involved in the Moxley murder investigation. After retiring from the Greenwich police, Garr became an inspector, and ultimately chief inspector, in the Bridgeport State's Attorney's office. In 1995, he met Leonard Levitt, a reporter who was then working on a story regarding the murder investigation. Soon thereafter, they became close

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in fact, expressed his belief and commitment to impartiality in spite of his significant connections to key players in the trial.

friends. Prior to the trial, on May 21, 2001, Attorney Sherman filed a discovery motion requesting disclosure of any information that any agent of the state had a "pecuniary or other interest in the development and/or outcome of this case, including, but not limited to, any contract, agreement, or on-going negotiations, which relate to the preparation of any book ..." See *Skakel v. State*, supra, 295 Conn. 503. As noted by the Supreme Court, the trial court denied the motion as written but granted it as to the state's witnesses. Later, during the course of the criminal trial, Garr testified outside the presence of the jury. When he was asked by Attorney Sherman whether he had a book deal, the state objected on relevancy grounds. In response, Attorney Sherman did not pursue the question. At the habeas hearing, he claimed that, in response to his question to Garr, the court "glared" at him, an indication Attorney Sherman took as disapproval of his question. In spite of having received information that Garr was planning to write a book about his successful investigation and pursuit of the petitioner from others, Attorney Sherman made no offer of proof; nor did he attempt to elicit testimony from any of these individuals in this regard.[59] Subsequently, in 2004,

[59] Attorney Sherman testified that he had heard from Dominick Donne, Mark Fuhrman and Leonard Levitt that Garr was planning to write a book. At the time, Donne was a writer who had written a magazine article regarding the investigation. Fuhrman, the former Los Angeles detective of O.J. Simpson infamy, published a book in 1998 entitled Murder in Greenwich, in which he, generally, excoriated the Greenwich (continued...)

Levitt published a book, Conviction, Solving the Moxley Murder, in which he repeatedly praised Garr for his leadership in pursuing and securing the conviction of the petitioner. In the book, Levitt stated that when Mark Fuhrman's book was published in 1998, pointing to the petitioner as the murderer and sharply criticizing the Greenwich police for its claimed incompetence, he and Garr were upset and they formed a pact to tell their story. And they did. "Conviction," which was made an exhibit in the habeas hearing, is, in essence, a paean to Garr and his steadfast pursuit of the petitioner in the face of resistance from others in the State's Attorney's office. While, at the habeas hearing, Garr denied that he had entered into a firm agreement with Levitt before the trial, he did acknowledge that Levitt had asked him before the trial if he would work with him on a book and, in response, Garr indicated that he probably would but not until the trial was completed. He indicated, as well, that he never contemplated making any money from the venture. Documents submitted at the habeas trial shed doubt on that claim. They reflect that Garr and Levitt were separately represented by counsel in conjunction with the preparation and execution of a book publishing agreement ultimately executed by

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police for its ineffectual investigation and undue deference to the Skakel family and in which he pointed the finger at the petitioner as the likely culprit. Levitt, as noted, was a reporter who became close to Garr in the course of the investigation.

them in February 2003. Garr's legal fees in regard to the contract were $2,100. The contract, negotiated at arm's length, provides that although Levitt would be the book's sole author, Garr would "cooperate in providing and confirming facts and information in support of Levitt's writing of The Book." The agreement provided, as well, that Garr and Levitt would equally share net proceeds from the sale of the book. Garr's role as the fact checker was confirmed by Levitt in his habeas testimony.[60]

On the basis of this record, the petitioner claims that Attorney Sherman was ineffective in not pursuing evidence that Garr had a book deal with Levitt at the time of the trial and that, through it, he had a financial stake in the trial's outcome. This

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[60] Notwithstanding his role as fact checker and proofreader, Garr disputes the statements in Levitt's book that he harassed and threatened trial witnesses and that he and Levitt had formed a pact in 1998 to tell their own story. He also disputes statements attributed to him reflecting an animus toward the Skakel family. He acknowledged, nevertheless, that he did not ask Levitt to delete or amend these portions of the book as it went to publication. While the court finds this testimony troublesome, the court is mindful that, at the time of the pretrial hearing, Attorney Sherman did not have the benefit of Levitt's assertion that the two had formed a pact as early as 1998 to tell their story. While the court believes that Levitt and Garr likely had a mutual understanding before the trial that they would undertake a book, the court has no reason to believe that Attorney Sherman would have been able to extract this information from Garr with any more forthrightness than was displayed during the habeas trial.

claim, however, is a perfect example of the danger of relying on after occurring events to assess trial counsel's conduct. Certainly Attorney Sherman should have pursued questioning Garr as proof that Garr had a financial interest in the outcome of the case; if obtainable, it would have been helpful to the defense. Even if the trial judge had signaled by facial expression that counsel should not pursue this line of inquiry, it is not the role of counsel to be cowed by judicial stares. Lawyers argue and judges rule. None of Attorney Sherman's behavior at trial suggests that he was cowed by the court or, in any way, treated unfairly by the court. The difficulty with this claim, however, is the uncertain response of Garr had he been pursued by Attorney Sherman. At the habeas trial, Garr denied that he had a book agreement with Levitt before the trial. He denied, as well, that he even had a tacit understanding to collaborate in a book notwithstanding Levitt's testimony affirming the statement in his book that he and Garr had formed a pact in 1998 to "tell their story." And, in considering this claim, the court cannot rely on later-occurring events which support the supposition that the pact Garr and Levitt formed in 1998 did, indeed, amount to a tacit understanding which was made concrete by the parties' 2003 contract. Also, the court cannot know with any degree of certitude what evidence Attorney Sherman could have adduced from Levitt or other witnesses in this regard in the spring of 2002. While Levitt revealed, after the petitioner's underlying criminal trial, that he and Garr had formed a pact in 1998 to

tell their story, that information was not available to Attorney Sherman at the time of trial. And, while Attorney Sherman indicated that he had heard rumors to this effect from others, including the writer Timothy Dumas, Dumas testified at the habeas trial that he had no information that Garr had a book deal prior to the trial. Thus, his testimony, even if solicited by Attorney Sherman, would have been to no avail.[61]

Finally, in regard to this issue, the court agrees with the suggestion by the commissioner that there is no evidence that Garr's conduct as an inspector for the State's Attorney's office was motivated by financial interest. That he was zealous in his pursuit of the petitioner and, at times, may have been dismissive of information pointing in another direction may speak to his single-minded pursuit of the petitioner. The court does not, however, attribute Garr's ardor to an interest in reaping a financial reward from his venture with Levitt. As a consequence, although evidence of the evolution of Garr and Levitt's personal and professional

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[61] Attorney Sherman indicated that in addition to hearing from Dumas that Levitt and Garr were writing a book, he heard a similar claim from the writer, Dominick Dunne. By the time of the habeas hearing, Dunne had died. Thus, this court is left with the testimony of Garr denying that any such agreement had been reached, Dumas who had no knowledge of such an arrangement and Levitt who acknowledged that the two had formed a pact in 1998 but had not discussed any financial arrangement until after the petitioner's conviction.

relationship and of their shared disdain for the Skakel family may reflect a single-minded commitment to the petitioner's conviction, this evidence falls short of demonstrating that, at the time of trial, Garr had a financial stake in the outcome of the petitioner's trial.

8
Failure to Suppress Hoffman Tapes

The petitioner claims that he was denied the effective assistance of counsel on the basis of Attorney Sherman's failure to seek and obtain suppression of certain tapes seized by the state from Richard Hoffman. The following additional information and procedural history is relevant to the court's consideration of this claim. In late 1997, the petitioner decided to write a book relating to the Moxley murder. For this purpose he entered into agreements with Richard Hoffman, (then) of Cambridge, Massachusetts, for Hoffman to serve as his ghost writer. One agreement, signed by the parties on March 18, 1998, set forth their respective rights and responsibilities regarding the project. The second agreement, dated and signed January 1, 1998, is styled "Confidentiality Agreement" and provides, inter alia: "2. I agree that copyright in any photograph, video tape, film, audio tape, or any other recorded sound or image, made or fixed by me, at any time during my association with [the petitioner], of any family, employees, accountants, attorneys and others involved in [the petitioner's] memoir vests

solely and exclusively in [the petitioner]." As part of this project, Hoffman and the petitioner spent several hours together during which Hoffman, on some occasions, made tapes of the petitioner's recounting the events of October 30, 1975, and the days leading up to it. During roughly the same time period, an investigatory grand jury was taking evidence into the death of Martha Moxley.[62]

Upon receiving reliable information of the Hoffman–Skakel arrangement, Attorney Benedict filed an application with the grand jury regarding Hoffman. As part of the application, Attorney Benedict represented his belief that Hoffman likely was in possession of materials used in conjunction with the development of the book, including, inter alia, audio and video tapes of conversations with the petitioner. Attorney Benedict's application asked the court to issue a certificate to Massachusetts setting forth that Hoffman is a material and necessary witness in the grand jury proceedings, and requesting that the Massachusetts Court order Hoffman to appear before the Massachusetts court for a hearing "to determine whether the Massachusetts Court should issue a summons directing him to appear and testify as requested." Attached to the application was a "Petition for Order to Show Cause," in which Attorney Benedict asked for an order "directing Richard Hoffman to attend

[62] As noted, infra, the grand jury proceedings took place pursuant to Connecticut General Statutes § 54–47b et seq.

with the requested records and testify in the grand jury investigation at the time and place set forth in this petition." Finally, in this packet of documents, there was an interstate summons, intended to be signed by a Massachusetts judge, ordering Hoffman to appear before the grand jury in Connecticut with the requested records. Significantly, nowhere in this application did Attorney Benedict ask the court to order Hoffman to turn any materials over to any authorities. The commissioner has provided this court with no evidence that Hoffman was, at any time, ordered by any authority to part with any of the materials in his possession as a consequence of his book agreement with the petitioner.

Hoffman, now a writer in residence at Emerson College in Boston, credibly testified at the habeas hearing that in January of 1999, Garr showed up at his Cambridge residence with "one large, beefy, full-dress, uniformed state policeman," April 18, 2013 Habeas Trial Transcript, p. 95; and informed him that he was there to obtain the materials in Hoffman's possession relating to his book arrangement with the petitioner. As Hoffman credibly testified, Garr stated in so many words that he was here to get the materials, and they could do this the easy way or the hard way, but that he was not leaving without the materials. Believing himself to be a dutiful citizen, Hoffman turned the materials in his possession over to Garr. These materials included tapes of his interviews of the petitioner and the petitioner's recounting of the events of October

30, 1975, in Belle Haven. Hoffman indicated that while Garr had documents with him, he did not read them. He had no understanding that the documentation brought by Garr only required him to attend the grand jury in possession of the papers. Garr prepared an inventory of items received from Hoffman on January 20, 1999. Notably absent from this list were the tapes of the petitioner's conversations with Hoffman, tapes that Garr took with him. At the habeas hearing, Garr had no explanation for their absence from the inventory he prepared. Subsequently, at the petitioner's criminal trial, these tapes were put to beneficial use by the state.[63]

Based on this historical record, the petitioner claims that he was denied the effective assistance of counsel on the basis that Attorney Sherman made no effort to suppress the tapes. In response, Attorney Sherman testified at the habeas hearing he did not believe he had standing to file a motion responsive to the seizure of these tapes. He reasoned that since he did not represent Hoffman, and the tapes were taken from Hoffman, he would have no standing to protest their seizure. In making this assertion, it is clear that Attorney Sherman was not aware that Hoffman

[63] During the state's closing argument, Attorney Benedict played these tapes to the jury while juxtaposing photographs of the victim. In the tapes, Skakel can be heard describing, in detail, leaving his room after 11 p.m. and going to the Moxley house where, he stated, he climbed a tree and masturbated, after which he returned home with great stealth.

and the petitioner had entered into a confidentiality agreement which specified, inter alia, that the petitioner retained ownership of any materials generated in the course of his dealings with Hoffman. It is equally apparent that Attorney Sherman made no effort to learn whether he had a basis for seeking to suppress the materials seized from Hoffman by Garr.

In this court's view, the agreement executed between Hoffman and the petitioner providing for confidentiality and continued sole and exclusive ownership of materials by the petitioner would have given Attorney Sherman standing to contest their seizure by Garr. In sum, Attorney Sherman was incorrect in his unstudied view that he would have no standing to make such an argument. His performance was deficient in this regard as it appears that it did not even occur to him to attempt to suppress the utilization of these seized materials at trial.[64]

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[64] In his post-trial brief, the petitioner asserts that Attorney Sherman should have sought to intervene in the grand jury proceeding in order to seek suppression of the tapes. The petitioner claims, as well, that Attorney Sherman should have moved to suppress the tapes at trial. While the court is not confident that the petitioner would have been granted intervener status at the investigatory stage of a grand jury proceeding, the court believes that the petitioner, as the apparent owner of the tapes, would have had standing to seek their suppression in the criminal proceedings following his arrest.

The more difficult question is whether Attorney Sherman would have succeeded and, if so, whether there is a reasonable likelihood that the outcome of the trial would have been different without the use of the tapes.

Although the court believes that Attorney Sherman should have made the effort, the court does not have confidence his effort would have been successful. At the outset, the court believes the seizure by Garr was unlawful. Acting as an agent of the state, indeed, as an arm of the prosecution, Garr intimidated and coerced Hoffman into giving him these materials when Hoffman was not legally required to do so. While, at the habeas hearing, Garr attempted to say that he thought the court documentation in his hand required Hoffman to give him the materials, the court discounts that testimony as disingenuous. Even assuming that Garr did not understand the import of the papers he carried with him, one's ignorance doesn't justify an unlawful seizure. “The fourth amendment protects against unreasonable seizures of an individual's property. [T]o state a constitutional violation, the [plaintiff] must allege (1) [the officer's] conduct constituted a seizure, and (2) the seizure, if one occurred, was unreasonable ... A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property ... If a seizure has occurred, then the court must engage in a complex inquiry to determine whether that seizure was reasonable.” (Citations

omitted, internal quotation marks omitted.) *Fleming v. Bridgeport*, 284 Conn. 502, 520, 935 A.2d 126 (2007).

The difficulty with the petitioner's position is this court's belief that the material would ultimately be discoverable by the grand juror. In other words, even if Attorney Sherman had argued for their return and suppression, this court does not believe there is a reasonable probability that such a motion would have been granted. The 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.

Accordingly, notwithstanding Attorney Sherman's inexcusable inaction regarding this violation, this court does not believe there is a reasonable probability that the court would have suppressed this information in response to its unlawful seizure by Garr. Therefore, the court finds no basis for concluding that if Attorney Sherman had acted diligently in regard to the Hoffman materials, there is a reasonable likelihood that the outcome of the petitioner's criminal trial would have been different.

9
Closing Argument

The petitioner claims that he was denied the effective assistance of counsel as a consequence of trial counsel's deficient closing argument. In support of this claim, Attorney Fitzpatrick asserted that Attorney Sherman's closing argument was one of the poorest he had seen in his career. Specifically, he stated that Attorney Sherman had failed, ever, to argue or, even, to mention the state's burden to prove the petitioner's guilt beyond a reasonable doubt or to remind the jury of the meaning of the presumption of innocence. As noted, supra, Attorney Fitzpatrick asserted that Attorney Sherman essentially eviscerated the third-party claim against Littleton by telling the jury he had no idea whether Littleton had committed the murder and that it was outrageous for Attorney Sherman to have told the jury that he felt badly for Littleton. Attorney Fitzpatrick criticized Attorney Sherman for "bragging" to the jury that he had no expert testimony in response to the state's expert evidence, and he criticized Attorney Sherman for giving his personal opinions about witnesses in several instances. Finally, he assailed Attorney Sherman's failure to address specific areas of evidence which Attorney Fitzpatrick thought should have been addressed.

The record supports Attorney Fitzpatrick's assessment of Attorney Sherman's closing argument. It was disjointed, unfocused, and, at times, improper. In addition to his failure to provide the jury a road map to an understanding of the state's burden of

proof and the absence of a corollary burden in the defendant, his failure to explain the relevance of the third-party culpability evidence to the issue of reasonable doubt, and his failure to discuss other specific areas of evidence as pointed out by Attorney Fitzpatrick, the record also demonstrates that Attorney Sherman 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 1990s. 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 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. 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. Finally, as to Attorney Sherman's handling of the evidence in closing, and as noted infra, Attorney Sherman completely failed 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.

Attorney Sherman also made improper comments during closing argument. On two occasions, the court, sua sponte, interrupted Attorney Sherman in the presence of the jury to caution him and to instruct the jury to disregard his argument. Additionally, after closing arguments by both counsel and at the request of the prosecution, the court gave the following instruction to the jury at the beginning of its jury charge:

> All right; good afternoon, again, ladies and gentlemen. Ladies and gentlemen, I am going to begin my charge in just a moment but before I do, the state has filed a motion for curative instruction concerning certain parts of defense counsel's argument to you which I have granted to the following extent.
>
> I am going to ask you or instruct you to disregard that portion of defense counsel's argument to the effect that he said—he meaning the defendant didn't do it and he doesn't know who did. To the extent that defense counsel says that he didn't do it, I am asking you to disregard that to the extent that it implies a personal opinion of defense counsel. He can certainly argue the evidence and argue reasonable inferences from that but he can't interject his personal opinion.

To the extent that he said, and he doesn't know who did it, I will instruct you later that a defendant in a criminal case has a right to testify or not to testify. You may draw no adverse inference from his decision not to testify. In this case, of course, the defendant has exercised that right not to testify and you may not draw any adverse inference from his decision not to do so.

A defendant may not, however, testify through his attorney for that would be unfair to the state who would not be able to cross examine the testimony the attorney provides. I therefore instruct you to disregard the argument of Attorney Sherman stating or suggesting what the testimony of the defendant would have been in this case had he chosen to testify.

Also, to the extent that defense counsel argued that certain witnesses had not been produced by the state during the course of the trial, and you will supply that from your own recollection, you are to disregard that portion of his argument. And, finally, to the portion where he argued that to the effect that there were any comments which infer the state was trying to hide or conceal anything by asserting objections at trial, you will certainly disregard that portion of defense counsel's argument as well. Okay; so with that said, I am going to give you instructions on the law.

June 3, 2002 Criminal Trial Transcript, pp. 141–42.

From this court's perspective, the fact that Attorney Sherman's improper comments necessitated these curative instructions is remarkable.

Nevertheless, the court is not able to state with any degree of certainty, that the ineptitude, and, on more than one occasion, the impropriety, of Attorney Sherman's closing argument prejudiced the petitioner in a constitutional sense. Here, the court is mindful that after counsel's closing arguments, 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. In reviewing this segment of the petitioner's claims, this court is obligated to assume that the jury followed the court's instructions. Because the court makes that assumption, this claim fails for want of proof of prejudice.

10
Miscellaneous Claims

In addition to the foregoing, the petitioner asserts the following claims which, for the reasons stated, the court finds lacking in merit. The petitioner claims that Attorney Sherman should have endeavored to prevent mention of the Sutton Reports at trial. Evidence adduced at the habeas hearing indicates that in 1992, Rushton, Sr., commissioned

an organization known as Sutton Associates to conduct an independent investigation into the murder of the victim. Writers indicated that Rushton, Sr.'s motive was to clear his sons of any suspected involvement and, if the investigation pointed toward either of them, to provide a vigorous defense for them. While the principals of Sutton Associates signed a confidentiality agreement, a person working for the organization leaked the contents of the report to a writer who, in turn, gave the information to Mark Fuhrman, who thereafter wrote a book in 1998, not only critical of the Greenwich police investigation, but providing the details of the Sutton Reports. Notably, the reports include interviews of the petitioner and T. Skakel, both of whom, as noted supra, changed the story of their activities in Belle Haven on October 30, 1975. For the first time, T. Skakel admitted to a sexual encounter with the victim between the hours of 9:30 p.m. and 10 p.m., and the petitioner narrated his masturbation account. Other writers in addition to Fuhrman published portions of the Sutton Reports once they had been publically leaked. Although Attorney Sherman was successful in preventing the principals of Sutton Associates from testifying as to their investigation on the basis of attorney-client privilege, there was nothing Attorney Sherman could do to remove this information from the public domain. Accordingly, in the court's view, Attorney Sherman was powerless to prevent mention of the reports or their contents by the time the murder case

came to trial. He should not be faulted in this instance.

The petitioner claims, as well, that Attorney Sherman should have sought the profile reports of T. Skakel and Littleton that had been compiled by inspectors working in the office of the State's Attorney. In the court's view, the short answer to this claim is that the reports, compiled at the behest of the prosecution, would have been protected from disclosure as work product. See Practice Book § 13–3. Accordingly, since the court believes Attorney Sherman's efforts in this regard would have been fruitless, the court does not criticize him for a lack of diligence in this regard.

The petitioner next claims that Attorney Sherman should have produced an age-appropriate photograph of the petitioner at the time of trial, and should have adduced evidence of his height and weight in an effort to demonstrate the likelihood that it would have been difficult for a person of his stature to have committed the crime in the manner asserted by the state. In this regard, the court is mindful that, at the criminal trial, the state adduced evidence that the victim was bludgeoned and stabbed with a golf club and that her body had been dragged seventy-eight to eighty feet to its final place of repose. There was also evidence that, at the time of her death, the victim was approximately 5' 3" tall and weighed 120 pounds. The court is aware, as well, that, at trial, the jury was shown photographs of the

petitioner when he was two or more years older than his age on the date of the victim's death, and the jury was not shown any photographs of the petitioner at age fifteen, when the murder took place. At the habeas hearing, the petitioner introduced a photograph of himself taken when he was fourteen or fifteen. In comparing the older with the younger depictions, there is no doubt that the petitioner, at a younger age, looked more like an adolescent boy than the older photographs that depicted a taller and more robust young man. That said, the court has heard no evidence that the petitioner would have been physically incapable of committing the murder in the manner claimed by the state. Indeed, the jury heard evidence that, at the time of the murder, the petitioner was a very athletic teenager.

This issue, in the court's view, is one of visualization. No doubt this was a difficult area for defense counsel. He was representing a client who, at the time of trial, was an adult male approximately forty-two years old and weighing in excess of 200 pounds. No matter the petitioner's stature at age fifteen in 1975, there was nothing Attorney Sherman could reasonably have done to remove the visage of his now heavy-set adult client from the jury's view. Under those circumstances, the court does not believe that there is a reasonable likelihood the jury would have reacted differently upon seeing a photograph of the petitioner showing him to be shorter and of less stature at age fifteen than he was two years later. While it would have been good

practice for Attorney Sherman to have presented an age-appropriate photograph of the petitioner at trial, the court does not believe his failure to do so amounted to a constitutional deficiency in representation.

The petitioner also claims that Attorney Sherman did not permit him to testify at his criminal trial when it was his constitutional right to do so. The petitioner ultimately acknowledged during his habeas testimony that he followed Attorney Sherman's advice that he not testify. In other words, he has abandoned his claim that he was not permitted to testify; rather, he asserts that he was poorly advised by Attorney Sherman in this regard. At the habeas hearing, Attorney Sherman testified that the petitioner had wanted to testify but that he advised the petitioner against testifying because he was concerned that he would not do well on cross examination.[65] The court finds no fault with Attorney Sherman's decision to recommend that the petitioner not testify given his concerns.

The petitioner further claims that Attorney Sherman failed to adequately prepare the witnesses presented in the petitioner's defense at trial. The

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[65] In testifying in this regard, Attorney Sherman emphasized his belief that the petitioner did not commit this murder and that his reasons for not wanting the petitioner to testify did not relate to his culpability, but rather to his foreboding that the petitioner would not handle cross examination very well.

short answer to this claim is that the court is not persuaded by any evidence adduced at the habeas hearing that any further preparation by Attorney Sherman of trial witnesses would have enlivened their memories.

Next, the petitioner claims that Attorney Sherman's failure to file a motion to exclude evidence of crime reconstruction and a request for a *Porter*[66] hearing constituted ineffective assistance. However, in this court's view, the crime reconstruction evidence by Dr. Lee would have been very helpful to a third-party culpability claim against T. Skakel. As noted herein, Dr. Lee testified that the victim's jeans had been unbuttoned before any assault occurred, and that she had no defensive wounds or DNA under her fingernails. This testimony would have been a significant aid to a third-party culpability claim against T. Skakel had the petitioner's case been properly defended. Therefore, in the court's view, this claim is lacking.

Finally, the petitioner asserts that Attorney Sherman was negligent in his failure to obtain a copy of the Morall report at trial. Briefly, this court heard evidence that during its investigation, the Greenwich police retained Kathy Morall, M.D. to conduct a forensic interview of Littleton and that, as a result, Dr. Morall provided a lengthy report concerning her interview, which also included her

[66] *State v. Porter*, supra, 241 Conn. 80–90.

assessment of the relative strength of evidence against Littleton and T. Skakel. For reasons the commissioner has difficulty stating with clarity, this report was not provided to Attorney Sherman, even though it clearly contains information favorable to the defense.[67] It is, however, apparent to this court that, at some unspecified time, Attorney Sherman was aware of Dr. Morall's interview of Littleton and that Attorney Sherman had been given some of the tapes of Dr. Morall's interviews. In the days before trial, Attorney Benedict made an ex parte filing of the report, asking the court to review the report in accordance with the dictates of *State v. D'Ambrosio*, 212 Conn. 50, 561 A.2d 422 (1989), cert. denied, 493 U.S. 1063, 100 S.Ct. 880, 1007 L.Ed.2d 963 (1990). While Attorney Sherman knew, generally, that Dr. Morall had interviewed Littleton, it is less clear whether Attorney Sherman had been made aware of the existence of a report provided by Dr. Morall to the Greenwich police and the State's Attorney's office. After Attorney Benedict made his ex parte filing, the court stated that it was going to conduct an in camera inspection of the filing to determine whether it contained any exculpatory information,

[67] For example, the report contains substantial information concerning Littleton's often bizarre activities in the years following the murder, some of which could have been used for impeachment purposes at trial. The report contained, as well, a comparison of the likely culpability of T. Skakel and Littleton, which could have provided fodder for cross examination of the state's witnesses who were involved in the murder investigation.

and following its examination, the court indicated that the defense would not be entitled to the material as it contained no exculpatory information. The court did not, however, foreclose Attorney Sherman from raising the issue again at trial. Attorney Sherman did not pursue his claim of entitlement. The petitioner now claims that Attorney Sherman was negligent for his failure to obtain the report and that he was thereby prejudiced because the report contained information helpful to the defense. Having read the report, the court agrees that it contained information helpful to the defense and the court has no reason to doubt that if Attorney Sherman had pursued this issue, he ultimately would have received the report. But the court's conclusion in that regard is reached only with the aid of hindsight illuminated by the contents of the report. Given the uncertain state of the record on this matter as to whether Attorney Sherman was ever informed of the subject matter of the materials examined under seal, the court does not have a sufficient basis on which to fairly assess Attorney Sherman's response to this unusual trial occurrence. For these reasons, the court is unable to conclude that Attorney Sherman's failure to persist in seeking this report amounted to a deficiency in representation of constitutional magnitude.

B

Conflict of Interest Claim

In a separate count, the petitioner claims that Attorney Sherman was burdened by a conflict of interest during his criminal representation. "The sixth amendment to the United States constitution as applied to the states through the fourteenth amendment, and article first, § 8, of the Connecticut constitution, guarantee to a criminal defendant the right to effective assistance of counsel ... Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest ... The right attaches at trial as well as at all critical stages of a criminal proceeding ..." (Citations omitted; internal quotation marks omitted.) *Santiago v. Commissioner of Correction*, supra, 87 Conn. App. 582–83.

Our Supreme Court has described a conflict of interest as "that which impedes [an attorney's] paramount duty of loyalty to his client ... Thus, an attorney may be considered to be laboring under an impaired duty of loyalty, and thereby be subject to conflicting interests, because of interests or factors personal to him that are inconsistent, diverse or otherwise discordant with [the interests] of his client ..." (Citation omitted; internal quotation marks omitted.) *State v. Crespo*, 246 Conn. 665, 689–90, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S.Ct. 911, 142 L.Ed.2d 909 (1999). "Conflicts of interest ... may arise between the defendant and the defense counsel. The key here should be the presence of a specific concern that would divide counsel's

loyalties." (Internal quotation marks omitted.) *State v. Barnes*, 99 Conn.App. 203, 217, 913 A.2d 460, cert. denied, 281 Conn. 921, 918 A.2d 272 (2007). "In a case of a claimed conflict of interest, therefore, in order to establish a violation of the sixth amendment the defendant has a two-pronged task. He must establish (1) that counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance." (Internal quotation marks omitted.) *Phillips v. Warden*, supra, 220 Conn. 133; *Dasilva v. Commissioner of Correction*, 132 Conn. App. 780, 785, 34 A.3d 429 (2012). Finally, as to general principles that guide the analysis of this issue, the court notes that Rule 1.7 of the Rules of Professional Conduct, concerning conflicts of interest, prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest and the rule sets forth that a concurrent conflict of interest exists if: "(2) there is a significant risk that the representation of one or more clients will be materially limited by ... a personal interest of the lawyer." The lawyer may, however, represent a client even where there is a conflict of interest so long as the affected client gives informed consent, confirmed in writing.[68] With these general

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[68] The court is aware that proof of a counsel's failure to abide by the Rules of Professional Conduct does not, by itself, establish constitutional ineffectiveness. In this instance, the court refers to the rules only for definitional purposes and not for a finding of ineffectiveness. Moreover, whether or not

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statements of law as a backdrop, the court now assesses the petitioner's conflict claim based on the following additional facts adduced at the habeas hearing.

Attorney Sherman and the petitioner initially agreed that Attorney Sherman would represent the petitioner on the basis of an hourly rate plus expenses. They agreed to an hourly rate of $350 for Attorney Sherman's services and $225 an hour for associates working with Attorney Sherman. The parties further agreed that the petitioner would pay a $25,000 retainer and that Attorney Sherman would bill him on a monthly basis. This arrangement continued in place through October 31, 2001, by which time Attorney Sherman had billed the petitioner approximately $1,200,000 in fees, all paid except for an outstanding balance of approximately $61,615. In December, Attorney Sherman proposed a change in the financial arrangement to Attorney Thomas Reynolds, a Chicago attorney who was acting on behalf of the Skakel family and who, apparently, served as bursar to Attorney Sherman throughout Attorney Sherman's representation of the petitioner. Through Attorney Reynolds, the Skakels came to an agreement to pay Attorney Sherman a lump sum of $450,000. This sum was intended to cover the outstanding balance of

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(...continued)
Attorney Sherman violated the Rules of Professional Conduct is not an issue confronting the court.

$61,615.79 due to Attorney Sherman, a bill to Attorney Sherman from Attorney Grudberg in the amount of $36,000, all other costs and expenses incurred at Attorney Sherman's request to date and, significantly, all of Attorney Sherman's future fees and expenses in conjunction with his continuing representation of the petitioner. Attorney Sherman's confirmation of this arrangement in a letter to the petitioner includes the following statement: “Simply put, it is our understanding and intent that you should not be required to pay to me or to anyone any additional sums of money in connection with your defense. I will pay for all necessary expenses in connection with the defense out of this lump sum payment.” The letter states, as well: “I will continue to provide to you and to Tom Reynolds monthly status reports of our progress and activities in the case.” Id.

At the habeas hearing, credible evidence was adduced that during this same time period, Attorney Sherman was experiencing personal financial difficulties as a result of which the Internal Revenue Service (IRS) had caused liens to be placed on his property totaling approximately $700,000. These liens were imposed on the basis of the government's claim that Attorney Sherman had failed to pay federal income taxes for certain years. Documents provided during the habeas hearing demonstrate that subsequently, Attorney Sherman was indicted for failure to pay $278,304 in federal income taxes for the tax year 2001, and $142,406 in income taxes

for the tax year 2002. He was later found guilty, by plea, on December 22, 2010, in the United States District Court for the District of Connecticut of two counts of failure to pay taxes. In addition to a period of confinement, Attorney Sherman was ordered to pay restitution to the IRS in the amount of $320,460 at a monthly rate calculated as a percentage of his ongoing income.

Upon receiving the sum of $450,000 as a lump sum payment from the Skakels, Attorney Sherman deposited the entire amount into his general account. In other words, he did not place any of these funds into a client's fund account. As a consequence, these funds were treated as earned by Attorney Sherman and constituted his property subject to third-party claims. Attorney Murphy was particularly troubled that Attorney Sherman exposed this income to immediate seizure or attachment by the government. Subsequent to receiving the lump sum payment from the Skakels, Attorney Sherman did not provide either Attorney Reynolds or the petitioner any monthly reports, as promised. Nor did Attorney Sherman provide any evidence at the habeas hearing of any expenditure made on behalf of the petitioner from these funds for later incurred investigative or other related expenses. Additionally, in August 2002, Steven Skakel, writing on behalf of the family, brought to Attorney Sherman's attention that there were outstanding invoices Attorney Sherman had not paid and which, in the writer's opinion, were deterring

the family's effort to advance the petitioner's appeal from his conviction. Attorney Sherman had agreed in December 2001 to pay some of these billings from the lump sum he received.

On the basis of these facts, the petitioner claims, and Attorney Murphy concurs, that the December 2001 agreement represented an actual conflict of interest between Attorney Sherman and the petitioner because the existence of IRS liens on Attorney Sherman's property put him in a position of having to protect his own interest instead of expending funds in pursuit of the petitioner's defense. Attorney Murphy testified that this arrangement constituted an actual conflict of interest as a result of the liens imposed by the IRS, and a potential conflict on the basis that whatever funds Attorney Sherman should have advanced on behalf of the petitioner's defense after December diminished Attorney Sherman's ability to protect himself from the weight of the federal government. Specifically, Attorney Murphy testified that Attorney Sherman had a duty to inform the petitioner of his IRS problems in order for the petitioner to be able to knowingly consent to the new arrangement. Attorney Mark Dubois testified that since Attorney Reynolds was an attorney and was working on behalf of the Skakel family, it can be presumed that the petitioner gave his informed consent to this arrangement. The short answer to that issue is that this court has not been provided with any written evidence of informed consent. Additionally, while it

appears that Attorney Reynolds was an attorney with a practice in Illinois, this court is unaware of any basis for concluding that Attorney Reynolds was able to represent the petitioner in Connecticut in regard to his fee arrangement with Attorney Sherman. In the court's view, the agreement reached between Attorney Sherman and the Skakels in late 2001 created, at least, a substantial risk of a conflict of interest, not because it was a flat fee arrangement, but because, at the time, Attorney Sherman was burdened with liens from the IRS which, if acted on, could have left him without funds for the petitioner's defense. Before making this arrangement, Attorney Sherman should have sought and obtained the petitioner's informed consent. In sum, if Attorney Sherman did not have an actual conflict of interest on the basis of the risk created by his obligations to the federal government that he would horde funds in order to save himself from ultimate prosecution, there existed at least the substantial potential for such a conflict which he should have discussed with the petitioner.

However, in order for a conflict of interest to constitute a sixth amendment violation for habeas purposes, the petitioner must demonstrate that the conflict adversely affected counsel's representation. The petitioner has not done so. While the petitioner correctly points out that Attorney Sherman failed, against his promise, to provide monthly reports of expenditures under the new agreement and failed, at the habeas hearing, to prove any expenses incurred

on behalf of the petitioner subsequent to the 2001 agreement, this court cannot, without resorting to speculation, determine that Attorney Sherman's failures in this regard represent a dereliction of duty to the petitioner and not merely poor record keeping. In short, in spite of Attorney Sherman's failure to provide monthly accountings as promised, this court is not willing to deduce, from that failure, that Attorney Sherman diverted funds from the petitioner's defense in order to obtain relief from his tax problems with the federal government. To the contrary, since he did not plead to the indictment until 2010, there is no basis for concluding that he gave priority to the federal government over the petitioner's defense. While Attorney Sherman should have fully informed the petitioner of his then existing tax difficulties with the federal government and, indeed, he put at risk the lump sum provided to him on the petitioner's behalf in December 2001, this court is not able to conclude that Attorney Sherman's lapses in this regard adversely affected his representation of the petitioner.

C
Brady Claim

In the third count of the amended petition, the petitioner alleges that the state suppressed a psychological crime profile, known as the Morall report, in violation of the dictates of *Brady v. Maryland*, supra, 373 U.S. 83, and that he was harmed by this failure of mandatory disclosure.

The following additional procedural and factual history is pertinent to this claim. Toward the close of the habeas hearing, the courtroom clerk brought to the court's attention the fact that there was an exhibit from the criminal trial marked and sealed as a state's exhibit. After conferring with counsel and with the assent of counsel, the court unsealed the exhibit and viewed its contents.[69] Based on this review, the court had the document marked as Court Exhibit 1 and ordered that copies of the exhibit be provided to counsel. The exhibit contains two documents of note. One is an ex parte filing by the State's Attorney dated April 17, 2002, and captioned: “State's Disclosure, D'Ambrosio Materials.” The other is a twenty-seven-page report from Kathy A. Morall, M.D., dated January 21, 1993, with a cover letter addressed to Inspector Jack F. Solomon and Detective Frank Garr.[70]

Upon reading the Morall report, it became clear to this court that it did not contain *D'Ambrosio*

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[69] Several days later, the commissioner changed courses and filed an objection to the court's order unsealing and marking the document. Aside from the state's waiver of this claim, the court believes it acted within its authority in this regard. See *Rosado v. Bridgeport Roman Catholic Diocesan Corp*., 276 Conn. 168, 191, 884 A.2d 981 (2005).

[70] The record reflects that at the time Solomon was an inspector with the State's Attorney's office and Garr was a detective with the Greenwich police.

materials.[71] To the contrary, and as noted supra, the document sent ex parte to the court was a report from Dr. Morall, a forensic psychiatrist, of her interviews with Littleton for which he had waived any claim of confidentiality. In her cover letter, Dr. Morall makes this point explicit. She states: "When I met Mr. Littleton, I immediately clarified his understanding of the meeting and informed him that the information being provided by him was not confidential ... I also read him his Miranda rights and he acknowledged his understanding by signature at the bottom of the form." Court Exhibit 1. Notwithstanding this recital, Attorney Benedict treated the document as confidential and submitted it ex parte to the court under the guise of *State v. D'Ambrosio*, supra, 212 Conn. 50. It is the petitioner's view that, in doing so, the state sought to evade its Brady responsibility of disclosure.

After marking this exhibit, the court permitted the petitioner and the respondent to offer evidence regarding its contents. Attorney Sherman testified that while he never received the report, he was aware, in the main, of the report's contents. The court sees no reason to doubt Attorney Sherman's testimony in this regard. In the main, the contents of

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[71] *State v. D'Ambrosio*, supra, 212 Conn. 50, is a Supreme Court opinion that addresses the parameters for obtaining an in camera review of a person's psychiatric records. Its overarching purpose is to set forth a procedure to balance the necessary protection of a person's privacy with the fair trial rights of litigants.

the report appear to be cumulative to information already available to Attorney Sherman. And, as to the report's conclusion that Littleton should remain a significant suspect, that analysis appears to rest, in the main, on the contours of Littleton's behavior in the years following the murder, information which would largely have been inadmissible at trial. In sum, although the manner in which this report was filed with the court was unusual and there is a strong basis for the petitioner's claim that the report should have been turned over to the defense as *Brady* material, the court cannot find that the petitioner was harmed by this prosecutorial lapse.[72]

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[72] As noted, infra, the record of the court's handling of this submission is confusing. Although it was submitted ex parte to the court pursuant to *State v. D'Ambrosio*, supra, 212 Conn. 50, it is clear from the record that the court treated it as a submission pursuant to General Statutes § 54–86c(b) for the court to determine whether it contained exculpatory information. As pointed out by the petitioner, however, the record is clear that Attorney Benedict did not seek review under General Statutes § 54–86c(b). How the exhibit changed from a *D'Ambrosio* submission to a General Statutes § 54–86c(b) filing is not explained by examination of the record. In any case, the court determined that the report was not exculpatory and made no ruling pursuant to *State v. D'Ambrosio*, supra, 212 Conn. 50. In the present hearing, the petitioner challenges both the procedures employed by the State's Attorney in submitting this report ex parte to the court and the court's determination that it was not exculpatory. In this regard, the petitioner correctly points out that the scope of *Brady* is greater than whether materials are exculpatory and that a prosecutor has a *Brady* obligation to turn over material that may merely be helpful to the defense. *Brady v. Maryland*,
(continued...)

III

SUMMARY AND CONCLUSION

In asserting a habeas claim, a petitioner's burden properly is great. A judgment of conviction affirmed on direct appeal should not lightly be overturned in order to protect the state's interest in the finality of judgments, to honor our system in which jury of peers is charged with determining whether or not a defendant is guilty, and, importantly, to bring closure to crime victims and their families. But these considerations cannot override the constitutional right of a criminally-charged defendant to the effective assistance of counsel in the critical stages of the criminal justice process.

Mindful of the significant deference to which trial counsel's conduct and choices and presumption of competent advocacy are entitled, and respectful of this court's obligation to view the circumstances not in the light of hindsight but with the vision available to counsel at the time of his representation, this court finds that trial counsel's conduct in many respects did not meet constitutional muster and that

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supra, 373 U.S. 83. While the court tends to agree with the petitioner's view in this regard, this particular thicket need not be cleared as the court has determined that the petitioner suffered no harm in a constitutional sense by not receiving this report on or before his criminal trial.

several of counsel's failures prejudiced the petitioner.

Specifically, the court finds that Attorney Sherman's failure to point the finger of culpability at T. Skakel cannot be excused as a reasonable exercise of judgment or a matter of trial strategy. To the contrary, the court can find no reasonable basis grounded on the petitioner's defense for counsel's failure to assert third-party culpability against T. Skakel. While this court acknowledges that great deference is due to trial counsel's strategic decision making, the court's leeway is not unbounded. As the *Bryant* court observed in regard to deference to trial counsel's trial strategies: "It does not follow necessarily that, in every instance, trial counsel's strategy concerning these decisions is sound." *Bryant v. Commissioner*, supra, 290 Conn. 521. Here, Attorney Sherman offered, as his reasoning, that he was not a fan of having multiple third-party culpability parties and that he thought that Littleton and T. Skakel might have provided alibis for one another. While, in general, it may be a reasonable trial strategy not to point the finger at more than one third party, in this case and aside from that general strategy, there was no reason consistent with the petitioner's defense to bypass T. Skakel as the evidence available to Attorney Sherman of T. Skakel's direct involvement with the crime was powerful. If the jury had heard T. Skakel's recitation of his claimed consensual sexual encounter with the victim that evening combined with evidence of his

increasing sexual interest in her leading up to the fateful evening, and Dr. Lee's recitation of the physical evidence, particularly as it related to the condition of the victim's clothes and the absence of any defense wounds, a jury would likely have harbored reasonable doubt regarding the petitioner's guilt.

Similarly, the court believes that Attorney Sherman's failure to locate and present the testimony of Dennis Ossorio, the one independent witness to the petitioner's presence at the Terrien household during the evening in question, was due to a failure to diligently investigate potential evidence in support of the petitioner's alibi. Attorney Sherman's claim that the petitioner never told him about this witness is of no avail. Once he was on notice of the existence of this witness from the grand jury testimony of Georgeann Dowdle, he had a duty to investigate to determine the name of the person whom she identified as her beau and to learn whether that person's recollection supported the alibi claim. With minimal investigation, Attorney Sherman readily would have found Ossorio. From Ossorio's testimony at the habeas trial, the court finds that he was credible and disinterested and available at the time of trial. The court believes, further, there is a reasonable likelihood that the jury would have been persuaded by his testimony. Moreover, the court finds that if Attorney Sherman had adduced Ossorio's alibi testimony at trial, there is a reasonable probability its outcome would have

been different. As our Supreme Court has noted: "[I]n circumstances that largely involve a credibility contest ... the testimony of neutral, disinterested witnesses is exceedingly important." *Bryant v. Commissioner*, supra, 290 Conn. 518. Here, the record reflects that even though the time of the victim's death was not an essential element of the state's burden, the state vigorously contested the petitioner's claim that he had left the Belle Haven area at approximately 9:15 p.m. and, in closing argument, the state pointed to evidence contesting the petitioner's absence as well as the evidence in support of the death occurring between 9:30 p.m. and 10 p.m. In making his argument, Attorney Benedict predictably pointed out the absence of any disinterested witnesses in support of the petitioner's alibi. In this regard, the jury's interest in the issue of whether the petitioner was in Belle Haven in that time frame is amply demonstrated by its request for a rereading of testimony from those whose testimony implied that the petitioner had not left the area.

And finally, as to dispositive errors of constitutional magnitude, is trial counsel's failure to contest and rebut the testimony of the state's key witness, Gregory Coleman. At trial, Coleman was the state's most powerful witness in support of the state's claim that the petitioner had made admissions regarding the crime. He was the only witness who claimed that the petitioner provided him with a detailed account of his actions during and after the murder. Importantly, Coleman stated that

one of three named people also heard the petitioner's narration. Notwithstanding, Attorney Sherman made minimal efforts to find these witnesses relying, instead, on his belief that his cross examination of Coleman at earlier hearings had been devastating to the state. After trial, however, new counsel located and obtained the testimony of these witnesses whose testimony, taken together, directly refutes Coleman's testimony. Having had the opportunity to review the testimony of all three, the court finds that they were credible and disinterested witnesses with no reason to fabricate in favor of the petitioner. At trial, their testimony would have put the lie to the core of Coleman's claim. Without their countervailing testimony, the state's path was considerably easier to urge the jury to credit Coleman notwithstanding his substantial history of criminal activity and substance abuse. Attorney Sherman's decision not to pursue these witnesses was a failure of judgment borne of an undeserved confidence in the impact of his cross examination of Coleman. This failure of judgment prejudiced the petitioner. With the testimony of these witnesses, there is a reasonable likelihood that the outcome of the trial would have been different.

In addition to these three claims, each of which the court believes is dispositive, the court finds that Attorney Sherman's representation was constitutionally deficient in several other areas, but none of these deficiencies, separately considered, entitle 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.

Attorney Sherman failed to investigate Bryant's facially exculpatory story and he mishandled the third-party culpability claim against Littleton. Aside from whether or not Attorney Sherman should have asserted such a claim against Littleton knowing that he had already been granted immunity from prosecution and that the jury likely would learn that fact during trial, Attorney Sherman essentially defeated his own claim regarding Littleton by the ineffectiveness of his examination of Littleton and his former wife, Baker, and by his concession during closing argument that he had no idea whether Littleton had committed the murder. His presentation of this evidence and argument was less than ineffective. It was fatal to an already tenuous claim.

So, too, Attorney Sherman's failure to respond to two main prosecution themes was inexcusable. During trial, the state claimed that the petitioner's masturbation story was a recent fabrication, invented once Dr. Henry Lee became engaged in the early 1990s out of fear that Dr. Lee might discover incriminating DNA evidence against him at the crime scene. Attorney Sherman needed only to have pointed out the testimony educed by the state at trial that the petitioner had provided this narration to Michael Meredith in 1987, well before the state claimed that DNA evidence had become a prevalent prosecution tool, to eviscerate this claim. In this regard, Attorney Sherman could have pointed to Dr. Lee's testimony that forensic scientists did not first learn how to apply DNA testing to crime solving until late in 1989 and that PCR testing did not begin until the early 1990s. Thus, with the state's own evidence, Attorney Sherman could have debunked the state's theory that the petitioner concocted the masturbation story out of fear that Dr. Lee might find his DNA at the crime scene. Instead, Attorney Sherman was mute on this timing issue during his jury argument.

The state claimed, as well, that the petitioner had been sent to Elan by his family to hide him from the police and because they were afraid they had a killer in their midst. If Attorney Sherman had read the Greenwich police file readily available to him well before the trial, he would have known of the Greenwich police's awareness of the petitioner's

presence at Elan, the particular circumstances of his admission to Elan, and of the Greenwich police's contacts with Elan while the petitioner was a resident. Instead, Attorney Sherman had no response to this emotionally charged claim.

As noted, Attorney Sherman also unreasonably chose a juror who was not simply a police officer but one who was friendly with Detective Lunney, a lead investigator for the Greenwich police and a principal state's witness, a juror who had a long term and sometimes adversarial relationship with Attorney Sherman.

Also, Attorney Sherman's closing argument was both inadequate and improper. His argument was, in the main, an unfocused running commentary on the state's evidence. Failing even to mention the notion of reasonable doubt or to put the claim of third-party culpability against Littleton into context, Attorney Sherman's argument did not provide the jury with any template for decision making.

With respect to Attorney Sherman's failure to adduce expert testimony related to Elan, while the court believes that Dr. Ofshe's expertise in explaining Elan's program would likely have been helpful to the defense, and this testimony should have been secured by Attorney Sherman, the court is not convinced that there is a reasonable likelihood that such testimony would have affected the trial's outcome.

Finally, as to constitutional deficiencies which individually do not entitle the petitioner to a new trial, there is the petitioner's claim that Attorney Sherman was ineffective for failing to seek to suppress the Hoffman tapes. To the court, Attorney Sherman's habeas trial testimony on this issue reflected a lack of understanding that these materials were unlawfully seized by the state from Hoffman and that the petitioner, as owner of the tapes, would have had standing to contest this material's seizure. It is the court's impression that Attorney Sherman simply did not focus on this issue as one of strategic importance and yet, as it developed, the seizure of these tapes provided the state with an emotionally powerful tool at trial that the state effectively used in closing argument. Assuming that Attorney Sherman had listened to the tapes, and based on the reasonable foresight expected of competent counsel, Attorney Sherman should have made a substantial attempt to prevent their disclosure.

As to this second group of deficiencies, the court is not satisfied that any of them warrants a new trial as the court cannot determine that if Attorney Sherman had capably handled any one of these issues there is a reasonable likelihood that the outcome would have been different. Here, however, the petitioner's claim that the court may consider the cumulative effect of Attorney Sherman's missteps could have some relevance but for the court's earlier findings regarding the failure to

adequately present the alibi, failure to assert a third-party culpability claim against T. Skakel and failure to adequately impeach Coleman. While the court need not reach the interesting claim made by the petitioner regarding the cumulative effect of Attorney Sherman's constitutional missteps, the court does note that both counsel appear to be under the mistaken notion that our Appellate and Supreme Courts have ruled that in a habeas matter a petitioner may not aggregate performance missteps in order to prove prejudice in a habeas case. In their briefs, both counsel appear to state that the Appellate Court in *Diaz v. Commissioner*, 125 Conn. App. 57, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011), stands for the proposition that performance deficiencies may not be aggregated to find prejudice in a habeas petition and both counsel appear to believe that the Diaz holding finds its pedigree in *State v. Tillman*, 220 Conn. 487, 600 A.2d 738 (1991), cert. denied, 505 U.S. 1207, 112 S.Ct. 3000, 120 L.Ed.2d 876 (1992).[73] The court disagrees. Neither *Diaz* nor *Tillman* addresses the issue at hand.

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[73] Counsel for the petitioner and the commissioner also appear to believe that *Adorno v. Commissioner*, 66 Conn.App. 179, 783 A.2d 1202, cert. denied, 258 Conn. 943, 786 A.2d 428 (2001), stands for the proposition that a trial court may not aggregate constitutional deficiencies in a habeas in determining the issue of prejudice. In the court's view, *Adorno*, like *Diaz*, states only that a court may not aggregate non-constitutional errors in order to find ineffectiveness. As such, *Adorno* is inapposite.

In *Diaz*, the petitioner attempted to aggregate non-constitutional flaws into a constitutional deprivation. *Tillman* is similar. In the case at hand, where the court has found that each of Attorney Sherman's performance deficiencies was of constitutional magnitude, that is, each represented a sixth amendment breach, the court finds instructive the plain language of *Strickland*, that in order to prevail in a habeas claim 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 v. Washington*, supra, 466 U.S. 694. If 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. Indeed, the United States Court of Appeals for the Second Circuit appears to have settled this question for federal courts within its ambit. In an often-cited decision directly on point, the court, in *Lindstadt v. Keane*, 239 F.3d 191, 199 (2nd Cir.2001), stated: "We need not decide whether one or another or less than all of these four errors would suffice, because *Strickland* directs us to look at the 'totality of the evidence before the judge or jury,' keeping in mind that '[s]ome errors have ... a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture ...' *Id., 695–96*. We therefore consider these errors in the aggregate. See *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir.1999) (holding that court should examine cumulative effect of errors committed by

counsel across both the trial and sentencing); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163–64 (10th Cir.1999) ("Taken alone, no one instance establishes deficient representation. However, cumulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense"); *cf. Rodriguez v. Hoke*, 928 F.2d 534, 538 (2nd Cir.1991) (dismissing case for failure to exhaust claims, but noting, "[s]ince Rodriguez's claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions, all his allegations of ineffective assistance should be reviewed together").[74]

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[74] As pointed out in the petitioner's post-trial reply brief, in assessing Strickland's prejudice prong, many courts in addition to the second circuit have concluded that a court may consider the aggregate impact of trial counsel's errors in assessing Strickland's second prong. "See *State v. Holden*, 2 CA–CR 2007–0032–PR, 2008 WL 4559872 (Ariz.Ct.App. Jan.8, 2008) ('Controlling jurisprudence likewise requires that we consider any claims of ineffective assistance of counsel, raised under the Sixth Amendment to the United States Constitution, cumulatively'); *Schofield v. Holsley*, 281 Ga. 809, 812, 642 S.E.2d 56 (2007) ('The Supreme Court of the United States has held that it is the prejudice arising from "counsel's errors" that is constitutionally relevant, not that each individual error by counsel should be considered in a vacuum. *Strickland*, 466 U.S. at 687'); *People v. Thompson*, 304160, 2013 WL 2420957 (Mich.Ct.App. June 4, 2013) ('The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal ...'); *Com. v. Koehler*, 614 Pa. 159, 36 A.3d 121, 161 (2012) ('When the failure of individual claims is grounded in lack of prejudice, however, then the cumulative prejudice from those

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Nevertheless, and in spite of persuasive federal decisional law on point, in the case at hand, the court need not reach the question of whether it is proper to aggregate constitutional errors in order to

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individual claims may properly be assessed.'); *State v. Clay*, 824 N.W.2d 488, 500 (Iowa 2012) ('... we should look to the cumulative effect of counsel's errors to determine whether the defendant satisfied the prejudice prong of the Strickland test'); *McKinney v. State*, W2006022132CCAR3PD, 2010 WL 796939 (Tenn.Crim.App. Mar.9, 2010) ('When an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice'); *Harris By & Through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir.1995) ('We have previously recognized that "prejudice may result from the cumulative impact of multiple deficiencies" '); *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 524 (2001) ('The cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually'); *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir.2001) ('We assess the impact of these errors in the *aggregate*'); *Pavel v. Hollins*, 261 F.3d 210, 228 (2d Cir.2001 (same); *Hooks v. Workman*, 689 F.3d 1148, 1188 (10th Cir.2012) (same); *Walker v. State*, 397 S.C. 226, 243, 723 S.E.2d 610 (Ct.App.2012) (same); *White v. State*, 957 N.E.2d 218 (Ind.Ct.App.2011), transfer denied, 963 N.E.2d 115 (Ind.2012) (same); *People v. Bodden*, 82 A.D.3d 781, 918 N.Y.S.2d 141 (2011) (same), *State v. Carabajal*, 2009 WL 6763560 (N.M.Ct.App. Feb.23, 2009) (same); *State v. Thiel*, 264 Wis.2d 571, 665 N.W.2d 305 (2003) (same); *Suggs v. State*, 923 So.2d 419, 433–34 (Fla.2005) (same); *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex.Crim.App.1999) (same); J. Thomas Sullivan, Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority, 59 U. Miami L.Rev. 341, 358 (2005)."

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.

Finally, in assessing the impact of Attorney Sherman's deficiencies, the court is mindful of the relative strength of the state's case and the relevance of the strength of the state's case to the issue of prejudice. As the Supreme Court noted in *Bryant*: “We recognize that the strength of the state's case bears most significantly to our analysis under the prejudice prong of *Strickland*.” *Bryant v. Commissioner*, supra, 290 Conn. 519 n. 11. It would be an understatement to say that the state did not possess overwhelming evidence of the petitioner's guilt. An unsolved crime for more than two decades, there was evidence that initially the Greenwich police sought the arrest of T. Skakel without success and then focused on Littleton to no avail before, finally, turning to the petitioner. The evidence adduced at trial was entirely circumstantial consisting, in the main, of testimony from witnesses of assailable credibility who asserted that, at one time or another and in one form or another, the petitioner made inculpatory statements. The state also adduced, as consciousness of guilt evidence, testimony that the petitioner changed his initial account to the police of his movements on the evening of the murder. The state capped this evidence with a dramatic presentation of the petitioner, in his own voice, telling his intended

ghost writer of leaving his bed after 11 p.m. and climbing a tree adjacent to the Moxley house where he stated that he masturbated and then returned to his house by stealth in order not to be seen. Against this evidence, defense counsel was in a myriad of ways ineffective. The defense of a serious felony prosecution requires attention to detail, an energetic investigation and a coherent plan of defense capably executed. Trial counsel's failures in each of these areas of representation were significant and, ultimately, fatal to a constitutionally adequate defense. As a consequence of trial counsel's failures as stated, the state procured a judgment of conviction that lacks reliability. Although defense counsel's errors of judgment and execution are not the fault of the state, a defendant's constitutional right to adequate representation cannot be overshadowed by the inconvenience and financial and emotional cost of a new trial. To conclude otherwise would be to elevate expediency over the constitutional rights we cherish.

The habeas petition is granted. The judgment of conviction is set aside and the matter referred back to the Stamford–Norwalk Judicial District for retrial. With the exception of any motions addressed to this judgment, all future proceedings regarding this matter shall be conducted by the appropriate judicial authority in the Stamford–Norwalk Judicial District.

/s/ Bishop, JTR

Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

28 U.S.C. § 1257. State courts; certiorari.

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be

had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.